

DISQUALIFICATION AND
RECUSAL OF
MUNICIPAL COURT JUDGES

OBJECTIVES

- Distinguish between disqualification and recusal
- ID laws that govern disqualification and recusal
- Describe appropriate procedure related to both

Why This Topic

- Good Public Policy
- Required by Texas Code of Judicial Conduct
Canon 3B(5) - *A judge shall perform judicial duties without bias or prejudice.*

Why This Topic?

Private Order of Additional Education of a
Municipal Court Judge
Judicial Conduct Commission - (3/2010)
(Violation of Canons 2A, and 3B(2))

- * Denied two motions to recuse without referring to regional presiding judge
- * Continued to take action in the case while motions were pending

Disqualification vs. Recusal

DISQUALIFICATION and RECUSAL
are not interchangeable terms.

Disqualification and Recusal Defined (Black's Law Dictionary (6th Edition))

- Disqualify – To divest or deprive of qualifications; to incapacitate; to render ineligible or unfit.
- Recusal – The process by which a judge is disqualified on objection of either party (or disqualifies him/herself) from hearing a lawsuit because of self interest, bias or prejudice.

Disqualification:

Disqualification deprives a judge of the authority to act and renders void the orders or judgments of a judge who is disqualified.

If DISQUALIFIED, you cannot preside.
NOT WAIVABLE BY DEFENDANT.

Recusal:

When a Judge should not preside because of bias, prejudice or self-interest.

Background: DISQUALIFICATION

- State Constitution of 1845
- Provided in each constitution enacted since then
- Current constitutional provision is essentially the same as the 1845 version

Background: RECUSAL

- 1972 - ABA Model Code of Judicial Conduct
- 1974 - Code of Judicial Conduct – Canon 3C(1)
- 1977 – Texas Legislature Amends Sec. 6,
Article 200a
- 1981 – Supreme Court adopts Rule 18a (current
form was adopted in 1990)
- 1985 – Texas Legislature repeals 200a
- 1988 – Supreme Court adopts Rule 18b

Disqualification:

- **Constitutional disqualification:**
Art. 5, Sec. 11 of the Texas Constitution
- **Statutory disqualification:**
Art 30.01 of the Texas Code of Criminal
Procedure

Constitutional Disqualification

- Art. V, Section 11 provides three grounds for disqualifying a judge from presiding:
- the judge was counsel in the case;
 - the judge “may be interested” in the outcome of the case; or
 - one of the parties is related to the judge.

Statutory Disqualification:
Article 30.01, Code of Crim. Proc.

When the judge:

- Is the injured party (e.g. the victim);
- Acted as counsel for the State or the accused; or
- Is connected to the accused or the party injured by consanguinity or affinity within the **third degree** as determined by Govt. Code, Chap. 573

"has been counsel for the State or the accused"


Dean v. State, 938 SW2d 764 (Tex. App. – Houston [14th District] 1997): "A trial judge is not disqualified from sitting because he was counsel in other prosecutions against the accused."

"is the injured party"

- Includes property and person
- Do not have to be named in the indictment

Government Code, Chapter 573
Degrees of Relationship;
Nepotism Prohibitions

- Chapter 573, the state's nepotism statute, applies to relationships within the **third degree** by consanguinity or within the **second degree** by affinity.



For disqualification – prohibited relationship is within the **third degree** by consanguinity AND affinity

Government Code, Chapter 573

- 573.021. Method of Computing Degree of Relationship.
- 573.022. Determination of Consanguinity.
- 573.023. Computation of Degree of Consanguinity.
- 573.024. Determination of Affinity.
- 573.025. Computation of Degree of Affinity.

Section 573.022: Determination of Consanguinity

(a) You are related to someone by consanguinity if:

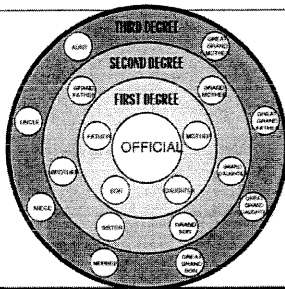
- (1) one is a descendant of the other;
- or
- (2) they share a common ancestor.

(b) An adopted child is considered to be a child of the adoptive parent for this purpose.

Section 573.023: Computation of Degree of Consanguinity

- (c) An individual's relatives within the third degree by consanguinity are the individual's:
- (1) parent or child (1st degree);
 - (2) brother, sister, grandparent, or grandchild (2nd degree); and
 - (3) great-grandparent, great-grandchild, aunt, uncle, nephew/niece (3rd degree).

Consanguinity Wheel



Section 573.024: Determination of Affinity

- "Affinity" is a relationship created by marriage (e.g. brother-in-law, stepparent).
- Two individuals are related to each other by affinity if:
 - (1) they are married to each other; or
 - (2) the spouse of one of the individuals is related by consanguinity to the other individual.

Degree of Relationships by Affinity

First Degree: Judge's spouse, parents' spouses, children's spouses, spouse's parents, stepchildren;

Second Degree: siblings' spouses, grandparents' spouses, grandchildren's spouses, spouse's siblings, spouse's grandparents, spouse's grandchildren;

Third Degree: aunts' and uncles' spouses, nieces' and nephews' spouses, great-grandparents' spouses, great-grandchildren's spouses, spouse's aunts and uncles, spouse's nieces and nephews, spouse's great-grandparents, spouse's great-grandchildren

How does a divorce or death affect "affinity?"

"The ending of a marriage by **divorce** or the **death of a spouse** ends relationships by affinity created by that marriage unless a child of that marriage is living, in which case the marriage is considered to continue as long as a child of that marriage lives." [Gov't Code Sec. 573.024(b)]

Disqualified?

Is a judge disqualified from sitting in a case if the victim's brother is married to the judge's daughter?

How is disqualification raised?

Although a motion can be filed alleging that the judge is disqualified, no written motion is required.

The motion can be raised orally at any time.

When can disqualification of the judge be raised? Short answer: ANY TIME!

Disqualification is jurisdictional, it can be raised at any stage of the proceeding. This follows because any orders or judgments rendered by a judge who is constitutionally disqualified are void and of no effect.

DON'T WAIT FOR THE LAWYERS TO RAISE DISQUALIFICATION

CAVEAT: Trial judge must conduct her own evaluation on disqualification; otherwise, the trial judge risks being the victim of an attorney, for example, in a municipal court of record, seeking a new trial if the outcome did not go as the losing side hoped.

Disqualification is an “absolute rule.”

- Ex parte Vivier, 699 S.W.2d 862 (Tex. Crim. App. 1987): Here the Judge who tried the rape case where the defendant was convicted did not know that he was related within the third degree of consanguinity.

If the Judge is disqualified but continues to preside, what happens?

“When a judge continues to sit in violation of a constitutional proscription, mandamus is available to compel the judge's mandatory disqualification without a showing that the relator lacks an adequate remedy by appeal.”

Recusal

Code of Judicial Conduct Canon 3: Performing the Duties of Judicial Office Impartially and Diligently

- 3B(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.
- 3B(5) A judge shall perform judicial duties without bias or prejudice.

Applicability of Rule 18a, Texas Rules of Civil Procedure to Criminal Cases

- The Texas Rules of **CIVIL** Procedure do not generally govern **CRIMINAL** proceedings.
- Arnold v. State, 853 S.W.2d 543 (Tex. Crim. App. 1993): "Tex. Rules of Civil Proc. 18a applies to criminal cases absent "any explicit or implicit legislative intent indicating otherwise."

Explicit Legislative Intent:
HB 3475, 82nd Legislature, Regular Session

- Adds Subchapter A-1 to Chapter 29 of the Government Code and repeals Section 29.012 of the Government Code
- Provides Procedure for the Recusal and Disqualification of Municipal Court Judges

Sec. 29.052 - Motion for Recusal or Disqualification

1. Must be filed within 10 days of the date set for any trial or hearing or at the earliest practical time if judge is assigned to a case 10 or fewer days before the date set for hearing;
2. Must be verified; and
3. State with particularity the alleged grounds

Sec. 29.053 - Notice

- Must serve all parties or their counsel:
 - Copies of motion
 - Notice that movant expects the motion to be presented to the judge three days after the filing of the motion unless the judge orders otherwise

Rule 18a – Timeliness of Motion

- Motion to recuse must be filed at least 10 days before the date set for trial or a hearing---or the issue is WAIVED!
- Autry v. Autry, 646 S.W.2d 586, 588 (Tex. App. Tyler 1983, no writ) (mandatory provisions do not come into play unless motion is timely filed).

Timeliness Exception:

When a party cannot know the basis of a recusal until he is within the 10 day time limit - good cause exists for the late filing.
Hudson v. Tex. Childrens Hosp., 177 S.W.3d 232, 235 (Tex. App. Houston [1st Dist.] 2005, no pet.)

JUDGES RESPONSE WHEN MOTION IS FILED

- Recuse or Disqualify Yourself
- Request the Regional Presiding Judge to assign a judge to hear the motion

(See Sec. 29.055(a), Gov't Code)

If you recuse or disqualify yourself, with or without a motion:

(See Sec. 29.055(b), Gov't Code)

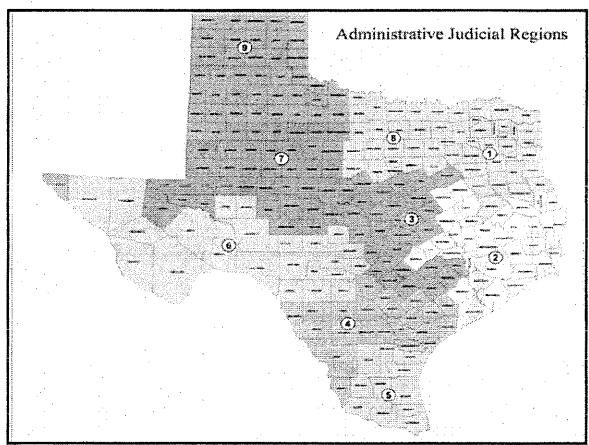
- Enter order of recusal or disqualification
- If you **are not** the presiding judge of your court, request the presiding judge of your court to assign another judge of the court to hear the case
- If you **are** the presiding judge of your court, request the Regional Presiding Judge to assign another judge of your court to sit in the case

If you recuse or disqualify yourself, with or without a motion: (continued)

- If you are the **only** judge of your court, request the Regional Presiding Judge to assign a judge of another municipal court in the county to hear the case
- Disqualified? Take no further action
- Recusal? Take no further action, except for good cause stated in the order in which the action is taken

Who are the Regional Presiding Judges?

- Nine Judicial Regions – Nine Judges
- Appointed by Governor
- Four-year terms
- Active or retired district judge; former district judge with 12 years experience; retired appellate judge with judicial experience on district court



Request the Regional Presiding Judge to assign a judge to hear the motion

- If you decline to recuse or disqualify yourself:
 - Forward to Regional Presiding Judge an original or certified copy of (1) an Order of Referral, (2) the motion, and (3) all opposing and concurring statements.
 - Take no further action barring good cause

(Sec. 29.055(c), Gov't Code)

Upon receiving the motion the Regional Presiding Judge will: (See Sec. 29.056, Gov't Code)

- Immediately set the hearing before himself, a district or statutory county court judge, or a judge who is eligible to serve on assignment under Sec. 74.055, Government Code and provide notice
- Give notice of hearing and enter necessary orders
- Hearing may be conducted by phone if parties do not object

Prohibited Action

When a motion to recuse or disqualify is filed in your court, DO NOT:

- Ignore or overrule the motion
- Transfer the case
- Enter any orders
- Voluntarily participate in recusal hearing

Procedure Following Granting of Motion (Sec. 29.057, Gov't Code)

The order granting the motion will:

- If you **are not** the presiding judge of your court, request the presiding judge of your court to assign another judge of the court to hear the case
- If you **are** the presiding judge of your court, request the Regional Presiding Judge to assign another judge of your court to sit in the case
- If you are the **only** judge of your court, request the Regional Presiding Judge to assign a judge of another municipal court in the county to hear the case

**Presiding Judge Unable to Find
Another Judge**

If there are no other judges in the municipality or all of them have been recused/disqualified or are otherwise unavailable to hear the case, the presiding judge shall request the regional presiding judge to assign:

- a municipal judge from another municipality in the county; or
- If necessary, assign a judge from a municipality in an adjacent county
