

CHAPTER 6 PRETRIAL PROCEEDINGS

One of the guiding principles of the American system of jurisprudence is the idea of an independent and neutral judiciary. In order to ensure the aims of justice and to protect the integrity of the judicial system, all judges must understand the law governing (1) disqualification and (2) recusal. While the terms disqualification and recusal are used interchangeably, such use is a grievous error. If a judge is disqualified under the constitution, he or she is absolutely without jurisdiction in the case, and any judgment rendered by him or her is void, without effect, and subject to collateral attack. The failure of a judge to recuse when recusal is appropriate can constitute a violation of the Code of Judicial Conduct. Failure to recuse may rise to the level of disqualification when it impacts a litigant's right to due process.

Article V, Section 11 of the Texas Constitution provides grounds for disqualifying a judge from sitting in any case. Similarly, Article 30.01 of the Code of Criminal Procedure provides instances in which the judge is disqualified regardless of the judge's application of discretion. The defendant cannot waive the judge's disqualification.

While disqualification is mandatory, recusal lies in a judge's appraisal of the individual situation. While this determination can only be made in light of the specifics of a situation, the Texas Rule of Civil Procedure 18b provide grounds for when a judge shall recuse. It should not be forgotten, however that judges are obligated to decide issues presented in cases and must not unnecessarily recuse themselves even when the judges might prefer not to decide the issues. *Ex parte Ellis*, 275 S.W.3d 109 (Tex. App.—Austin 2008).

While disqualification and recusal are very different, the procedure following a judge's disqualification or recusal is the same. In the 82nd Legislative Session (2011), a comprehensive series of procedures was created in Subchapter A-1 of Chapter 29 of the Government Code. These rules, derived from Texas Rule of Civil Procedure 18A, are designed to accommodate all sizes of municipal courts, and strike a balance between uniformity in application of the law and judicial efficiency. They can be used in any kind of criminal or civil case in which a municipal court has jurisdiction.

6. Recusal and Disqualification

| Checklist 6-6 | Script/Notes |
|---|--|
| Recusal <input type="checkbox"/> 1. A judge must recuse in any proceeding in which: <ul style="list-style-type: none"> <input type="checkbox"/> a. The judge's impartiality might reasonably be questioned; <input type="checkbox"/> b. The judge has a personal bias or prejudice concerning the subject matter or a party; <input type="checkbox"/> c. The judge has personal knowledge of | T.R.C.P. 18b sets out the law concerning recusal and includes instances in which a judge must step down from hearing a case for reasons other than the disqualifying grounds listed in the constitution. <i>Gaal v. State</i> , 332 S.W.3d 448 (Tex. Crim. App. 2011). |

disputed evidentiary facts concerning the proceeding;

- ☐ d. The judge or a lawyer with whom the judge previously practiced law has been a material witness concerning the proceeding;
- ☐ e. The judge participated as counsel, adviser, or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service;
- ☐ f. The judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child 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;
- ☐ g. 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:
 - ☐ (1) Is a party to the proceeding or an officer, director, or trustee of a party;
 - ☐ (2) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
 - ☐ (3) Is to the judge's knowledge likely to be a material witness in the proceeding; or
- ☐ h. The judge or the judge's spouse, or a person within the first degree of relationship to either of them, is acting as a lawyer in the proceeding.

Disqualification:

☐ 2. No justice or judge shall sit in any case where:

Art. 30.01, C.C.P.

- ☐ a. The judge may be the party injured;
- ☐ b. The judge has been of counsel for the State or the accused; or
- ☐ c. The accused may be connected with him by consanguinity or affinity within the third degree.

An individual's relatives within the third degree by consanguinity are the individual's parent, child, brother, sister, grandparent, grandchild, great-grandparent, great-grandchild, aunt, uncle, nephew, or niece. Sec. 573.023, G.C. Two individuals are related to each other by affinity if they are married to each other or the spouse of one of the individuals is related by consanguinity to the other individual. Sec. 573.024, G.C.

Recusal or Disqualification Without a Motion:

Sec. 29.055, G.C.

☐ 3. If you choose to recuse or disqualify yourself, you are recused or disqualified. Go to step 5.

Recusal or Disqualification Upon Party Motion:

Sec. 29.052, G.C.

☐ 4. If a motion has been filed to recuse or disqualify you from presiding over the case, you may do one of the following:

- ☐ a. Recuse or disqualify yourself (go to step 3); or
- ☐ b. Decline to recuse or disqualify yourself and request the Regional Presiding Judge of the Administrative Judicial Region to assign a judge hear the motion; and
 - ☐ (1) Forward a referral order, the motion, and statements to the Regional Presiding Judge.

Sec. 29.055, G.C.

- ☐ 5. If you are recused or disqualified, a determination must be made as to who will sit for you in the case.
 - ☐ a. If you are the only municipal judge in the municipality, you must request the Presiding Judge of the Administrative Judicial Region to assign another judge.
 - ☐ b. If you are the presiding municipal judge in the municipality, you must request the Presiding Judge of the Administrative Judicial Region to assign another judge.
 - ☐ c. If you are not the presiding municipal judge in the municipality, you must request the presiding municipal judge of the municipality to assign another judge of the city to hear the case.

Sec. 29.057, G.C.