MAINTAINING THE APPEARANCE OF IMPARTIALITY

Disqualification and Recusal of Judges in North Carolina

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"Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge….It is not enough for a judge to be just in his judgments; he should strive to make the parties and the community feel that he is just; he owes this to himself, to the law and to the position he holds."
Ponder v. Davis, 233 N.C. 699,706, 65 S.E. 2d 356, 360 (1951)

At some time during their service on the bench, every judge must determine whether circumstances and fairness dictate that the judge not preside in a particular case. When recusal is warranted, a judge's refusal to step aside may involve not only the commission of reversible error, but also it may constitute judicial misconduct. A key to avoiding appellate reversal and disciplinary sanctions is knowing (1) the factors that disqualify a judge and (2) when and how recusal is to occur.

I. THE STANDARD FOR RECUSAL - ACTUAL OR APPARENT GROUNDS FOR DISQUALIFICATION

The statutory standard for disqualification is found in two places – Canon 3 of the N.C. Code of Judicial Conduct and N.C.G.S. Sec. 15A-1223. Canon 3 applies to both civil and criminal cases. Sec. 15A-1223 applies to criminal cases.

Canon 3 (c) (1) provides: "On motion of any party, a judge should disqualify himself *in a proceeding in which his impartiality may reasonably be questioned* (emphasis added)…" The canon lists seven fact situations in which a judge is *per se* disqualified, including actual bias, prior personal knowledge, a personal

or family financial or other interest in the outcome of a case, and personal or family participation as a litigant, attorney or witness in a case. If any of the specifically enumerated grounds for disqualification exist in a case, recusal is mandatory unless the litigants remit the disqualification under the provisions of Canon 3 (d).

G.S. Sec. 15A – 1223 (b) requires that a judge, on motion of the State or the defendant, must disqualify himself from presiding over a criminal trial or other criminal proceeding if he is (1) prejudiced against the moving party or in favor of the adverse party, (2) closely related to the defendant by blood or marriage, or (3) for any other reason unable to perform the duties required of him in an impartial manner. Sec. 15A-1223 (e) disqualifies a judge who will be a witness in the case.

If a judge feels that he or she cannot act impartially in a case, then the judge should obviously grant recusal. However, a judge's personal feelings or beliefs as to his or her impartiality are not controlling. Recusal of a judge may be required even though the judge honestly believes he or she is impartial and intends to preside impartially in a case. The test for recusal is an objective test.

A party moving for a judge's recusal must demonstrate objectively that grounds for disqualification actually exist. The movant must present substantial evidence that the judge has a personal bias, prejudice or interest that would make the judge unable to rule impartially. *State v. Honaker,* 111 N.C. App. 216, 431 S.E. 2d 869 (1993). Alternatively, the movant may show that circumstances would cause a reasonable person to question the judge's impartiality. *State v. Fie*, 320 N.C. 626, 359 S.E. 2d 774 (1987). This alternative test is hereafter referred to as "the appearance of partiality" test.

In *State v. Fie,* a Superior Court judge wrote a letter to the District Attorney requesting that a grand jury consider criminal charges against two men. The judge wrote the letter after hearing testimony during a trial at which the judge presided. The two men were indicted and brought to trial before the judge who had written the letter. One of the defendants filed a motion to recuse the judge. Another Superior Court judge heard the motion and denied it after finding that the trial judge had not taken any direct action against the defendant that would require recusal. The N.C. Court of Appeals affirmed the denial.

In reversing the Court of Appeals, the N.C. Supreme Court held that the trial judge's letter to the District Attorney could create a perception in the mind of a reasonable person that the trial judge thought the defendants were guilty, making it difficult for the defendants to receive a fair trial. The Supreme Court said that the appearance of bias was sufficient to require the judge's recusal. *State v. Fie*, *supra. See also State v. Hill,* 45 N.C. App. 136, 243 S.E.2d 14 (1980) (judge increased defendant's bond on judge's own motion and without regard to whether defendant would appear at trial)

One may draw several conclusions from reading the North Carolina appellate court decisions applying the test for recusal.

1. **A judge is not disqualified from presiding at a trial or hearing simply because he has presided previously at a trial or hearing involving the same event, evidence or parties.** *In Re Faircloth*, 153 N.C. App. 565, 571 S.E. 2d 65 (2002); State *v. Duvall*, 50 N.C. App. 684, 275 S. 2d 842, *rev'd on other grounds,* 304 N.C. 557, 284 S.E. 2d 495 (1984); *State v. Vega* 40 N.C. App 326, 253 S.E. 2d 94, *disc rev denied*, 297 N.C. 457, 256 S.E. 2d 809, *cert denied,* 444 U.S. 968, 100 S.Ct. 459, 62 L.Ed. 382 (1979). A judge is not disqualified because he has knowledge of evidentiary facts gained by presiding at an earlier proceeding or because has ruled against a party previously. *In Re LaRue,* 113 N.C. App. 807, 440 S.E. 2d 301 (1994); *Love v. Pressley,* 34 N.C. App. 503, 239 S.E. 2d 574 (1974), *disc rev denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978).

2. **A judge is not disqualified from presiding at a trial in which the city or county where the judge resides is a party.** *County of Johnston v. City of Wilson*, 136 N.C. App. 775, 525 S.E. 2d 826 (2000). (Absent evidence of actual bias, prejudice or interest, senior resident judge of the county did not err in denying recusal in county's challenge of a city's condemnation proceeding)

3. **A judge is not disqualified from presiding at a criminal trial or hearing because he has strong feelings about a particular type of crime**. In the case of *State v. Kennedy,* 110 N.C. App. 302, 429 S.E. 2d 449 (1993), a defendant charged with driving while impaired moved to recuse the trial judge, alleging that the judge could not be fair because of the judge's feelings regarding DWI offenders and the fact that the judge's wife had been seriously injured in an automobile accident caused by an impaired driver. The Court of Appeals affirmed the denial of the recusal motion, noting that the bias, prejudice or interest that will disqualify a judge is a personal disposition or attitude toward a party, not the views a judge may have toward the subject matter involved in a case. A trial judge may hold personal views on the particular crime for which a defendant is charged and may believe that a crime is more serious or more deserving of punishment than other crimes. However, the presence of these feelings alone does not show that the judge is biased or raise a reasonable belief that the judge cannot rule impartially. *Ibid.*

4. **A judge's participation in settlement discussions during trial, including the expression of opinions regarding the merits of a case, does not necessarily disqualify the judge from continuing to**

preside at the trial. In *Roper v. Thomas*, 65 N.C. App. 64, 298 S.E. 2d 424, 298 S.E. 2d 424, *cert denied,* 308 N.C. 191, 302 S.E. 2d 244 (1982), at the conclusion of a witness' testimony, the trial judge summoned the attorneys for the plaintiffs and defendants to his chambers and told them that based upon the testimony that had been presented, the defendants were liable to the plaintiffs, regardless of any further evidence. The judge then inquired about settlement. The Court of Appeals affirmed the denial of a recusal motion, finding no evidence that the judge could not conduct the trial impartially and noting that the judge's conference with the attorneys had been for the purpose of exploring settlement, a function trial judges in all civil cases should undertake. *See also State v. Kamtsiklis*, 94 N.C. App. 250, 380 S.E. 2d 400, *app dismd, review denied,* 325 N.C. 711, 388 S. E. 2d 466 (1989) (Trial judge in chambers angrily stated he did not believe settlement negotiations were being conducted in good faith and if case was not settled, it would be tried)

5. **A judge is not disqualified from presiding at a motion to suppress evidence even though the judge issued the search warrant being challenged.** In *State v. Montserrate*, 125 N.C. App. 22, 479 S.E. 2d 494 (1997), the defendant sought to recuse a judge from ruling on a motion to suppress evidence because the judge had issued the search warrant being challenged. The Court of Appeals held that a judge does not vouch for the truth of an affidavit given in support of a search warrant application; he merely determines whether the facts stated constitute probable cause. The Court said that although it would have been preferable for a different judge to rule upon the validity of the search warrant, neither the Code of Judicial Conduct nor any statute or constitutional provision prevent a judge from presiding at a hearing to determine the validity of a search warrant issued by the judge.

6. **A judge's actions and statements in a proceeding may be grounds for disqualification.** In *McClendon v. Clinard*, 38 N.C. App. 353, 247 S.E. 2d 783 (1978), a district court judge dismissed a civil case because neither the plaintiffs nor their counsel was present when the case was called for trial. The plaintiffs filed a Rule 60(b) motion to set aside the dismissal. In one of the affidavits filed with the motion, there were facts indicating that, on the day plaintiffs' case was called and dismissed, the plaintiffs' attorney had lunched with a vernireman serving on jury duty in district court that week. The district court judge notified the president of the county bar association of the attorney's contact with the juror and asked that the matter be investigated. The judge also spoke with representatives of the local news media regarding the incident. The plaintiffs moved to have the judge recuse himself from hearing their motion to set aside the judgment of dismissal. The judge denied the motion for recusal and the Rule 60 (b) motion. On appeal, the Court of

Appeals ruled that the district court judge should either have disqualified himself or referred the recusal motion to another judge. The Court said that a reasonable person would have doubts about the judge's ability to rule on the recusal motion in an impartial manner.

In the case of *In Re Dale*, 37 N.C. App. 680, 247 S.E. 2d 246 (1978), a Superior Court judge initiated a disciplinary proceeding against an attorney when it came to the judge's attention that the attorney had failed to perfect an appeal in a criminal case. The Notice of Hearing and Specification of Charges issued by the judge read:

> "On 3 June 1976 you were appointed to represent the defendant in *State v. Kenneth Mathis,* 76 CR 1377 upon appeal from conviction of first degree rape. You have negligently failed to perfect the appeal or to seek appellate review by any other means, in violation of Disciplinary Rule 1-102(1) (5) and Disciplinary Rule 6-101(3) as contained in the Code of Professional Responsibility."

The respondent attorney filed a motion to recuse the judge from hearing the proceeding. In denying the motion, the judge stated that he had issued the notice based upon the public record and that was the extent of his knowledge about the matter. On appeal, the Court of Appeals held that the judge should have disqualified himself and permitted another judge to hear the disciplinary proceeding. The Court said that although it appeared that the judge had worded the specification to advise the attorney of the seriousness of the matter, the judge's choice of words gave the impression that the judge had decided the matter before hearing any evidence. *But see In re Smith*, 45 N.C. App. 123, 263 S.. 2d 23, *revd on other grounds,* 301 NC 621, 272 SE 2d 834 (1980) (Superior Court judge cited attorney for contempt. Prior to conducting the contempt hearing, judge sent a proposed contempt order containing findings of fact and conclusions of law to the alleged contemnor. Court of Appeals held judge did not err in failing to recuse himself at contempt hearing. The proposed order was a notice to the attorney of the seriousness of the charges against him and of the possible consequences if the charges were proven at the hearing)

7. **A judge is not disqualified *per se* from conducting a contempt hearing arising out of conduct directed toward the judge, but the judge must be careful in deciding how to handle the contempt.**

In the case of *In re Paul*, 28 N.C. App. 610, 222 S.E. 2d 610, *cert denied,* 286 N.C. 414, 211 S.E. 2d 793 (1974), at the conclusion of a murder trial, the trial judge found one of the attorneys in direct contempt of court. The attorney had made statements during the trial that were critical of the court's rulings. In upholding the trial judge's refusal to recuse himself, the Court of Appeals noted that there was no evidence of

any “marked personal feelings” or ”personal stings” exhibited by the trial judge toward the attorney as a result of his conduct nor any appearance of bias that would prevent the judge from balancing the interests of the court and the interests of the alleged contemnor.

The N.C. Supreme Court has recognized that judges must walk a fine line in exercising the contempt power when the contempt involves a personal attack upon the judge. On the one hand, the judge must preserve the authority and dignity of the court. But the judge must not allow personal feelings to influence his or her actions. In *Ponder v. Davis,* 233 N.C. 694, 65 S.E. 2d 356 (1951), the Court said that a judge should recuse himself in a contempt proceeding where his personal feelings do not permit “an impartial and calm judicial consideration and conclusion in the matter.” 233 N.C. at 704, 65 S.E. 2d at 359. The Court did not say that a judge must refer to another judge all contempt matters involving personal attacks or disobedience of the judge’s orders. However, the Court wrote: “All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place.” 233 N.C. at 705, 65 S.E. 2d at 360.

8. **The North Carolina appellate courts have not always interpreted and applied the recusal test uniformly and consistently.**

Recent decisions of the N.C. Supreme Court and N.C. Court of Appeals show that applying the test for recusal is not always a simple matter and that the appellate courts have been inconsistent in applying the test. The trial court and appellate decisions in *Lange v. Lange* are a case in point. *See Lange v. Lange*, 157 N.C. App. 310, 578 S.E. 2d 677 (2003); *Lange v. Lange*, 357 N.C. 645, 588 S.E. 2d 877 (2003); and *Lange v. Lange,* ___N.C. App___, 605 S.E. 2d 732 (2004).

In *Lange*, a district court judge was assigned to determine a child custody case. The judge owned a mountain vacation home in common with the defendant’s attorney and others. At the time of the custody hearing, neither the plaintiff nor plaintiff’s counsel were aware of the joint ownership. After the judge announced his decision in favor of the defendant, but prior to the signing of a custody order, the plaintiff filed a recusal motion. The district judge delayed entry of the custody order pending a hearing on the recusal motion. The motion was heard before Judge Christian, a district court judge from another judicial district.

Judge Christian found the trial judge had not violated any canon of the Code of Judicial Conduct and that there was no evidence of actual

bias toward either party. However, Judge Christian ordered that the trial judge be recused because the relationship between the trial judge and defense counsel would cause a reasonable person to question whether the trial judge could issue an impartial ruling. He also ordered a new hearing on the custody issue. Defendant appealed to the Court of Appeals.

In his findings of fact, Judge Christian pointed to the joint ownership of the vacation home and also to the fact that the trial judge was responsible for paying on behalf of all the owners the debt service, tax payments and maintenance fees for the property. This financial relationship created a fiduciary duty owed to the defense counsel and the other owners, Judge Christian wrote. He also noted that there had been on-going discussions between the trial judge and defense counsel regarding the sale of their ownership interests to each other.

In a split decision, the Court of Appeals dismissed as moot the defendant's appeal of the recusal order because the trial judge had retired subsequent to the entry of the recusal order but before the appeal was heard. 157 N.C. App. 310, 578 S.E. 2d 67. The Supreme Court ruled the appeal of the recusal order was not moot and remanded the case to the Court of Appeals with an instruction to apply the appropriate standard for recusal. In its opinion, the Supreme Court said that the standard for recusal was whether there was "substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially." 357 N.C. at 649, 588 S.E. 2d at 880.

The Supreme Court opinion did not mention the appearance of partiality test enunciated in *State v. Fie, supra.* Indeed, the opinion implicitly rejected Judge Christian's use of the test, writing that his order was based upon "inferred perception and not the facts as they were found to exist." *Ibid.* The Court noted that Judge Christian had found no violations of the Code of Judicial Conduct and no evidence of actual bias. The Court said that if, in fact, the trial judge did not violate the Code of Judicial Conduct, the Court of Appeals should conclude that the issuance of the recusal order was error.

On remand, the Court of Appeals followed the Supreme Court mandate and reversed Judge Christian's order in a split decision. Judge Calabria dissented, opining that Judge Christian correctly applied the standard for recusal, including the appearance of partiality test adopted by the Supreme Court in *State v. Fie*. Judge Calabria wrote: "Nothing in the Supreme Court's opinion remanding this case to this Court indicates that any portion of *Scott* or *Fie* has been overruled or improperly sets

forth the standard, and both cases expressly support the proposition that the appearance of impropriety justifies recusal." 605 S.E. 2d at 735.

(**Note:** Judicial ethics advisory opinions issued in Florida in 2002 and 2001 hold that a judge who owns real estate jointly with an attorney is disqualified in cases in which the attorney is involved.)

II. WHO RAISES THE ISSUE OF DISQUALIFICATION?

In most cases, the issue of disqualification will arise when a party or attorney files a motion for recusal. In fact, G.S. 15A –1223 anticipates that an attorney or party will usually be the one raising the issue. The statute requires that a motion for recusal in a criminal case must be in writing and supported by at least one affidavit that sets forth the facts relied upon as grounds for disqualification. The written motion must be filed at least five days before the time the case will be called for trial unless good cause is shown for filing the motion within the five day period. The N.C. Court of Appeals has held that a motion to recuse must be made as soon as the movant knows of the facts supporting disqualification. *State v. Pakulski*,106 N.C. App. 444, 417 S.E. 2d 515 (1992).

In *Pakulski*, the trial judge remarked to defense counsel, "Why don't you just plead the slimy sons-of-bitches guilty?" The defendant's motion to recuse the judge was not filed until more than a year after the remark was made. The recusal motion was denied. On appeal, the Court of Appeals affirmed the denial of the motion, noting the defendant's long delay in filing the motion. The Court said: "A defendant cannot choose to wait and seek a trial judge's recusal until after the trial judge rules unfavorably to the defendant on some other grounds." 106 N.C. App. at 450, 417 S.E. 2d at 519.

Canon 3 (d) of the Code of Judicial Conduct acknowledges that there will be cases in which the obligation to raise disqualification falls upon the trial judge. The section reads:

> Nothing in this Canon shall preclude a judge from disqualifying himself from participating in any proceeding upon his own initiative." Also, a judge potentially disqualified by the terms of Canon 3(c) may, instead of withdrawing from the proceeding, disclose on the record the basis of his potential disqualification."

A judge who knows that grounds for disqualification exist is ethically bound to either withdraw or at least raise the subject of disqualification even if the parties or attorneys do not. Prudence dictates that a judge err on the side of caution and make the parties and attorneys aware of any facts that might be grounds for disqualification. Under Canon 3 (d), such notification gives the parties the option of either moving for recusal or stipulating that the judge's

basis for potential disqualification is immaterial or insubstantial and allowing the judge to participate in the proceeding. A good rule of thumb is: "When in doubt, shout it out!"

III. WHO HEARS THE MOTION FOR RECUSAL?

Assume that a judge is assigned to preside at a civil term of Superior Court. In a case called for trial, the plaintiff is represented by an attorney who has previously filed a complaint against the judge with the N.C. Judicial Standards Commission. The complaint led to a censure of the judge by the N.C. Supreme Court. The plaintiff's counsel has filed a motion to recuse the trial judge from presiding at the civil trial. Can the trial judge hear the recusal motion? Should the trial judge hear the motion?

Nothing in the Code of Judicial Conduct expressly forbids a trial judge from ruling upon a motion to recuse the judge. However, the N.C. appellate courts have established a guideline for determining when a judge should refer a recusal motion to another judge. The general rule is that a judge **must** (emphasis added) refer a motion to recuse to another judge for ruling when "a reasonable man knowing all the circumstances would have doubts about the judge's ability to rule on the motion to recuse in an impartial manner." *State v. Hill,* 45 N.C. App. 136, 141, 263 S.E. 2d 14, 17 (1980) [quoting *McClendon v. Clinard,* 38 N.C. App. 353, 356, 247 S.E. 2d 783, 785 (1978)]

In one of the earliest North Carolina cases dealing with recusal, the N.C. Supreme Court reversed a trial judge who denied a recusal motion, holding that the judge should not have heard the motion or should have disqualified himself. The case of *Ponder v. Davis*, *supra,* involved a disputed election for sheriff in Madison County. The plaintiff, E.Y. Ponder, was the Democratic candidate for sheriff in the 1950 general election. The defendant, Hubert Davis, was the Republican incumbent sheriff. Both men claimed victory in a close election. The county board of elections certified plaintiff's election, and the plaintiff took the oath of office. The defendant also took the oath of office.

The plaintiff filed an action in the Superior Court of Madison County and requested that the resident Superior Court judge issue a temporary restraining order forbidding the defendant and his chief deputy/jailer from exercising any of their official powers. The judge issued the TRO, which was served upon the chief deputy/jailer, but not the defendant sheriff. The plaintiff contended the defendant was hiding to avoid service of the injunction upon him. The chief deputy/jailer and the other deputies refused to surrender possession of the jail and the sheriff's office in response to the TRO. The judge issued a show cause order. At the time appointed for a hearing on the show cause order, the defendants did not appear. However, their attorney did appear, and he filed a motion to recuse the resident judge from hearing the contempt.

The recusal motion alleged that the judge was disqualified because he had actively campaigned for the plaintiff and other Democratic candidates in the 1950 general election, the judge had been a Democratic candidate for re-election in the same election, and citizens of Madison County would believe that any decision of the judge was tainted by politics. The judge made a finding of fact that the motion was "scurrilous and untrue", and he ordered the motion stricken from the record.

The judge found the defendants in contempt, ordered their arrest and ordered them to appear before another judge holding court in Buncombe County for entry of judgment. Ultimately, the defendants received fines for their contempt. The N.C. Supreme Court said that the judge's transfer of the contempt matter to another judge for entry of judgment indicated that another judge should have heard the contempt matter. The Supreme Court said that because of the circumstances alleged in the recusal motion, the judge was disqualified.

When the allegations in a recusal motion are such that a judge must make findings of fact regarding his impartiality, the judge must either grant the motion for recusal or refer the motion to another judge. In *Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976), a recusal motion alleged that the judge was prejudiced against the defendant because (1) the judge had previously prosecuted the defendant in a criminal case while the judge was serving as a Recorder's Court solicitor; (2) the judge had money on deposit with the plaintiff bank and was a friend of some of the bank's employees, and (3) a previous attorney-client relationship between the judge and defendant's family had terminated on an unfriendly basis. The judge denied the recusal motion. On appeal, the Supreme Court wrote:

> "We are, however, constrained to observe that when the trial judge found sufficient force in the allegations contained in defendant's motion to proceed to find facts, he should have either disqualified himself or referred the matter to another judge before whom he could have filed affidavits in reply or sought permission to give oral testimony. Obviously it was not proper for this trial judge to find facts so as to rule on his own qualification to preside when the record contained no evidence to support his findings."
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> 291 N.C. at 311, 230 S.E. 2d at 380.

IV. CONCLUSION

Litigants in the courts of North Carolina have a right to equal and fair treatment by the judges before whom they appear. The provisions of Canon 3 of the N. C. Code of Judicial Conduct and G.S. 15A –1223 are designed to insure that a judge who presides at a trial or other proceeding will be free of

considerations that may affect the judge's ability to be impartial. These same provisions are intended also to uphold public confidence in the integrity of our courts. As the N.C. Supreme Court has written:

> *"One of the fundamental rights of a litigant under our judicial system is that he shall be entitled to a hearing before a court to which no taint or prejudice is attached…. It is the duty of courts to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought into question."*
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> Ponder v. Davis, 233 N.C. at 706, 65 S.E.2d at 360, quoting Talbert v. Owen-Ames-Kimbel Co., 305 Mich. 345, 9 NW 2d 572 (1943) and State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613 (1939)