

**Judicial Ethics**

**“Disqualification, Recusal, Remittance”**

*Judge D. Allen , Chief Judge, Chattahoochee Circuit*

*Vice-Chair Judicial Qualifications Commission*

State Court Judges 2009 Spring Conference  
Brasstown Valley Conference Center



There are generally four (4) areas of concern pursuant to which recusal is a consideration:

- I. Disqualification
- II. Judicial Canon of Ethics
- III. Recusal (bias)
- IV. Considerations of Due Process
- V. Remittance

**I. Disqualification:**

Disqualification is mandated by Georgia Statutory Law under certain circumstances:

**O.C.G.A. § 15-1-8. WHEN JUDGE OR JUDICIAL OFFICER DISQUALIFIED.**

- (a) No judge or Justice of any court, magistrate, nor presiding officer of any inferior judicature or commission shall:
  - (1) Sit in any case or proceeding in which he is pecuniarily interested;
  - (2) Preside, act, or serve in any case or matter when such 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
  - (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.

- (b) No judge or Justice of any court, magistrate, nor presiding officer of any inferior  
judicature or commission 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) Nothing in this Code section shall be construed as applying to the qualifications of  
trial jurors.
- (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.

**O.C.G.A. § 15-1-8**

- (a) “Pecuniary interest”
  - (1) “Judge’s interest in a public matter in common with other taxpayers is not  
sufficient to disqualify . . . Judge’s interest must be direct and immediate  
to require disqualification. City of Valdosta v. Singleton, 197 Ga. 194  
(1944)
  - (2) “Interest which disqualifies a judge in a case is a direct pecuniary or  
property interest in the subject matter of the litigation, whereby a liability

or pecuniary gain, would occur on the outcome of the suit.” Adams v. McGehee, 211 Ga. 498 (1955)

- (3) “Probate Court Judge’s ownership of stock in a bank which was a party to the proceeding disqualified the judge from hearing the matter - - - and the judge should have granted a motion to recuse “White v. SunTrust Bank, 245 Ga. App. 828 (2000)

“Pecuniarily interested means interest in one side or the other of the case - - a loss in the subject matter, or a gain dependent upon the result of the issue.” Denard v. State, 46 Ga. App. 513 (1933)

“Prior knowledge of facts of case does not disqualify judge - - (only goes to bias or prejudice.” Stevenson v. Stevenson, 222 Ga. 47 (1966)

This section is exclusive as to disqualification. *cits*

#### **O.C.G.A. § 15-1-8(a)(2) [Relationship Disqualification]**

Relationship within prohibited degree must be to a party “interested in the result of the matter to require disqualification of judge Chadwick v. State, 87 Ga. App 900 (1953); However, see In Re Judge No. 97-61, 269 Ga. 425 (1998).

“The close familial relationship between the major, who was judge’s mother, and the judge could impede the impartiality of the judge’s judgment in presiding over the adjudication of matters involving the city; such a perceived bias or prejudice suffices for disqualification.”

(3)(b) of O.C.G.A. § 15-1-8 yields an exception to pecuniary interest - - allows for being a

policy holder in Mutual Insurance Company or related to such party.

**II. Judicial Canon of Ethics & Recusal.**

- A. Violations of certain of the Judicial Canons of Ethics may serve as a basis for recusal of the judge in a matter before the court.

This power of such canons to allow recusal and/or discipline of judges for failure to adhere to the dictates of the Canons of Ethics is grounded in Due Process clause of Fourteenth Amendment of U.S. Constitution; Art. II, VI & VII Georgia Constitution; and, U.S. Supreme Court case law which is well settled.

- B. The most frequently cited canon to invoke recusal (usually on the basis of bias and impartiality) is Canon 3.E.(1).

**Canon -3 - E. Disqualification.**

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

*Commentary: Under this rule, judges are subject to disqualification whenever their impartiality might reasonable be questioned, regardless of whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.*

*Judges should disclose on the record information that the court believes the*

*parties or their lawyers might consider relevant to the question of disqualification, even if they believe there is no legal basis for disqualification.*

*The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as possible.*

- (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;
- (b)** the judge served as a lawyer in the matter of 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;

***Commentary:*** *A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); judges formerly employed by a governmental agency, however, should disqualify themselves in a*

*proceeding if their impartiality might reasonably be questioned because of such association.*

(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 a 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.

*Commentary: The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section B(1)(c)(iii) requires the judge's disqualification."*

C. **Bias, Impartiality as basis for Recusals:**

1. Can judge at whom motion is directed defend the action? No!

Isaacs v. State, 257 Ga. 126 (1989) [Judge attempted to participate but was

excluded from proceedings. Judge hired a lawyer to represent him who peripherally participated.]

“A judge may not become so involved in a controversy that his objectivity could reasonable be questioned. See *In re Crane*, 253 Ga. 667 (1) (324 SE2d 443) (1985) (contumacious conduct directed at a judge). A judge has no interest in sitting on a particular case; at most, his interest lies in protecting his own reputation. His efforts at defending himself against a motion to recuse will inevitably create an appearance of partiality. One reason is that if he defends himself he becomes an adversary of the movant for if he defends himself he becomes an adversary of the movant for recusal. This adversarial posture may create an antipathy which persists after the motion to recuse is denied.

We recognize that judges may be sorely tempted to respond to motions to recuse which they perceive as gratuitously defamatory. We also recognize that a judge who actively resists recusal may be fully capable of even-handedly presiding if the motion is denied. Nevertheless, we think that these factors are heavily outweighed by the necessity of preserving the public’s confidence in the judicial system. We therefore hold that after a legally sufficient motion to recuse has been assigned for hearing, the judge against whom the motion is directed may not oppose the motion.” *Isaacs, supra*

2. Lemming v. State, 292 Ga. App. 138 (2008)

District Attorney had previously represented defendant in criminal matter. District Attorney offered to remove herself and her office from case. Defendant and attorney decided not to move to recuse - - - strategically. The judge had previously presented defendant, yet defendant *felt comfortable with proceeding*. *Defendant convicted and sentenced to thirty years.*

“[There is no duty for a trial judge to *sua sponte* recuse himself absent a violation of a specific standard of O.C.G.A. § 15-1-8 or Canon 3(E)(1)(a) through (c) of the Code of Judicial Conduct . . . “ (Citations omitted.) Phillips v. State, 267 Ga. App. 733, 736(2), 601 S.E.2d 147 (2004). Here, **Lemming’s** claim that Judge Colston should have **recused** herself is based on Canon 3(E)(1)(a), which provides, in relevant part: “Judges shall disqualify themselves in any proceeding in which their impartiality might reasonably be questioned, including . . . instances where . . . the judge has a personal bias or prejudice concerning a party . . . “

In construing Canon 3, this Court has interpreted the phrase “impartiality might reasonably be questioned” as meaning the existence of “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; it is not based upon the perception of either interested parties or their lawyer-advocates . . .” (Citation omitted.) Baptiste v. State, 229 Ga. App. 691, 694(1), 494, E. 2d 530 (1997). A trial judge’s failure to *sua sponte* recuse herself will warrant reversal only where “the conduct or remark of the judge [constitutes] an egregious violation of a specific [ethical] standard” (BITT Intl. Co. v. Fletcher, 259 Ga. App. 406, 410(5), 577 S.E. 2d 276 (2003) (citations omitted)), and it must support “the inescapable conclusion that a reasonable person would consider [the judge] to harbor a bias that affects his ability to be impartial.” (Citations omitted.) Turner v. State, 280 Ga. 174, 176, 626 S.E. 2d 86 (2006). See also *Phillips* supra, 267 Ga. App at 736 (2), 601 S.E. 2d 147 (“To merit **recusal**, any alleged bias must be of such a nature and intensity to prevent the defendant from obtaining a trial uninfluenced by the court’s prejudgment.”) (citation and punctuation omitted).

**Lemming** supports her assertion that Judge Colston was biased against her by citing (i) the harsh sentence imposed by the trial court; (ii) Judge Colston’s personal knowledge of **Lemming**, which resulted from the Judge’s previous prosecution of her; and (iii) allegedly improper remarks

Judge Colston made in an unrelated trial involved **Lemming's** son and daughter-in-law.

Given that the sentence was within the parameters provided by the law, we cannot say that it evidences bias. Additionally, evidence of **Lemming's** prior prosecutions, including the 1994 case prosecuted by Judge Colston, was introduced by the State at the sentencing phase of trial. This evidence would have been before any trial judge, and the mere fact that Judge Colston has participated in one of Lemming's several prior prosecutions does not give rise to a presumption that she was somehow biased against Lemming. See *Baptiste*, supra, 229 Ga. App. At 697(1), 494 S.E. 2d 530 ("The fact that the judge has sat on prior cases of the party or ruled on prior matters in the case before the judge is legally insufficient as a grounds for recusal.") (citations omitted). Moreover, at the motion for new trial hearing, defense counsel conceded that a judge's having prior knowledge of a defendant or her family did not constitute evidence of bias."

[As an aside issue consider the following quote from the same case]

"Nor do we find any merit in Lemming's argument that Patterson's potential conflict of interest as to the current case automatically disqualified the Floyd County district attorney's office from prosecuting the same. The Supreme Court of Georgia has held that the previous representation of a criminal defendant by a lawyer in the district attorney's office does not automatically disqualify other members of that office from prosecuting the case. *Sealey v. State*, 277 Ga. 617, 619 (4), 593 S.E. 2d 335 (2004). Rather, the other lawyers on the district attorney's staff may continue with the case so long as the attorney who previously represented the defendant (i) did so in an unrelated proceeding; and (ii) is properly "screened from any direct or indirect participation" in the current prosecution. *Id.* See also *Billings v. State*, 212 Ga. App. 125, 129(4), 441 S.E. 2d 262 (1994) ("Vicarious disqualification of a government department is not necessary or wise, and the individual lawyer should be screened from any direct or indirect participation in the matter, and discussion with colleagues concerning the case should be prohibited. [Cit.]"). Both of these requirements were met by Patterson. As noted, supra, the matters on which she had previously represented Lemming were unrelated to the current case. Additionally, Patterson neither participated in the prosecution of the current case nor discussed it with any of her colleagues."

3 - Wilson v. McNeely, [Judge sat on a case wherein a defendant was a judge in the circuit - - Judge was not being tried in capacity as judge.

“Canon Two of the Code of Judicial Conduct mandates that judges avoid not only actual impropriety, but that they avoid even the appearance of impropriety.” “The test for the appearance of impropriety is whether the situation would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”

4 - In Smith v. Guest Pond Club, counsel for one of the parties was also a **judge** on the same court as the presiding **judge**. The Supreme Court of Georgia observed that “our Judicial Qualifications Commission has opined that a **judge** of a particular court should never preside over a matter involving another **judge** from the same circuit:”

Simply stated, the public must believe in the absolute integrity and impartiality of its judges . . . Consequently, even without a showing of actual bias, prejudice or unfairness, and regardless of the merits or timeliness of a **Motion** to Recuse, this Commission concludes that 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 which sits in the same circuit.

The Court applied these principles in *Smith* to conclude that the **judge** “potentially brought the impartiality and unbiased nature of the judicial office into question, something that th[e] Court will not countenance.” Having determined that the trial court erred by denying the **motion** to recuse the **judge** and that the **judge** should not have presided over or ruled upon the matter, the Court held that “the orders entered by [the **judge**] in this case must be declared void and ordered vacated.” (emphasis added)

This court relied upon *Smith* in Ga. Transmission Corp. V. Dixon, where a **judge** presided over and ruled upon a case wherein one of the parties was also a **judge** on the same superior court

as the presiding **judge**. We concluded that, quite apart from whether any actual impropriety occurred, reasonable persons might have perceived a conflict of interest in the performance of the presiding judge's official duties, thus compromising the good character of his judicial office as impartial and unbiased. Consequently, we vacated as void the complained-of order entered by the **judge**.

In accordance with *Smith* and *Dixon*, it was inappropriate for the trial **judge** in this case to preside over and rule upon the matter, wherein one of the parties was also a **judge** sitting on a court within the same circuit. The trial court erred by denying Wilson's **motion** to recuse; the **judge** should not have presided over or ruled upon this matter, and consequently, "the orders entered by [the **judge**] in this case must be declared void and ordered vacated."

#### IV. Recusal Grounded in Due Process Concerns.

- a. It is well settled that recusal of judges may well be mandated by Due Process concerns. E.G. Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319 (1977)

"[I]t is normally within the power of the state to regulate procedures under which its laws are carried out - - - and its decision in this regard is not subject to prosecution under the Due Process Clause (14<sup>th</sup> Amendment) unless it offers some principle of justice so rooted in the traditions and consciences of our people as to be ranked as fundamental"  
Tumey v. Ohio, 273 U.S. 510 (1927) (Basis for Canons?)

"It certainly violates the Fourteenth Amendment - - - to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him."

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of

course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.” In Re Murchison, 349 U.S.133 (1955)

b. Courts have sometimes given nod to the principle that due process sometimes requires disqualification without actual showing of bias. See, e.g. Del Vecchio v. Illinois Dept. of Corrections, 31 F.3d 1363 (7CA 1994) (*en banc*) “The Due Process Clause sometimes bar trial by judges who have no actual bias . . . but to perform its high functions in the best way judges must satisfy the appearance of justice.”

c. “A fair trial in a fair tribunal is a basic requirement of due process.” In Re Murchison, 239 U.S. 57 (1972) “A neutral and detached judge is an essential component of the due process clause.” Ward v. Village of Monroeville, 409 U.S. 57 (1972)

*c.f.* In the Matter of Inquiry Concerning a Judge No. 97-61, 269 Ga. 425 (1998)

d. Caperton v. A.T. Massey Coal, Col, et al

Movant filed motion to recuse judge who had received “obscene” amounts of money from opposing party (editorial) in judge’s election campaign. Judge was deciding vote in a decision to reverse judgment in millions against contributor.

**Issue:** Whether a judge’s failure to disqualify himself in a case involving his principal financial supporter violated the due process clause of the Fourteenth Amendment.

V. Uniform Superior Court Rules Governing Recusal Procedures - USCR 25.1 et seq.

**25.1 Motions**

*All motions to recuse or disqualify a judge presiding in a particular case or proceeding shall be timely filed in writing and all evidence thereon shall be presented by accompanying affidavit(s) which shall fully assert the facts upon which the motion is founded. Filing and presentation to the judge shall be not later than five (5) days after the affiant first learned of the alleged grounds for disqualification, and not later than ten (10) days prior to the hearing or trial which is the subject of recusal or disqualification, unless good cause be shown for failure to meet such time requirements. In no event shall the motion be allowed to delay the trial or proceeding.*

- a. If all three conditions precedent for disqualification of trial judge are not met, the trial judge shall deny the disqualification motion on its face as insufficient; the three conditions are the timeliness of the motion, the legal sufficiency of the accompanying affidavit, and whether recusal would be warranted if some or all of the facts alleged in the affidavit are true. **Uniform Superior Court Rule 25.1 et seq. Penland v. Corlew, 248 Ga. App. 564 (2001)**
- b. Tenant in action to enforce crop lien waived claim that trial court was under a duty to *sua sponte* recuse itself after exhibiting bias in favor of landlord, where tenant failed to make a motion for recusal. BITT Intl. Co., Inc. v. Fletcher, 259 Ga. App. 406 (2003).
- c. An untimely motion to recuse a trial judge or a motion to recuse that is defective waives the grounds for recusal. BITT Intl. Co., Inc., v.

Fletcher, 259 Ga. App. 406 (2003).

- d. Defendant was not entitled to evidentiary hearing on his motion to recuse trial judge for bias, where motion was untimely and failed to state legally sufficient grounds for recusal. **Uniform Superior Court Rule 25.** Christensen v. State, 245 Ga. App. 165, (2000) certiorari denied.
- e. To allow an extraordinary motion for new trial based on newly discovered evidence to be a vehicle to raise the issue of recusal would allow by indirection what is prohibited by direction, i.e., untimely motions to recuse, and would render recusal procedure meaningless; therefore, such motion cannot be used in such fashion. **Uniform Superior Court Rule 24.** Christensen v. State, 245 Ga. App. 165, (2000), certiorari denied.

[On motion seeking recusal, there is a presumption that a trial judge, acting as a public official, faithfully and lawfully performs the duties devolving upon him. O.C.G.A. § 15-1-8.]

#### **25.2. Affidavit.**

*The affidavit shall clearly state the facts and reasons for the belief that bias or prejudice exists, being definite and specific as to time, place, persons and circumstances of extra-judicial conduct or statements, which demonstrate either bias in favor of any adverse party, or prejudice toward the moving party in particular, or a systematic pattern of prejudicial conduct toward persons similarly situated to the moving party, which would influence the judge and impede or prevent impartiality in that action. Allegations*

*consisting of bare conclusions and opinions shall not be legally sufficient to support the motion or warrant further proceedings.*

[**Editor's notes.** - - Former Rule 25.2, pertaining to duty of the trial judge, was amended and renumbered as Rule 25.3 and present Rule 25.2 was adopted, effective January 31, 1991.]

- a. **Judge's duty is limited.** This rule provides that when a trial judge is presented with a motion for recusal accompanied by an affidavit, the judge's duty is limited to determining the timeliness of the motion and the sufficiency of the affidavit. Bedford, Kirschner & Venker v. Goodman, 197 Ga. App. 858, 399 S.E. 2d 723 (1990).
- b. **The test for determining the sufficiency of the affidavit** is whether, assuming the truth of the facts alleged, a reasonable person would conclude that the judge is likely to be a material witness in the proceedings. Bedford, Kirschner & Venker v. Goodman, 197 Ga. App. 858, 399 S.E. 2d 723 (1990).
- c. **Sufficiency of affidavit.** - Plaintiff did not establish a legally sufficient affidavit so far as to require a recusal hearing before another judge. Stephens v. Ivey, 212 Ga. App. 407, 442 S.E. 2d 248, cert. Denied, 513 U.S. 867, 115 S. Ct. 185, 130 L. Ed. 2d 119 (1994); Dickerson v. State, 241 Ga. App. 593, 526 S.E. 2d 443 (1999).
- d. Trial court did not err in denying a county sheriff's motion to recuse all the judges within the circuit as untimely and insufficient, as: (1) the sheriff's affidavit was not specific as to time, place, persons, and circumstances, but

stated generally that the sheriff, the Board of County Commissioners, and the Board's members had unspecified "personal and professional relationships" with the superior court judges of the Clayton Judicial Circuit; and (2) the sheriff merely speculated that the judges of the Clayton Judicial Circuit might have personal knowledge of the facts and issues relevant to the pending litigation. Hill v. Clayton County Bd. Of Comm'rs, 283 Ga. App. 15, 640 S.E. 2d 638 (2006).

- e. A supporting affidavit submitted by the defendant was inadequate when it did not set forth specific details of the basis for the claim of bias, but simply referenced the motion to recuse; moreover, as all of the allegations of bias in the motion to recuse arose from the defendant's "history" in the judge's courtroom and chambers, the motion did not state facts which, if true, would have required recusal. Keller v. State, 286 Ga. App. 292, 648 S.E. 2d 714 (2007), cert. denied, 2007 Ga. LEXIS 868 (Ga. 2007).
- f. 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.** Liberty Mutual Ins. Co. v. Johnson, 244 Ga. App. 338 (2000) "Allegations in the motion **merely stating rulings and decisions made by the trial judge in the course of the case** fail to satisfy the requirement that the bias stem from an extra-judicial source." Thomason v. State, 199 Ga. App. 875 (1991). **See also, Rice v. Cannon**, 283 Ga. App. 438 (2007), where the movant claimed that the presiding

judge was biased since the movant had previously sought money damages in federal court against this same judge. Even in those circumstances, the high court found no error in the denial of the recusal motion. “*The alleged bias must be of such a nature and intensity to prevent the complaining party from obtaining a trial uninfluenced by the court’s prejudgment.*” The allegations were deemed conjecture.

**25.3. Duty of the trial judge.**

*When a judge is presented with a motion to recuse, or disqualify, accompanied by an affidavit, the judge shall temporarily cease to act upon the merits of the matter and shall immediately determine the timeliness of the motion and the legal sufficiency of the affidavit, and make a determination, assuming any of the facts alleged in the affidavit to be true, whether recusal would be warranted. If it is found that the motion is timely, the affidavit sufficient and that recusal would be authorized if some or all of the facts set forth in the affidavit are true, another judge shall be assigned to hear the motion to recuse. The allegations of the motion shall stand denied automatically. The trial judge shall not otherwise oppose the motion.*

[**Editor’s notes.** - - Former Rule 25.2 was amended and renumbered as Rule 25.3 effective January 31, 1991.]

**a. Effect of trial judge’s failure to make requisite determinations. - -**

*Where a superior court judge, against whom a motion to recuse has been filed, refers the motion to recuse to another judge, but has not made the*

*three requisite determinations at the time the motion was reassigned - - i.e., the timeliness of the motion, the legal sufficiency of the affidavit, and whether, assuming any of the alleged facts were true, recusal would be warranted - - it is necessary and proper for the assigned judge to make these determinations, which the alleged recusant judge was supposed to have made. Birt v. State, 256 Ga. 483, 350 W.E. 2d 241 (1986).*

- b. Motion not necessarily granted if opposing party files no pleadings in opposition to motion. Kirkland v. Tamplin, 283 Ga. App. 596 (2007)*

#### **25.4 Procedure Upon a Motion for Disqualification**

*The motion shall be assigned for hearing to another judge, who shall be selected in the following manner:*

- (A) If within a single-judge circuit, the district administrative judge shall select the judge;*
- (B) If within, a two-judge circuit, the other judge, unless disqualified, shall hear the motion;*
- (C) If within a multi-judge circuit, composed of three (3) or more judges, selection shall be made by use of the circuit's existing random, impartial case assignment method. If the circuit does not have random, impartial case assignment rules, then assignment shall be made as follows:*
- (1) The chief judge of the circuit shall select a judge within the circuit to hear the motion, unless the chief judge is the one against whom the motion is filed; or*

- (2) *In the event the chief judge is the one against whom the motion is filed, the assignment shall be made by the judge of the circuit who is most senior in terms of service other than the chief judge and who is not also a judge against whom the motion is filed; or*
- (3) *When the motion pertains to all active judges in the circuit, the district administrative judge shall select a judge outside the circuit to hear the motion.*
- (D) *If the district administrative judge is the one against whom the motion is filed, the available judge within the district senior in time of service (or next senior in time of service, if the administrative judge is the one senior in the time of service) shall serve in the selection process instead of the district administrative judge.*
- (E) *If all judges within a judicial administrative district are disqualified, including the administrative judge, the matter shall be referred by the disqualified administrative judge to the administrative judge of an adjacent district for the appointment of a judge who is not a member of the district to preside over the motion or case.*

If the motion is sustained, the selection of another judge to hear the case shall follow the same procedure as outlined above.

[Former Rule 5.4 deleted effective January 31, 1991. Former Rule 25.3 renumbered as Rule 25.4 effective January 31, 1991; amended effective May 19, 2005]

See, Smith v. Adamson, 226 Ga. App 698 (1997)

**25.5. Selection of judge.**

*In the instance of any hearing on a motion to recuse or disqualify a judge, the challenged judge shall neither select nor participate in the selection of the judge to hear the motion; if recused or disqualified, the recused or disqualified judge shall not select nor participate in the selection of the judge assigned to hear further proceedings in the involved action.*

**25.6. Findings and ruling.**

*The judge assigned may consider the motion solely upon the affidavits, but may, in the exercise of discretion, convene an evidentiary hearing. After consideration of the evidence, the judge assigned shall rule on the merits of the motion and shall make written findings and conclusions. If the motion is sustained, the selection of another judge to hear the case shall follow the same procedure as established in Rule 25.4 above. Any determination of disqualification shall not be competent evidence in any other case or proceedings.*

**F. Canon 3. Remittal of Disqualification.**

**Judges disqualified by the terms of Section 3E may disclose on the record the basis of their disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.**

*Commentary: A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently to the court, judges must not solicit, seek or hear comment on possible remittal or waiver of the disqualification, unless the lawyers jointly propose remittal after consultation as provided in Section 3F. A party may act through counsel, if counsel represents on the record that the party has been consulted and consents. As a practical matter, judges may wish to have all parties and their lawyers sign a remittal agreement.*

