Judicial Recusal

Presented by Judge Steve Stafford
& Judge Mary Wagner

A Little Light Hearted History

Harrison v. Wisdom, 54 Tenn. 99 (Tenn. 1872).

- In 1862, the residents of Clarksville convened a public meeting to discuss the impending invasion of the Union. According to the Opinion:

> There was at the time in the hands of merchants and dealers in the city a large quantity of whiskey and other spirituous liquors, which it was supposed would imperil the lives and property of the inhabitants if it should fall into the hands of the Federal soldiery, then flushed with victory and inflamed with the evil passions of civil war. It was therefore resolved by the citizens, convened as aforesaid, to destroy said spirituous liquors, as a measure of safety, and to recommend to the common council of said city, and to the county authorities, to levy a special tax upon the people in order to raise a fund for the reimbursement of those whose property should be thus destroyed.

- The town, therefore, resolved to appoint agents to confiscate and destroy the offending liquor.
- Plaintiff's liquor was destroyed as a result of the town meeting and he later filed suit to recover his loss. During the proceedings it was revealed that the trial judge was present at the town meeting referenced above. Accordingly, plaintiff filed a motion to recuse the trial judge, which was later denied.

- On appeal, the Tennessee Supreme Court affirmed the trial court's denial of the recusal motion, explaining:

  We are not prepared to say that the Circuit Judge who presided at the trial of this cause had such an interest in the result as disqualified him from sitting in judgment upon it. The Constitution of this State provides that no judge of the Supreme or inferior courts shall preside on the trial of any cause in the event of which he may be interested, or when either of the parties shall be connected with him by affinity or consanguinity, within such degrees as may be prescribed by law, or in which he may have presided in any inferior court, except by consent of all the parties: Art. 5, s. 11. This provision is certainly broad enough to fortify the integrity of the courts against suspicion; for the mere blemish of suspicion is, to the judicial ermine, a blot of defilement. It was an observation of Lord Coke that even an act of Parliament made against natural equity--as to make a man a judge in his own case--is void in itself: Co. Litt., s. 212. And it is a familiar remark of Sir William Blackstone that the administration of justice should not only be chaste but unsuspected. The maxim applies in all cases where judicial functions are to be exercised and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge or to his sense of decency to decide whether he shall act or not; all his powers are subject to this absolute limitation, and when his own rights are in question he has no authority to determine the cause . . . .

Such is an example of the prestige preserved by the judiciary of England upon this subject, where the rule is a mere maxim of national equity; and it should be even the more sacredly guarded in this country, where it is a principle of the organic law itself. We entirely concur, therefore, with the counsel for the plaintiff, that no judge should preside in a cause, or render any judgment, or make any order, where he can by possibility be suspected of being warped by the influence of fear, favor, partiality, or affection. When once a court has lost the charm of integrity and justice, with which it should ever be invested, it forfeits its influence for good, and degrades the majesty of the law.

The idea that the judicial office is supposed to be invested with ermine, though fabulous and mythical, is yet most eloquent in significance. We are told that the little creature called the ermine is so acutely sensitive as to its own cleanliness, that it becomes paralyzed and powerless at the slightest touch of defilement upon its snow-white fur. When the hunters are pursuing it they spread with mire the passes leading to its haunts, to which they then drive it, knowing that it will submit to be captured rather than defile itself. And a like sensibility should belong to him who comes to exercise the august functions of a judge. It is his exalted province to pronounce upon the rights of life, liberty, and property, to make the law respected and amiable in the sight of the people, to dignify that department of the government upon which, more than all others depend the peace, the happiness, and the security of the people. But when once this great office becomes corrupted, when its judgments come to reflect the passions or the interest of the magistrate rather than the mandates of the law, the courts have ceased to be the conservators of the common weal, and the law itself is debauched into a prostrate and nerveless mockery.

- Note: Prior to the tenure of Chief Justice John Marshall, who was appointed to the Supreme Court in 1801, Justices on the Supreme Court wore scarlet robes with ermine collars. Chief Justice Marshall began the tradition of simple black robes. Judges in many European countries (Scotland, Italy, Ireland, Belgium, and the Netherlands) still wear ermine-collared robes.

When Should a Judge Recuse?

Basis for Disqualification

- Section 2.11 of the Rules of Judicial Conduct provides: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ."
  - When might a judge's impartiality be reasonably questioned?
    - Personal bias or prejudice against a party or lawyer
    - Personal knowledge of the facts in dispute
    - Third degree relationship with party, lawyer, material witness, or person with more than a de minimis interest in the outcome
    - Judge or judge's close relative has an economic interest in the litigation
    - Judge knows that party, lawyer, or law firm involved in case had made a campaign contribution such that the judge's impartiality may reasonably be questioned.
    - Judge has made a public statement outside of court that appears to commit the judge to reaching a particular result
    - Judge previously represented a party, or presided over the matter in an inferior court or judicial settlement conference.

- ***Bean v. Bailey***, 280 S.W.3d 798 (Tenn. 2009) (holding that recusal is based upon an objective standard).
  - Plaintiff sought recusal of the trial judge in a personal injury case based upon the acrimonious relationship between the trial judge and plaintiff's counsel. The trial court denied the motion on the basis that he could be fair and impartial.
  - The Supreme Court reversed, ruling that the trial judge applied an improper, subjective standard. According to the Court, the appropriate standard requires:

    > Even if a judge believes he can be fair and impartial, the judge should disqualify himself when 'the judge's impartiality might be reasonably questioned' because 'the appearance of bias is as injurious to the integrity of the judicial system as actual bias.'
    >
    > In making his decision, Judge Wilson failed to consider whether a person of ordinary prudence in his position would find a reasonable basis to question his impartiality in light of the acrimonious history recounted above. In considering only his own belief that he could be fair and impartial and that he had no bias or prejudice, Judge Wilson erred.

  - Because the trial judge had a previous acrimonious relationship with plaintiff's counsel, there was a "reasonable factual basis for doubting [the judge's] impartiality. Specifically, among other things, "Judge Wilson requested twice that the T.B.I. investigate [the attorney] for criminal conduct and accused [the attorney] and members of his firm of tampering with political polls and having knowledge of a wiretap on Judge Wilson's phone. Both Judge Wilson and [the attorney] filed claims for misconduct against one another." Thus, recusal was warranted.

What Conflicts Can be Waived?

- Parties can waive all conflicts other than for bias, prejudice, or participation in a judicial settlement conference, if the judge informs the parties of the issue on the record
- If no other judge is able to hear the case, the rule of necessity may allow the judge to hear the case "in spite of [the judge's] possible bias" if no one else is authorized to act. ***Gay v. City of Somerville***, 878 S.W.2d 124, 128 (Tenn. Ct. App. 1994) (involving an administrative decision where only the Mayor and Board of Alderman were authorized to act).

How Do I Seek Recusal?

Procedure for Disqualification pursuant to Tennessee Supreme Court Rule 10B

Asking a Judge to Withdraw

- Party seeking recusal must file a timely written motion. Judge is to take no action in case until motion is disposed of
  - After a motion for disqualification has been lodged, judge must grant or deny recusal motion by written order. If denying the motion, the court must state the grounds for denying the motion. If granting the motion, no written grounds are required.

Appeal of Denial

- If the judge denies the recusal motion, the moving party has the right to an accelerated interlocutory appeal pursuant to Tennessee Supreme Court Rule 10B, Section 2.01
  - Although the movant has a right to an interlocutory appeal, the failure to take one does not waive the issue of the judge's failure to recuse in any later Rule 3 appeal (appeal from a final judgment).
  - Have 21 days to file accelerated appeal from time when judge filed written order denying recusal motion.
    - Appeal goes to Court that would have jurisdiction over underlying issues
    - No automatic stay, but either the trial court or the appellate court may grant one.
  - Appeal is decided on an expedited basis.
    - Court can order additional briefing after the filing of the petition and supporting documents, or can act summarily, without oral argument or additional briefing .
  - Judge's decision to remain on the case is reviewed under a *de novo* standard of review.
    - (**NOTE:** <u>This is a change from the previous abuse of discretion standard</u>).
  - Not required, however, that a litigant seek an accelerated appeal. Can still seek review of denial of recusal motion at the conclusion of the case (Rule 3 Appeal).
  - Essentially same process when seeking recusal of an appellate judge.

What if I grant the recusal motion?

There is no right to immediately appeal the grant of a recusal motion.

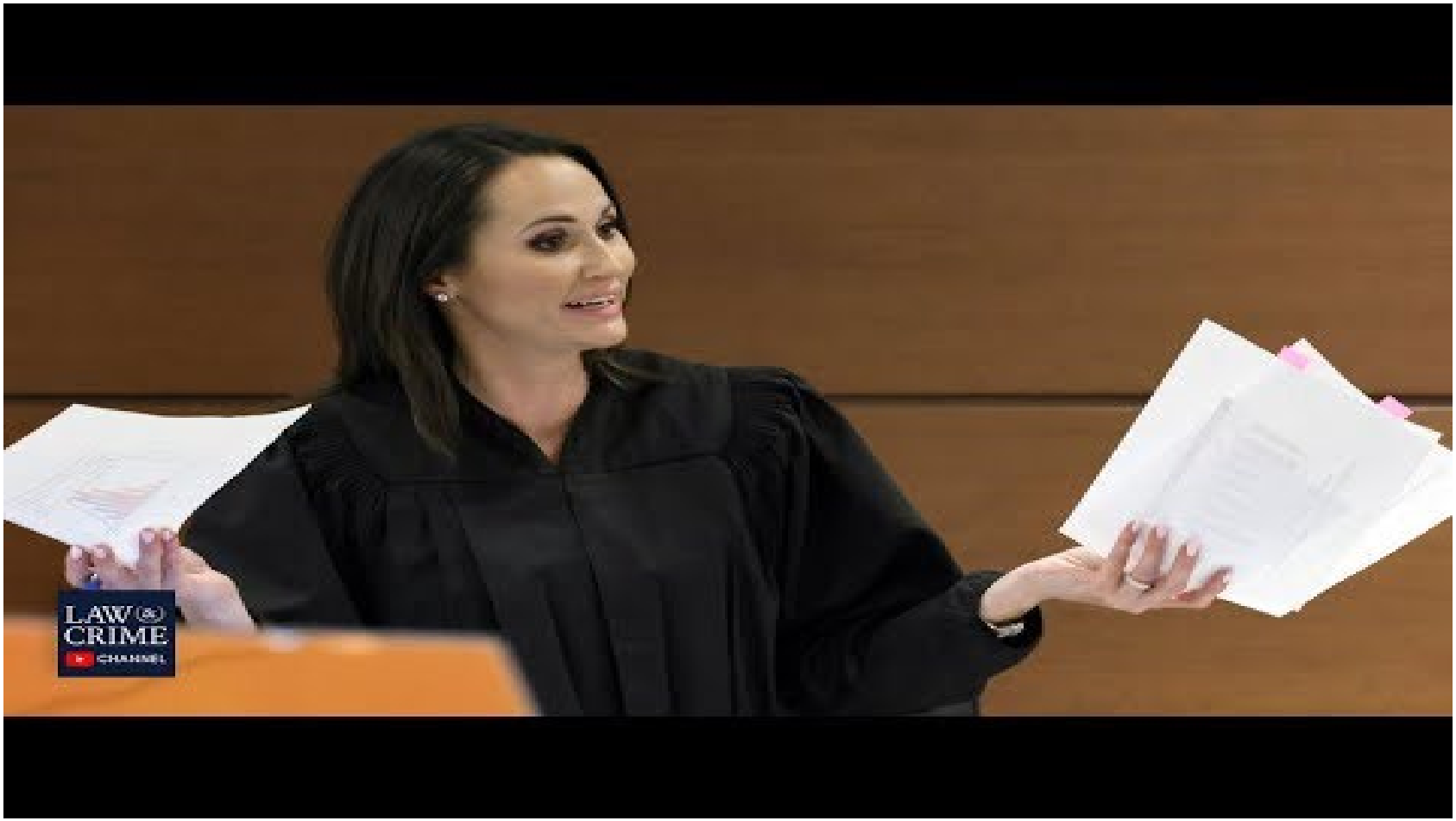
- ***Young v. Young***, No. W2022-01031-COA-T10B-CV, 2022 WL 3572443, at *1 (Tenn. Ct. App. Aug. 19, 2022).

So should I just grant recusal motions to avoid possibly being reversed?

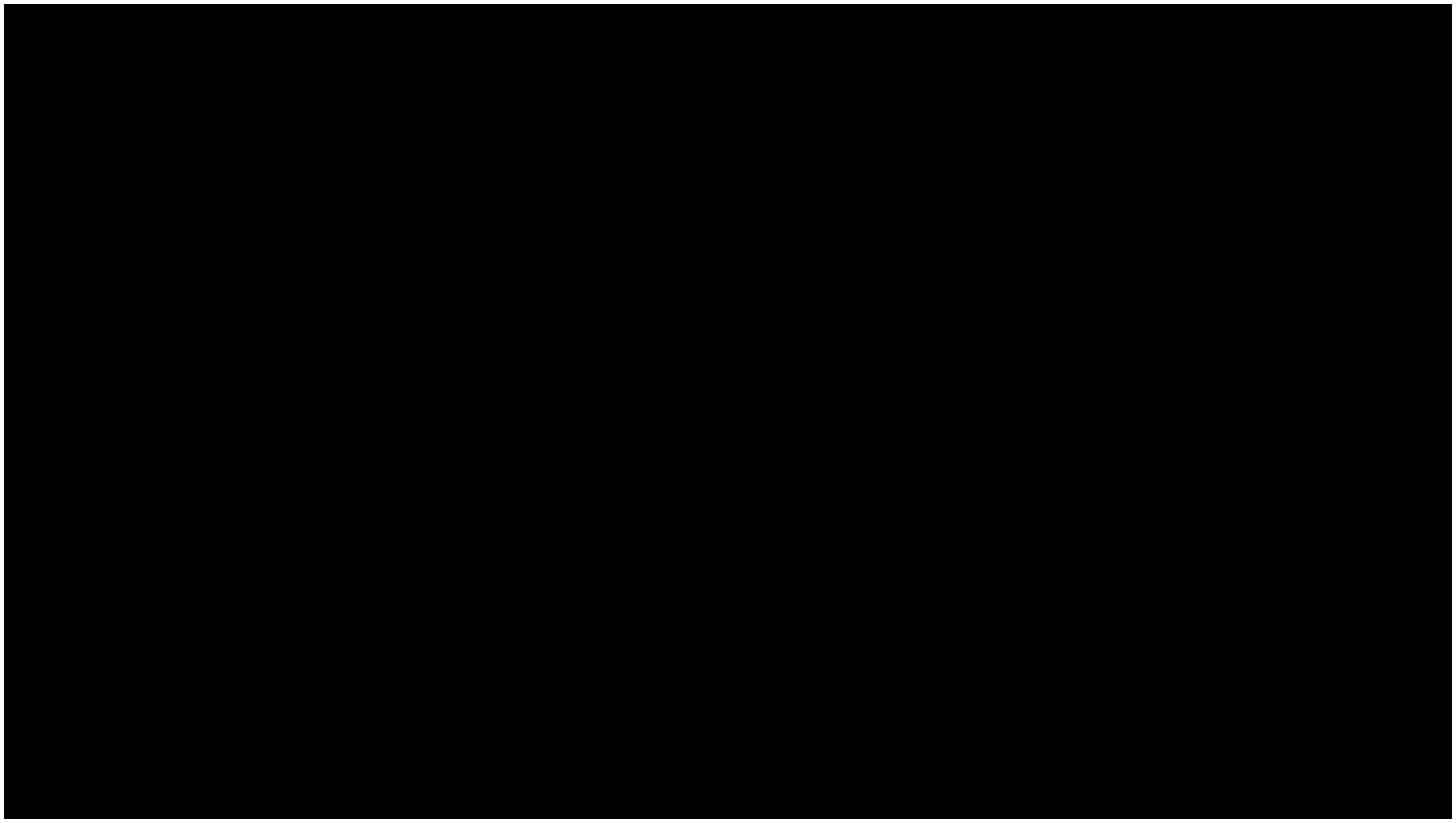
No. "[T]he issue with respect to recusal is not the convenience of the judge, who should agree to recusal only when it is truly required to do so. A judge has as much of a duty not to recuse himself absent a factual basis for doing so as he does to step aside when recusal is warranted."

- ***Rose v. Cookeville Reg'l Med. Ctr.***, No. M2007-02368-COA-R3-CV, 2008 WL 2078056, at *2 (Tenn. Ct. App. May 14, 2008) (citation omitted).

Recusal in the News



Judges and Social Media



Clay County v. Purdue Pharma L.P., No. E2022-00349-COA-T10B-CV, 2022 WL 1161056 (Tenn. Ct. App. Apr. 20, 2022).

- This case involved claims against the manufacturers of opioid medication. During a hearing concerning discovery sanctions, the trial judge stated that he would hold the defendant in default and that their former counsel "might be going to jail with or without their toothbrush" "if they had . . . show[n] up" at the hearing. The judge then gave an interview to an online law magazine in which he characterized the discovery violations as "the worst case of document hiding that I've ever seen. It was like a plot out of a John Grisham movie, except that it was even worse than what he could dream up."
- The judge also posted on his own Facebook page that "Why is it that national news outlets are contacting my office about a case I preside over and the local news is not interested." Screenshots of the trial judge's Facebook page reveal that the page appears to be devoted in part to a re-election effort given a "Re-Elect" picture banner next to his name.
- Then after one commenter stated that "You're not trying to ban drunken bridesmaids on peddle carts," the trial judge responded, "[N]ope. Opioids." The commenter then followed up by stating, "I don't know if you're going to get the help or platform you need from those with power/deep pockets. Many of Tennessee's powerful have ties to pharmaceuticals." The trial judge specifically "liked" this comment. The judge then went to criticize the news media.
- The defendants filed a motion to recuse. While the motion was pending, the judge issued sanctions against the defendants. The judge then denied the motion to recuse.

- The Court of Appeals reversed. With regard to the Facebook posts, the court held that the comments "can reasonably be construed to suggest that the trial judge has a specific agenda that is antagonistic to the interests of those in the pharmaceutical industry." Moreover,

  > This perception is enhanced when considered alongside the trial judge's ready participation in the Law360.com article and apparent desire, as expressed on his Facebook page, for more local media coverage. The trial judge appears to us to be motivated to garner interest in this case and draw attention to his stated opposition to opioids within a community that he noted had been "rocked with that drug." Regardless of the specific motivation, however, it is clear here to us that the trial judge's comments and social media activity about this case are easily construable as indicating partiality against entities such as the Endo Defendants. For this reason, and to promote confidence in our judiciary, we conclude that the trial judge erred in refusing to recuse himself from the case. We therefore reverse the trial court's order denying the Endo Defendants' motion for recusal and remand the case to the Presiding Judge of the Thirteenth Judicial District for transfer to a different judge.

- The court therefore reversed the denial of the recusal motion and vacated the order granted while the motion was pending.

Frazier v. Frazier, No. E2016-01476-COA-T10B-CV, 2016 WL 4498320 (Tenn. Ct. App. Aug. 26, 2016).

- Wife found the trial judge's Instagram profile, which was marked "private." Wife made a request to follow the trial judge, and the request was immediately accepted. She began to look at the pictures and saw pictures of the trial judge and Husband's counsel at a football game. She "screenshotted" the pictures, but the pictures had been deleted within a few hours of her discovery.
- The first picture was a group picture, which included the trial judge and the opposing counsel at the football game. The second picture was "the kind of self-portrait taken with a cellular telephone commonly referred to as a 'selfie.'"
- The photos were dated September 5, 2015; on September 30, 2015, the parties divorce case was filed in the circuit court.
- Wife filed a motion to recuse upon her belief that the activities depicted in these pictures would appear to a reasonable person to undermine the Judge's independence, integrity, and impartiality.

- The Court of Appeals held that recusal was necessary:
- It is clear from the record in this case that [the trial judge] maintained a private account on Instagram which required him to approve all "follow" requests before the photographs posted by him on the account could be seen. It is also clear from the record that the photographs of the social interactions between [the trial judge] and [Father's counsel], taken from [the trial judge's] Instagram account and relied on in support of the motion seeking his recusal, depict a closeness to their friendship that undermined Wife's confidence in [the trial judge's] ability to remain independent and impartial, as stated by her in the affidavit filed in support of her motion. While we do not suggest that [the trial judge] is unable to put his personal friendship with [Father's counsel] aside in order to fulfill his role as an impartial judge, we do conclude that the photographs [the trial judge] allowed Wife to view on his account, by accepting her "follow" request, would lead "a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge," to "find a reasonable basis for questioning the judge's impartiality." . . . The Court notes that the effect of [the trial judge's] action in accepting Wife's "follow" request was to initiate an ex parte online communication with a litigant whose case was then pending before him, which is expressly prohibited by Rule 2.9(A) of the Code of Judicial Conduct.

State v. Madden, No. M2012-02473-CCA-R3-CD, 2014 WL 931031, at *1 (Tenn. Crim. App. Mar. 11, 2014).

- The defendant filed a motion to recuse the trial court on the basis that the trial judge had a substantial connection to Middle Tennessee State University ("MTSU"), where the victim was a star basketball player. In support, the defendant noted that the trial judge had 205 Facebook connections to individuals at MTSU and was "Facebook friends" with the MTSU basketball coach, an expected witness. According to the defendant, there were numerous comments about the victim on the coach's page, that the trial court had made numerous comments about men's MTSU basketball, and that following the motion to recuse, the trial court had unfriended several people connected to MTSU.
- The trial court denied the motion, indicating that he initially believed that defense counsel hacked his account because he did not know that it was public. The trial court also admitted into evidence an affidavit from the coach, who said he was not "friends" with the trial court judge.
- The Court of Criminal Appeals affirmed the denial of the recusal motion. The Court first noted that the trial judge's contact with multiple MTSU individuals could not be denied, nor could the trial judge's angry temperament throughout the proceedings. Nevertheless, the court concluded that recusal was not required because the defendant failed to show that she was disadvantaged by any bias of the trial court. According to the court, the fact that the trial judge is acquainted with a participant in a case, without more, was insufficient to necessitate recusal.
  - NOTE: This case was decided under the old abuse of discretion standard. It could be different under the current de novo standard.

Groves v. Ernst-Western Corp., No. M2016-01529-COA-T10B-CV, 2016 WL 5181687 (Tenn. Ct. App. Sept. 16, 2016).

- Plaintiffs claimed many reasons for recusal, the most interesting one is regarding social media. Plaintiff's claim that trial judge's tweet created a reasonable appearance of judicial bias against Plaintiff's attorneys because of their age and inexperience. Trial judge tweeted a blog post that contained the article "Why people under 35 are so unhappy." The attorneys were in the age group described in the tweet.
- "Though Plaintiffs' attorneys are in the age group described in the blog post, there is nothing to suggest that it was somehow directed at them personally. Moreover, the judge did not write the blog post, nor did his tweet expressly endorse all of its contents. The tweet states only that the blog post is a "[v]ery interesting read" that ends with "very good advice." In any event, the blog post itself, though written in a sarcastic tone, is not wholly critical of individuals in that age group. It merely suggests those individuals would benefit from tempering their expectations and refrain from measuring themselves against others. As such, it does not constitute a reasonable basis for questioning the judge's impartiality."

In re Samuel P., No. W2016-01592-COA-T10B-CV, 2016 WL 4547543 (Tenn. Ct. App. Aug. 31, 2016).

- Father contended that Mother's counsel inappropriately contacted trial judge via email. Mother's attorney sent trial judge an email, but it was jointly addressed to the trial judge and Father's counsel. In the email, Mother's counsel apologized for addressing the issue, but it was necessary because there was an emergency situation involving a surgery for the minor child. Court found that there was no basis for recusal. Although there may have been ex parte communication, it did not require recusal:
- The Code of Judicial Conduct addresses ex parte communication in Canon 2, Rule 2.9, which provides that "[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter," except under certain circumstances inapplicable here. However, the Rule does not state that recusal is required if the judge receives an ex parte communication. Instead, it provides that "[i]f a judge receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond." . . . "Generally, an ex parte communication requires recusal only where it creates an appearance of partiality or prejudice against a party so as to call into question the integrity of the judicial process." . . . Recusal is required when a reasonable "'person in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality.'"
- Father did not argue that this communication was concealed from him, as the email clearly lists his attorney as a recipient along with the trial judge. Nor did he argue that he was not given an opportunity to respond. There was no indication that the trial judge granted the injunction sought by Mother in the email or otherwise acknowledged either email. Most importantly, the email from Mother's counsel did not create an appearance of partiality or prejudice against Father on the part of the trial judge. Accordingly, this communication provided no basis for recusal.

In re Charles R., No. M2017-02387-COA-R3-PT, 2018 WL 3583307, at *6 (Tenn. Ct. App. July 25, 2018), *perm. appeal denied* (Tenn. Oct. 3, 2018).

- A parent in a termination of parental rights case appealed the denial of her recusal motion on the basis that the trial judge and foster mother were "Facebook friends" creating a "risk" of extrajudicial communications or knowledge of the case.
- The Court of Appeals affirmed the denial of the motion, as the trial court denied seeing any posts regarding the child, explained that the community was small and close-knit, and his interaction with foster mother on Facebook was limited to birthday salutations.

State v. Forguson, No. M2013-00257-CCA-R3-CD, 2014 WL 631246 (Tenn. Crim. App. Feb. 18, 2014).

- Defendant filed a motion to recuse the trial judge on the basis that the judge and the confidential informant were "friends" on social media. The trial judge denied the motion on the basis that "[i]f I recused myself on every case that I either knew a witness or was friends with a witness, I couldn't try cases in Stewart County."
- The Court of Criminal Appeals affirmed, concluding that the simple fact that the judge and informant were friends on Facebook was not sufficient to show an appearance of impropriety. The court specifically pointed out the lack of proof as to "the length of the Facebook relationship between the trial court and the confidential informant, the extent of their internet interaction or the nature of the interactions."

- Judge Curwood Witt filed a concurring opinion, however, cautioning judges that

> [T]he opinion in my view should not stand for the proposition that a judge's Facebook relationship with a litigant or a key witness for a litigant poses no ground for disqualification. I accept and agree with the trial judge's commentary that one cannot reasonably expect a trial judge living in a small community to recuse himself or herself because he or she is acquainted with a litigant or a key witness. When a judge shares a Facebook "friendship" with such a person, however, the aggrieved party may be able to show that this "social media" relationship is more active, regular, or intimate than mere incidental community propinquity might suggest. For instance, how intentional is the relationship? Who initiated it and when? How do the participants use the medium? What type of information is shared? What is the frequency of the communications? Certainly, I could envision a properly presented Rule 10B motion that, upon proof, evinces at least an appearance of impropriety.

Can Judges Express Their Opinions?

Cook v. State, 606 S.W.3d 247 (Tenn. 2020).

- This case involved a petition for post-conviction relief. During the hearing on the motion, the trial court made several remarks that were derogatory toward post-conviction relief, post-conviction relief petitioners and attorneys, and in favor of the petitioner's prior attorneys. The trial court denied the petition, and the petitioner appealed, raising for the first time that the judge should have recused. The Court of Criminal Appeals affirmed in a split decision. Judge Williams, the dissenter, concluded that "the post-conviction judge's comments at the conclusion of the hearing were so egregious that the judge's impartiality might reasonably be questioned[.]"

- The Tennessee Supreme Court reversed, holding that Rule 2.11 of the Rules of Judicial Conduct required that the judge recuse regardless of a motion being filed. The court noted that while Rule 2.11 enumerates several circumstances in which no recusal motion is necessary, that list is not exhaustive. Instead, Rule 2.11 states that "[a] judge *shall* disqualify himself or herself in *any* proceeding in which the judge's impartiality might reasonably be questioned[.]"
- The court noted that while none of the trial judge's actions standing alone, warranted recusal, consideration of the entire record was necessary due to the trial court's comments at the conclusion of the hearing. Responding to the State's waiver argument, the court stated that "the post-conviction judge chose to make remarks that were not only egregious but also global in nature, expressing disdain for the entire class of proceedings he was charged with conducting. Under these unique circumstances, no recusal motion was required; the post-conviction judge should have known that the remarks compelled him to recuse himself."

- The court, however, declined to recuse the trial judge from all future post-conviction proceedings. As the court explained:

> We stop short of reaching the broader question *implicitly* presented by this appeal, which is: whether the post-conviction judge's inappropriate comments in this case call his impartiality into reasonable question and require his disqualification from all future post-conviction cases. An argument certainly can be made for answering this question in the affirmative. However, we decline to do so at this time. First, this decision should serve as an unmistakable admonition to this judge, and all other Tennessee judges, to refrain from such inappropriate comments in future cases. It also should serve as a crystal-clear reminder to this judge, and every other Tennessee judge, of the obligation to recuse without any motion in any proceeding in which the judge's impartiality might reasonably be questioned. We have no reason to doubt that Judge Coffee will fulfill these obligations in future cases in compliance with the oath he has taken as a judge. We decline to deny to judges the presumption that is applied to all other public officials in Tennessee.
>
> Nevertheless, we take seriously this Court's obligation to ensure that justice in Tennessee remains impartial both in fact and in appearance. As a result, if, in a future case, this Court determines that a judge has habitually made inappropriate comments that call into reasonable question the judge's impartiality in a particular category of cases, this Court will not hesitate to hold, in the exercise of its supervisory power over the Judicial Department, that the judge is disqualified from hearing all future cases in that category. The circumstances of this appeal placed it only inches away from the threshold that must be crossed for this Court to invoke that extraordinary remedy.

(Citations omitted)

Judges and Free Speech

Republican Party of Minnesota v. White, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002).

- Holding that "announce clause" in Minnesota Supreme Court's canon of judicial conduct, which prohibited candidates for judicial election from announcing their views on disputed legal or political issues, violated the First Amendment; clause prohibited speech on the basis of content and burdened speech of political candidates, a category of speech at the core of First Amendment freedoms.

What about Tennessee law?

A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

Tenn. R. Sup. Ct. 10, Rule 2.10 (also applies to the judge's staff).

Judicial Campaigns

Judicial campaigns can create situations that may lead to difficult recusal questions.

Recent Changes to the law now allow judges to personally solicit campaign contributions. *See* Tenn. Code Ann. § 2-10-313 ("Notwithstanding any law to the contrary, a judicial candidate may personally solicit and accept campaign contributions."); see also Tenn. Jud. Ethics Op. 22-01 (opining that judges may personally solicit campaign contributions).

What do the Rules say?

The fact that a lawyer in a proceeding, or a litigant, contributed to the judge's campaign, or supported the judge in his or her election does not of itself disqualify the judge. Absent other facts, campaign contributions within the limits of the "Campaign Contributions Limits Act of 1995," Tennessee Code Annotated Title 2, Chapter 10, Part 3, or similar law should not result in disqualification. However, campaign contributions or support a judicial candidate receives may give rise to disqualification if the judge's impartiality might reasonably be questioned.

Tenn. R. Sup. Ct. 10, Rule 2.11, cmt. 7.

How Do We Know if Impartiality Should be Questioned?

In determining whether a judge's impartiality might reasonably be questioned for this reason, a judge should consider the following factors among others:

(1) The level of support or contributions given, directly or indirectly, by a litigant in relation both to aggregate support (direct and indirect) for the individual judge's campaign and to the total amount spent by all candidates for that judgeship;

(2) If the support is monetary, whether any distinction between direct contributions or independent expenditures bears on the disqualification question;

(3) The timing of the support or contributions in relation to the case for which disqualification is sought; and

(4) If the supporter or contributor is not a litigant, the relationship, if any, between the supporter or contributor and (i) any of the litigants, (ii) the issue before the court, (iii) the judicial candidate or opponent, and (iv) the total support received by the judicial candidate or opponent and the total support received by all candidates for that judgeship.

Tenn. R. Sup. Ct. 10, Rule 2.11, cmt. 7.

Cases Involving Campaign Contributions

- Minimal monetary support of the judge's campaign does not require recusal. *See* ***In re Gabriel V.***, M2014-01298-COA-T10B-CV, 2014 WL 3808916 (Tenn. Ct. App. July 31, 2014).
- Being the member of a law firm that sponsored a campaign event for the judge does not necessitate recusal. *See* ***Tarver v. Tarver***, No. W2022-00343-COA-T10B-CV, 2022 WL 1115016, at *4 (Tenn. Ct. App. Apr. 14, 2022).
- Recommending the judge for an appellate vacancy does not require recusal. *See* ***Hamilton v. Methodist Healthcare Memphis Hosps.,*** No. W2019-01501-COA-T10B-CV, 2019 WL 4235000 (Tenn. Ct. App. Sept. 6, 2019).

Does the Judge Have a Duty to Disclose that a Lawyer or Litigant Contributed to His or Her Campaign?

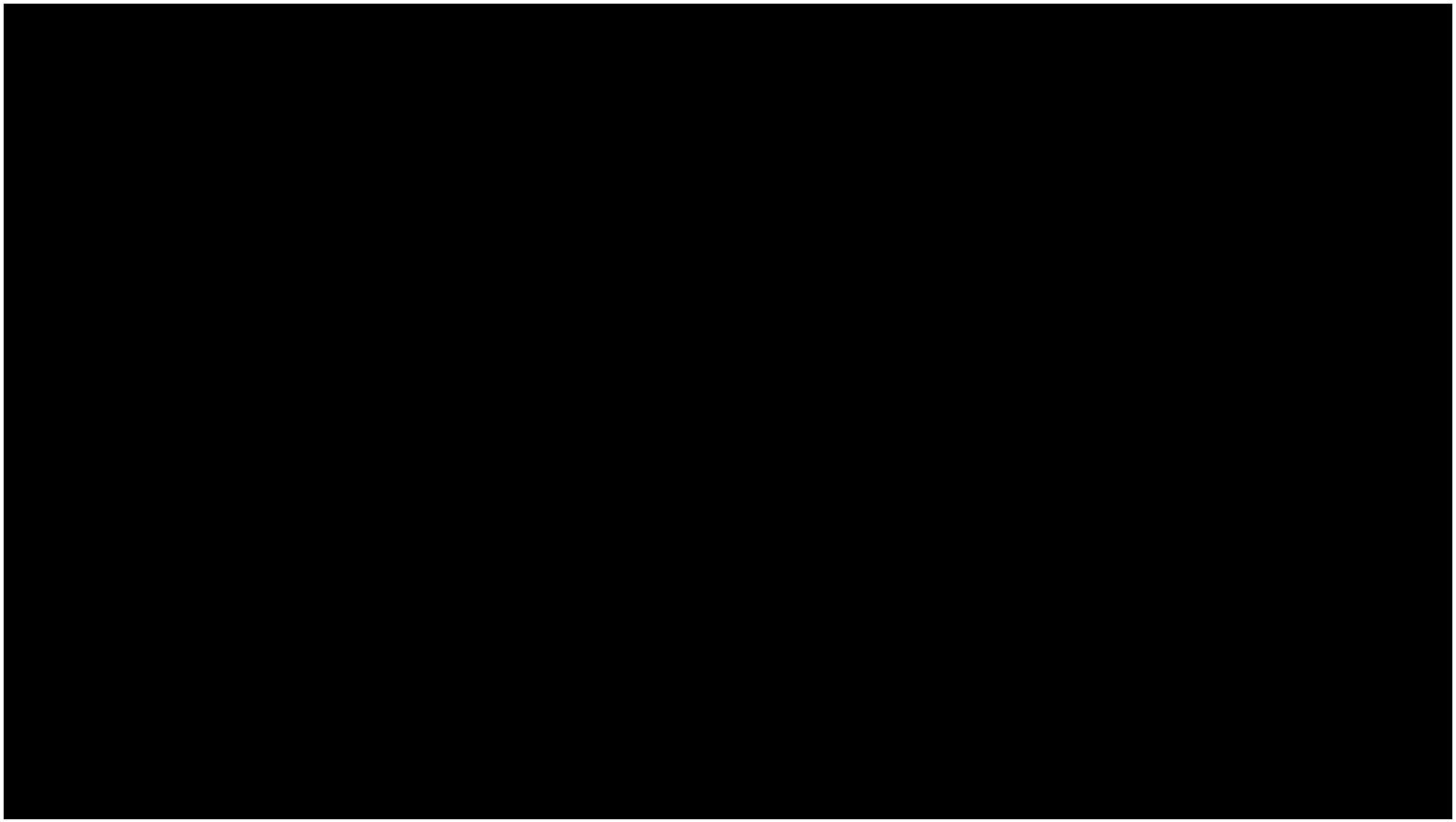
Oath Contained in Financial Disclosure Form

"I do solemnly swear . . . that the information contained in this campaign financial disclosure report is true and that this report is true and that this report is an accurate accounting of campaign contributions . . . ."

Collier v. Griffith, No. 01-A-019109CV00339, 1992 WL 44893, at *6 (Tenn. Ct. App. Mar. 11, 1992).

- The information [concerning the opposing lawyer's contribution to the judge's campaign] was not of the type that Mr. Collier or any other lawyer should necessarily have known or discovered. As far as the record shows, Mr. Collier resided in Nashville during these proceedings, not in the Twenty-third Judicial Circuit. He should not be expected to be intimately familiar with the composition of campaign committees in another judicial circuit or to have consulted the records of the Registry of Election Finance or the Coordinator of Elections in order to discover this information.

Can my Campaign Ad be Used Against Me?



State v. Griffin, 610 S.W.3d 752 (Tenn. 2020).

The test for recusal is whether "a person of ordinary prudence in the judge's position, **knowing all of the facts known to the judge**, would find a reasonable basis for questioning the judge's impartiality." ***State v. Cannon***, 254 S.W.3d 287, 307 (Tenn. 2008) (emphasis added).

But what if the judge's campaign ads conflict with the facts known to the judge?

- The trial judge served as Deputy District Attorney General, in which he had broad and general supervisory authority, including at the time that the defendant was indicted. The question on appeal was whether this supervisory authority amounted to the trial judge participating "personally and substantially" in this case such that his impartiality might reasonably be questioned.
- Generally mere employment as a DA alone is not grounds for recusal. And being a DA during a time that a defendant was indicted and convicted on earlier charges is not sufficient to require recusal on later unrelated charges.
- In cases involving a supervisor, however, the proper test is "(1) whether the trial judge had direct supervisory authority over the assistant district attorney in the case; and (2) whether the trial judge had any direct involvement in the case."
- In this case, the judge's campaign material specifically stated that he had supervised "all criminal prosecutions in Knox County, a jurisdiction where up to 60,000 new criminal cases arise every year."." But in denying the recusal, the judge state that he was not the direct supervisor of the ADA that had originally prosecuted the defendant. And the court held this was a credible explanation despite his campaign advertisements because persons should not believe a campaign statement that a lawyer had supervised 60,000 cases a year. So the denial of the recusal motion was upheld.

Example Situations Where Recusal was not Mandated

- When the trial judge called a professor uninvolved in the case to get background on an expert that a party wanted to call as a witness. *See* ***Holsclaw v. Ivy Hall Nursing Home, Inc.***, 530 S.W.3d 65 (Tenn. 2017).
- Multiple adverse rulings and alleged errors. *See, e.g.,* ***Nelson v. Justice***, No. E2017-00895-COA-R3-CV, 2019 WL 337040, at *12 (Tenn. Ct. App. Jan. 25, 2019).
- Where the judge may have relied on prior knowledge of the facts of the case gleaned from prior proceedings. ***In re Destiny C.***, No. M2021-00533-COA-R3-PT, 2022 WL 2287022, at *8 (Tenn. Ct. App. June 24, 2022).

- Irritation or exasperation with counsel during the proceedings. *See* ***McKenzie v. McKenzie***, No. M2014-00010-COA-T10B-CV, 2014 WL 575908 (Tenn. Ct. App. Feb. 11, 2014).
- Attorney is former law clerk of judge. *See* ***In re Conservatorship of Patton***, No. M2012-01878-COA-10B-CV, 2012 WL 4086151 (Tenn. Ct. App. Sept. 17, 2012).
- When the party retains an attorney for the purpose of creating a conflict with the judge. *See* ***Bishop v. Bishop***, E2008-01854-COA-R10-CV, 2009 WL 1260233 (Tenn. Ct. App. May 7, 2009).

- Telling a party that their initial impression of their case was not favorable and encouraging a settlement. *See* ***Neamtu v. Neamtu***, No. M2019-00409-COA-T10B-CV, 2019 WL 2849432, at *1 (Tenn. Ct. App. July 2, 2019).
- Refusing to continue a hearing even though one attorney was sick and asked for a continuance. *See* ***Lee v. Lee***, No. E2019-00538-COA-T10B-CV, 2019 WL 2323832, at *1 (Tenn. Ct. App. May 31, 2019).
- When the judge becomes emotional after hearing the evidence. *See* ***Williams by & through Rezba v. HealthSouth Rehab. Hosp. N.***, No. W2015-00639-COA-T10B-CV, 2015 WL 2258172, at *6 (Tenn. Ct. App. May 8, 2015).

Example Situations where Recusal was Mandated

- The judge's previous patient-physician relationship with an expert witness. *See* ***Hall v. Randolph***, No. W2013-02571-COA-T10B-CV, 2014 WL 127313 (Tenn. Ct. App. Jan. 14, 2014).
- The party's attorney had previously sued the judge's spouse's law firm, where she had worked and the judge recused from other cases involving that attorney. *See* ***Young v. Dickson***, No. W2019-01442-COA-T10B-CV, 2019 WL 4165237 (Tenn. Ct. App. Sept. 3, 2019).
- Stating that you disagree with the state law applicable to your decision and prefer the law of another state. *See* ***Cook v. State***, 606 S.W.3d 247 (Tenn. 2020).

- Expressing praise for an attorney in a post-conviction proceeding based on out of court knowledge. *See* ***Cook v. State***, 606 S.W.3d 247 (Tenn. 2020).
- Refusing to explain why you are granting a new trial in order to avoid mandatory recusal under Rule 59.06. See ***Buckley v. Elephant Sanctuary in Tennessee, Inc.***, -- S.W.3d --, 2020 WL 3980437 (Tenn. Ct. App. July 14, 2020).