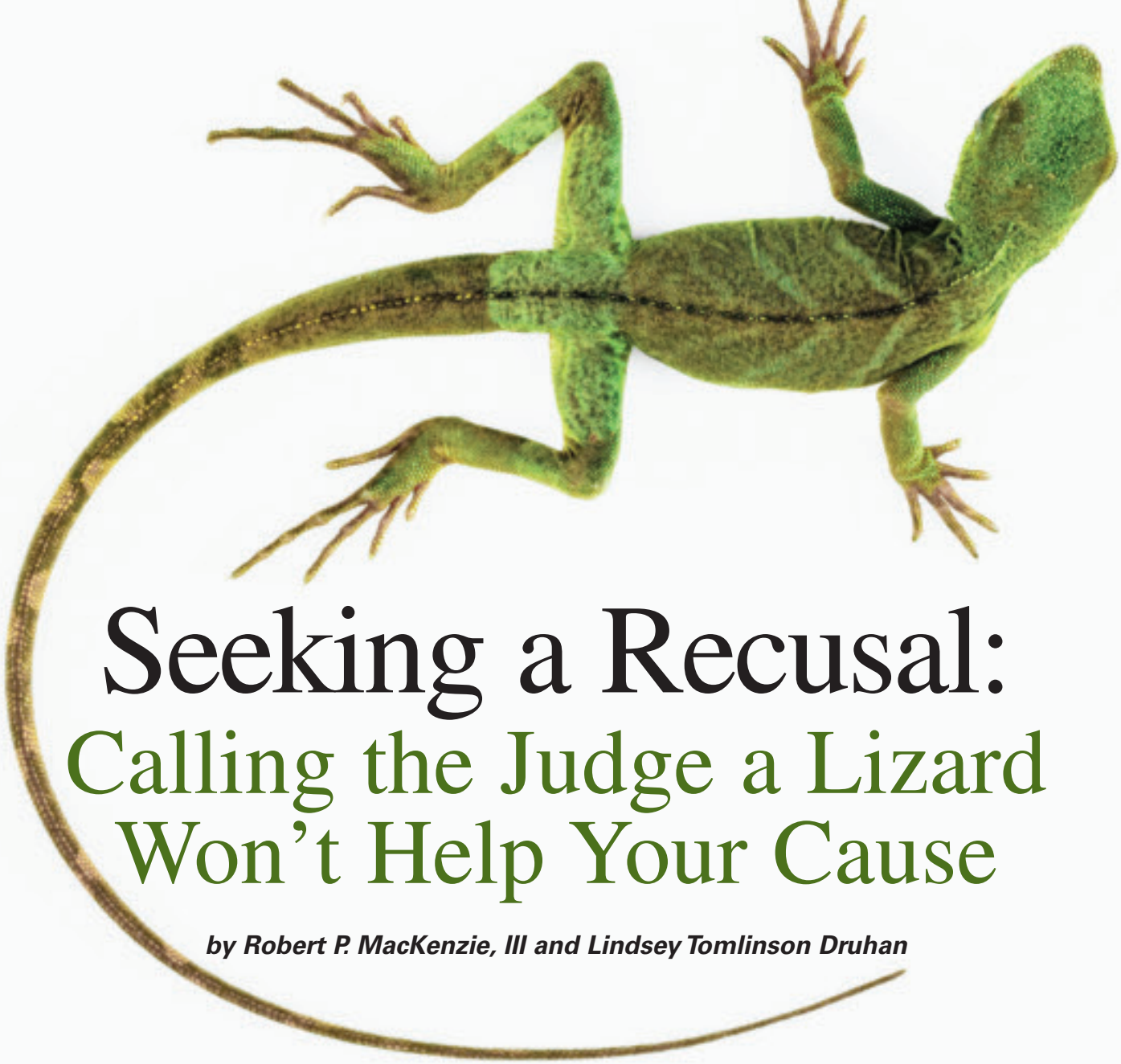

Seeking a Recusal:
Calling the Judge a Lizard Won't Help Your Cause

by Robert P. MacKenzie, III and Lindsey Tomlinson Druhan

Introduction

Life was not going well for Joe Bentley and now it was about to become worse. Indicted for murder during the course of an armed robbery, Bentley found himself awaiting trial. Dissatisfied with pretrial rulings and without advising his attorney, Bentley elected to convey his feelings directly to the trial judge. From his jail cell, Bentley told the judge he had "sold his soul to Lucifer," and the judge would "die like his lizard spy." Later, realizing the significance of his client's conduct, Bentley's lawyer sought to recuse the trial judge. The motion contended any judge who had received such a threatening letter could not possibly be in a position to be fair and impartial. The trial court, however, ruled, despite Bentley's claim, recusal was not warranted. In affirming the court's order, the Alabama Supreme Court observed it was the defendant, not the judge, whose wrongful conduct was at issue. *Ex parte Bentley*, 849 So. 2d 997 (Ala. Crim. App. 2002).

Bentley's actions represent the extreme response of a party's dissatisfaction with a judge. As the client's advocate, it is the attorney's duty to recognize and, if based upon merit, to challenge any judge who cannot be fair and impartial. Asserting the proposition that the trial judge or justice should not hear the case is awkward at best. Judges are required to take a solemn oath to uphold the law and to be fair in all circumstances. To suggest otherwise is a strike at the very core of judicial principle. Yet, there are occasions where guided by the law or common sense, judges must step aside. Be wary, however, that challenges to the court are most often unsuccessful.

I. Alabama Statutory Law and Canons of Judicial Ethics

The law of recusal reflects two fundamental judicial polices; first, it is the duty of a judge to decide cases. Second, a judge should be a neutral, or impartial, decision-maker. *Archer Daniels Midland Co. v. Seven Up Bottling Co. of Jasper, Inc.*, 746 So. 2d 966 (Ala. 1999). The test for recusal is whether a person of ordinary prudence would qualify the judge's action as prejudicial. *Ex parte Monsanto Co.*, 862 So. 2d 604 (Ala. 2003). Actual bias is not necessary. *Crowell v. May*, 676 So. 2d 941 (Ala. Civ. App. 1996). There is a presumption, however, that a judge is not prejudiced or bias. *Sullivan v. State Personnel Bd.*, 679 So. 2d 1116, 1118 (Ala. Civ. App. 1996). Recusal of a trial judge is not required by the mere accusation of wrongdoing unsupported by substantial evidence. *Gladden v. Gladden*, 942 So. 2d 362 (Ala. Civ. App. 2005). Further, judges must not recuse themselves for imaginary reasons; judge-shopping should not be encouraged. *Glassroth v. Moore*, 229 F. Supp. 2d 1283 (M.D. Ala. 2002). It is, however, the duty of the judge "to disqualify himself whenever, at whatever state of the litigation, it appears that his impartiality might reasonably be questioned." *Streater v. Woodward*, 7 F. Supp. 2d 1215, 1218 (N. D. Ala. 1998).

The grounds for recusal are predicated upon the statutory authority of ALA. CODE § 12-1-12 (1975) and the Alabama Canons of Judicial Ethics. The statutory provisions concern (1) the judge's family relationship with a party, (2) prior involvement in the particular case as an attorney or (3) the validity of any instrument drafted or signed by the judge. *See also* 28 U.S.C. § 455. Beyond the specifics of ALA. CODE § 12-1-12 (1979), the Canons of Judicial Ethics set forth broader grounds for recusal including bias and financial interests. The Canons are not merely guidelines for proper judicial conduct but have "the force of law." *Ex parte Atchley*, 936 So. 2d 513 (Ala. 2006) (citing *Balogun v. Balogun*, 516 So. 2d 606 (Ala. 1987)).

A. Mechanics for Recusal

When the judge knows of any circumstance or fact which may be grounds for recusal, it is the judge's duty to so advise the parties. *Ex parte City of Dothan Personnel Board*, 831 So. 2d 1 (Ala. 2002). For a moving party, they must file at the first opportunity or, otherwise, the issue may be waived. In *Johnson v. Brown*, 707 So. 2d 288 (Ala. Civ. App. 1997), the plaintiff brought a civil action which was assigned to a judge who had formerly been the county district attorney. While serving in this capacity, his office prosecuted the plaintiff in a criminal matter.

Approximately one year after the civil case was filed, the plaintiff filed a certificate of readiness. The defendants moved for summary judgment. At the hearing on the motion for summary judgment, the plaintiff, for the first time, orally moved for recusal because of the judge's past position as district attorney. The trial judge observed the motion for recusal was likely a dilatory tactic. In fact, the plaintiff's attorney conceded in open court, "I can honestly state I am not completely prepared to respond to the motion for summary judgment." The judge, however, allowed the plaintiff to submit a brief on the recusal issue. When no brief was submitted, the recusal was denied and the summary judgment motion was granted. Given the untimeliness of the motion, the trial judge's ruling was affirmed.

From the court's perspective and to minimize the chance of reversal, the determination of the motion for recusal should be deliberate. The motion may be heard by the judge whose conduct is at issue or transferred for hearing by another. *Ex parte Monsanto Co.*, *supra.* In response to a motion for recusal, the judge may submit testimony on his own behalf. In *Ex parte Knotts*, 716 So. 2d 262 (Ala. Crim. App. 1998), the criminal defendant sought recusal of the trial judge for comments allegedly made by the judge about the defendant's "New York lawyers." In a well-reasoned affidavit, the judge denied making any such statements. Thereafter, the defendant argued the trial judge should recuse himself because, by denying the allegations and setting forth his position by way of an affidavit, the trial judge had now become a material witness. The court of criminal appeals disagreed. The court determined the defendant, by alleging the trial judge was biased against him, placed the judge in the position of having to address the allegations. *Id.*

The supreme court, however, reached a different conclusion in considering the judge's response to a claim of bias. *In the Matter of Sheffield*, 465 So. 2d 350 (Ala. 1984). In *Sheffield*, the trial judge entered a contempt ruling against the writer of a letter to the newspaper editor which criticized the judge's rulings in a domestic relations matter. When called by a newspaper reporter about the letter, the trial judge outlined his position. Those comments, among other issues, were the basis of an ethics complaint. The Court of the Judiciary determined the judge should recuse himself. The Alabama Supreme Court affirmed the decision.

B. Steps Taken after a Judge is Recused

Once a judge has been recused, the judge should take no further action except to notify the presiding judge. In *Ex parte Jim Walter Homes*, 776 So. 2d 76 (Ala. 2000), the trial judge disqualified himself and, thereafter, pursuant to Rule 13 of the *Alabama Rules of Judicial Administration*, assigned the case to another judge. The defendant moved to recuse the second judge, arguing the case had been improperly assigned. The motion was denied. On appeal, the Supreme Court of Alabama held the trial judge, once disqualified, cannot appoint a successor. To facilitate the proper transfer, the supreme court set forth the following protocol:

> In a circuit with only one circuit judge, if the district judge within the county in which the action is pending has been temporarily assigned by the presiding circuit judge to serve in circuit court pursuant to Rule 13, [of the *Alabama Rules of Judicial Administration*], the circuit judge shall notify that district judge of the circuit judge's disqualification. If no judge with authority to hear the case is available in the county in which the action is pending, the case shall be referred to the AOC for assignment of a judge.

Id. In order to avoid the appearance of impropriety, once disqualified, the judge should take no further action in that case, not even the action of reassigning the case.

II. Common Issues Which Suggest Recusal

A. Bias

Canon 3.C. (1) of the Alabama Canons of Judicial Ethics calls for a judge to recuse himself when "he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." This personal bias must "stem from an extrajudicial source" in order for recusal to be required. *Ex parte Melof*, 553 So. 2d 554, 557 (Ala. 1989). Personal bias, as contrasted with judicial bias, is an attitude of extra-judicial origin, or one derived *non coram judice. Woodall v. State*, 730 So. 2d 627 (Ala. Crim. App. 1997).

In *Carruth v. State*, 927 So. 2d 866 (Ala. Crim. App. 2005), Carruth filed a motion for recusal based upon the judge allegedly making comments which reflected the judge's bias toward the defendant. According to Carruth, the judge said, "The best news that you're going to have this year is that I'm no longer in charge of criminal matters, that I'm on the civil side" and "I may be a son-of-a-bitch, but I'm an equal opportunity son-of-a-bitch." *Id.* at 871. The judge testified he did not recall making the specific statements. In finding insufficient grounds for recusal, the Alabama Criminal Court of Appeals determined that the judge's alleged bias, if it existed, was not personal, but judicial, in nature. *Id.* at 874. While the comments, if made, may have not been particularly appropriate or "cordial," a judge's demeanor during a judicial proceeding is not sufficient to warrant recusal." *Id.* at 875.

Likewise, in *Hartman v. Board of Trustees of University of Alabama*, the supreme court considered whether the trial judge allegedly expressed favoritism toward the defendant which warranted a recusal. 436 So. 2d 837 (Ala. 1983). The plaintiff had brought suit against university officials. The trial judge contacted the student's attorney and explained "the University of Alabama [is] 'our friend' and 'we just shouldn't file suits like this against the University of Alabama.'" *Id.* at 839. When requested, the trial judge did not recuse himself based upon these statements. On appeal, the Supreme Court of Alabama held that while the remarks may not have been appropriate, there was insufficient cause for recusal.

Recusal, however, was necessary in *Ex parte Eubank*, based upon the judge's opinion of the ability of the defendant's attorney to provide competent legal service. 871 So. 2d 862 (Ala. Crim. App. 2003). The judge sent a letter to the Alabama State Bar expressing that the attorney was impaired due to his drinking, should be considered a danger to himself and the community, and suspended from practicing law. The court felt these actions by the judge were enough to establish personal bias and the court issued a writ of mandamus.

B. A Judge's Prior Exposure to a Case

A judge does not have to disqualify himself merely because of prior involvement in the case in a judicial capacity. In *Ex parte Brooks*, 855 So. 2d 593 (Ala. Crim. App. 2003), the defendant argued the judge should be required to recuse himself after he executed a search warrant which led to the arrest of the defendant. The recusal motion was denied, and then affirmed on appeal.

> A trial judge's participation in a previous proceeding in a case does not ipso facto render him disqualified to preside at trial. A judge is not disqualified to sit in a trial on the merits by having heard and decided a preliminary proceeding in the same cause. So, the fact that he conducted the preliminary examination which resulted in the prosecution of the accused does not, in the absence of any showing as to any personal bias or prejudice, disqualify him from presiding at the trial. Nor is a judge disqualified to try a criminal case because he ordered the grand jury which indicted the defendant, and had presided throughout the grand jury proceedings, and had passed on numerous preliminary motions.

Id. at 595. The court concluded that "the mere fact that the Judge . . . signed the search warrant used to obtain evidence against Brooks is not alone sufficient to warrant the Judge's . . . recusal." *Id.*

Similarly, a judge's exposure to statements relating to the case is insufficient cause for recusal. In *Stallworth v. State*, 868 So. 2d 1128 (Ala. Crim. App. 2001), the judge attended a civic meeting where the guest speaker discussed the facts of the case against the defendant. A witness to the meeting explained the remarks made by the speaker were sarcastic and heard by all including the judge. The judge did not make any comments at the meeting, nevertheless, the defendant sought to recuse him. The recusal motion was denied by the trial court. In affirming the denial, the Alabama Court of Civil Appeals held:

> We refuse to hold that a judge is required to recuse himself or herself when the judge has inadvertently been exposed to remarks about a case. It is another matter, however, if the judge chooses to respond to the remarks he or she has overhead about a case.

Id. The court, therefore, determined that the judge was not required to recuse himself because of mere exposure to remarks regarding the case.

It is, however, generally recognized the judge should recuse himself if he is a witness. In *Ex parte Brooks*, the moving party alleged the judge should recuse himself because he planned to authenticate his signature on an evidentiary document. 847 So. 2d 396, 397 (Ala. Crim. App. 2002).

> By virtue of the fact that [the] Judge['s] … name was contained on the alleged search warrant, [the] Judge … is in the position of having personal knowledge of the truth or falsity of the warrant. [The moving parties] were charged with four counts of capital murder – one count of murder during a burglary. It is necessary for the State to present evidence concerning their method of gaining entry into the Bowyer home. [The] Judge… has personal knowledge of the unlawfulness of the petitioners' entry into the Bower house.

Id. at 398. This personal knowledge was enough for the court to decide that the judge was required to recuse himself from the case.

The Supreme Court of Alabama has specifically held that recusal is required in those situations where the judge has appointed a judicial officer whose conduct is now at issue. In two similar actions, *Ex parte Bryant*, 682 So. 2d 39 (Ala. 1996) and *Ex parte Price*, 715 So. 2d 856 (Ala. 1997), lawyers were appointed by the circuit courts to hold positions as a guardian and conservator. In both actions, the attorneys were accused of taking money from estates over which the attorneys had been appointed. Recusal was proper as to all judges within the circuit. The supreme court noted reasonable persons could question the impartiality of the judges of the circuit "whose trust the defendant is charged with previously breaching." *Bryant*, 682 So. 2d at 42.

C. Prior Representations of a Party

There are occasions where prior to election and/or appointment to the bench, the judge represented or was opposite one of the parties. The fact of this relationship in and of itself does not require automatic recusal. In *Smith v. State*, 795 So. 2d 788 (Ala. Crim. App. 2000), the defendant plead guilty to receiving stolen property and to burglary in the third degree prior to trial. The sentencing judge was the former district attorney whose office represented the State of Alabama and was now prosecuting the defendant. *Id.* Smith asserted a motion for recusal which was denied. In affirming the trial court, the court of criminal appeals explained "the fact that the trial judge, before he was a judge and while he was district attorney of the particular circuit, had prosecuted the defendant in another case presented no valid ground for a motion that he recuse himself." *Id.* at 804.

"[t]he fact that the trial judge, before he was a judge and while he was district attorney of the particular circuit, had prosecuted the defendant in another case presented no valid ground for a motion that he recuse himself."

In *Ex parte Adams*, the judge was the city attorney at the time the defendant was first arrested for two counts of theft of property. 910 So. 2d 827 (Ala. Crim. App. 2005). The defendant made a motion for recusal which the court denied. On appeal, the Alabama Supreme Court explained that although the judge was a city attorney when the defendant was arrested, "[t]he sole responsibility for prosecuting persons charged with felonies rests with the district attorney for the county in which the crime occurred. Here, the attorney of record for the charges against Adams was the district attorney . . . not the city attorney." *Id.* at 829. Because the defendant could not establish personal bias, the court denied the motion to recuse. *See also Crawford v. State*, 686 So. 2d 199, 200 (Ala. Crim, App. 1996) (even though judge was the district attorney and had previously prosecuted the defendant, this did not warrant recusal); *Ex parte Adams*, 910 So. 2d 824 (Ala. Crim. App. 2005) (judge was city attorney when defendant was arrested, no recusal). *See Coleman v. State*, No. 06-1242, 2007 WL 2459320 (Ala. Civ. App. Aug. 31, 2007) (case remanded to determine if "circuit judge was the district attorney at the time of the proceedings underlying the prior convictions which were used to enhance appellant's sentence").

In *Grider v. State*, the defense made a motion to recuse, claiming the judge, while in private practice, had represented the defendant in two assault cases. 766 So. 2d 189, 193 (Ala. Crim. App. 1999). The trial judge had no recollection of the representations. The Alabama Court of Criminal Appeals court held the trial judge did not abuse her discretion by denying the motion for recusal.

> The trial judge stated that she had no recollection of representing the appellant and no knowledge of his opposing interests in any civil cases. Moreover, our review of the record indicates that the facts surrounding the previous cases were separate from the facts in the instant case. Thus, a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find that there is no reasonable basis for questioning the judge's impartiality.

Recusal, however, was warranted in *Ex parte Atchley*, where the judge, while in private practice, had represented Atchley. 951 So. 2d 764 (Ala. Crim. App. 2006). The judge denied the motion. On appeal, both parties filed affidavits with the court. Atchley explained that he and the judge engaged in heated arguments while the judge represented him. The judge stated she had no recollection of representing the defendant. The judge further argued the facts of the two cases did not relate. The court found there was an appearance of impropriety and granted the writ of mandamus.

D. A Party's Own Misconduct

A judge is not required to recuse himself when a party's own misconduct initially

creates the conflict. *Ex parte Bentley*, *supra*. Likewise, the majority of the states observe "that a defendant should not benefit from his or her own misbehavior and that recusal lies within the sound discretion of the trial court." *Id.* at 998 (quoting *State v. Bilal*, 893 P.2d 674 (Wash. App. 1995)). The judge was not required to recuse himself after a defendant threw a stamping machine and a microphone at the judge. *Wilks v. Israel*, 627 F.2d 32, 37 (7th Cir. 1980), *cert. denied*, 449 U.S. 1086 (1981). In *Fitzgerald v. State*, 248 A.2d 667 (Md. App. 1968), the judge was not required to recuse himself after the defendant tossed a chair at the judge. Similarly, threats made by the defendant, including idle death threats, do not require a judge to recuse himself. *In re Marriage of Johnson*, 576 P.2d 188 (Colo. App. 1977).

Threats, however, considered to be genuine may warrant recusal. In *U.S. v. Greenspan*, 26 F.3d 1001 (10th Cir. 1994), the FBI became aware the defendant had contracted to kill the judge and his family. The defendant had been convicted, but not yet sentenced, at the time the judge learned of this information. At the sentencing hearing, the defendant moved for judicial recusal. The trial court denied the motion, but the appellate court reversed given the nature of the threats. The threats were not made to delay proceedings or simply harass the judge. Instead, the defendant intended to kill the judge by contracting to do so, and, therefore, recusal was necessary.

E. The Affect of Adverse Rulings/Orders

The court's fundamental role is to issue rulings. Obviously, no ruling is going to completely satisfy the parties. The mere fact a party is upset by a court's order is not grounds, in and of itself, for the judge to be recused. Judicial rulings alone almost never constitute a valid basis for bias. In *Williams v. Williams*, 812 So. 2d 352 (Ala. Civ. App. 2001), the parties were in a custody battle. The father's attorney and the judge exchanged harsh words and the bailiff had to restrain the attorney. Subsequently, the trial judge made various rulings against the father and granted the mother's petition to modify custody. The father argued the judge should recuse himself because of the bias against his attorney which allegedly was the basis of various adverse rulings. The Alabama Court of Civil Appeals did not require the judge to recuse himself. The court explained, "Adverse rulings during the course of the proceedings are not by themselves sufficient to establish bias and prejudice on the part of a judge." *Id.* at 354. Even though the attorney and the judge had a hostile exchange during the proceedings, the court still refused to require recusal.

A judge may question the mental competency of a party and order a defendant to undergo a psychological exam without fearing recusal. In *Key v. State*, 891 So. 2d 353 (Ala. Crim. App. 2002), the judge ordered the exam because Key had made "inappropriate facial expressions to the surviving victim and to the deceased victim's family." *Id.* At trial, the judge described Key's appearance as comparable with Ted Kaczynski. The judge explained it was his responsibility to determine whether the defendant was competent to stand trial, especially in a capital case. *Id.* By ordering an exam, the judge could not comprehend how protecting the defendant's rights could require his recusal. *Id.* at 371. Because Key had not offered any evidence which established bias or prejudice, the Alabama Court of Criminal Appeals refused to require the judge to recuse himself after ordering a psychological exam.

Similarly, a judge was not required to recuse himself when he called the defendant a "dangerous man." *Riddle v. State*, 669 So. 2d 1014 (Ala. Crim. App. 1994). In *Riddle*, the judge had presided over misdemeanor charges brought against the defendant in a prior case. The judge stated that the defendant was a "thug and he needed to be taken off the streets." *Id.* at 1019. Further, "You've dodged that felony bullet on this." *Id.* Even though the statements appeared to be prejudicial on their face, the court did not require the judge to recuse himself. The court reviewed the evidence presented and explained "the trial judge's comments . . . were fair assessments of the evidence, rather than indications of bias." *Id.*

A judge may hold a defendant in contempt of court and not be required to recuse himself. In *Ex parte Vandiver*, the defendant physically assaulted an individual who was seated in the courtroom. 950 So. 2d 1215 (Ala. Civ. App. 2006). The judge held the defendant in contempt of court and sent a letter to the Alabama Department of Corrections detailing the defendant's actions and requesting that the defendant's custody classification be increased. The court determined because the alleged bias of the judge occurred during judicial proceedings, this was not enough to require recusal. The Alabama Court of Criminal Appeals relied upon a previous decision by the United States Supreme Court:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task.

Id. (quoting *Liteky v. United States*, 510 U.S. 540, 550-51, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994)).

In *Oliver v. Towns*, 738 So. 2d 798 (Ala. 1999), the defendant attorney appealed the judgment of $1.5 million arising out of a $12,000 legal malpractice claim. The attorney claimed the high

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amount of the judgment was "sufficient to demonstrate that the trial judge had a personal bias." *Id.* at 804. The court disagreed, explaining that "the judge conducted the trial in an impartial manner." *Id.* Furthermore, "We will not judicially create a rule under which trial judges are required to recuse where the award of damages is greater than the defendant would have hoped." *Id.* Thus, the fact that a party feels a judgment was excessive will not warrant recusal of a trial judge.

F. The Family and Personal Relationship between the Judge, the Attorneys and/or the Parties

Alabama Canons of Judicial Ethics specifically list the degree of relationship which require judicial recusal. Alabama Canons of Judicial Ethics 3.C. (1)(d). *See also* ALA. CODE § 12-1-12. The relationship between an attorney's firm and the judge, however, does not necessarily require recusal as long as there is no genuine issue of impartiality.

> The fact that a lawyer in a proceeding is affiliated with a law firm in which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that 'his impartiality might be reasonably questioned' under Canon [3.C.](1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be 'substantially affected by the outcome of the proceedings' under Canon [3.C.](1)(d)(ii) may require his disqualification.

Alabama Canons of Judicial Ethics 3.C.(1)(d)(i) (Commentary).

In *Liberty Mutual Ins. Co. v. Wheelwright Trucking Co., Inc.*, 851 So. 2d 466 (Ala. 2002), the judge found no reasonable grounds to recuse himself because the judge's son was a member of the law firm which represented one of the parties at trial. The movant contended such a relationship would foster bias and or prejudice. The judge disagreed, explaining that "the motion made no showing that my son has had any involvement in the matters made the basis of these proceedings, and I am not independently aware that he has had any involvement." *Id.* at 498. The judge quoted an Alabama Judicial Inquiry Commission Advisory Opinion which states: "The opinion of the Commission is that a judge is not obligated to recuse from hearing a case in which a law firm that employes the judge's daughter or son-in-law as an associate also represents a party and the relative does not participate in the case." *Id.* at 498 (citing Ala. Jud. Inquiry Comm'n Adv. Opn. No. 97-665 (August 15, 1997)).

A judge is not required to recuse himself or herself if an attorney appearing on behalf of one of the parties has represented the judge in the past. In *Ex parte City of Dothan Personnel Bd.*, 831 So. 2d 1, 2 (Ala. 2002), one of the attorneys for the plaintiff was also representing the trial judge in a divorce proceeding. Consideration was given as to whether the judge should recuse himself. This concern was "cured," however, after the attorney withdrew from representing the judge and, instead, his partner continued the representation. The Supreme Court of Alabama explained:

> [t]he mere fact that a judge has retained an attorney's law partner to represent the judge . . . in a single case would not disqualify the judge under Canon [3.C.], from sitting in a different case where the attorney represents one of the parties.
>
> . . . .
>
> [Absent unusual additional circumstances,] if the judge's attorney withdraws from a case before the judge, the judge is not disqualified to proceed in the event another member of the same firm who has no involvement in the judge's case appears.
>
> . . . .
>
> The Commission also has held that, absent extraordinary circumstances, a judge is not disqualified from hearing a case in which another member of the judge's attorney's law firm appears.

Id. at 2. Looking at the totality of the circumstances, the court held that the trial judge did not abuse his discretion when he refused to recuse himself.

Given the cordial relationship between the bench and bar in Alabama, it is expected the judges and attorneys will maintain professional relationships. This relationship, standing alone, is insufficient for recusal even when the attorney is a party. *Smith v. Math*, (Ala. Civ. App. 2060415, Nov. 16, 2007). Further, the fact that the judge has a personal friendship with an attorney is not grounds for recusal. In *General Motors Corp. v. Jernigan*, the judge took a weekend trip with a group of attorneys, one of whom was an attorney for the plaintiff in a civil action pending before the judge. 883 So. 2d 646 (Ala. 2003). Prior to departure, the judge contacted the Judicial Inquiry Commission requesting an opinion as to whether the trip would show bias or impropriety on his part. The Judicial Inquiry Commission responded the trip would not be a problem and, further, that the judge did not have to disclose the trip to opposing defense counsel. The judge did, however, inform all the parties in writing that he would be taking the trip, if there was no objection. No objection was made and the trip went forward. The defendant subsequently filed its motion to recuse which was denied. On appeal, the Supreme Court of Alabama concluded that the judge was not required to recuse himself because his actions and the surrounding facts did not establish bias or impartiality.

G. Campaign Contributions and Political Activities

The Alabama Legislature has adopted statutory limitations for campaign contributions to judges. ALA. CODE § 12-24-1 et seq. On its face, the statute precludes a judge or justice from hearing a case where they have received campaign contributions from a party or lawyer in excess of the statutory limits. Those limits are $4,000 received by a justice of an appellate court and $2,000 received by a circuit judge. ALA. CODE § 12-24-2(c). The Act was prescribed to apply to all elections after January 1, 1996. While a part of the Alabama *Code*, the enforceability of the Act, however, remains in question.

In *Ex parte Kenneth D. McLeod Partnership*, 725 So. 271 (Ala. 1998), the Alabama Supreme Court observed that while the Alabama Legislature has attempted to address campaign contributions in § 12-24-1 and § 12-24-2, the Act had not been pre-cleared by the United States Justice Department as required. *See id.* at 274. The validity of ALA. CODE § 12-24-1 and § 12-24-2 was further questioned in *Finley v. W. T. Patterson, et al.*, 705 So. 2d 834 (Ala. 1997). In *Finley*, the campaign contribution issue came before the Alabama Supreme Court on motions for disclosure and to stay issuance of a certificate of judgment. *Id.* at 834. The motions were denied. Justice Cook in his concurring opinion explained the enforceability of ALA. CODE § 12-24-2 was in legal limbo. *Id.* at 835. Justice Cook found the required pre-clearance under Section V of the Voting Rights Act by the United States Department of Justice had yet to be performed. *Finley*, *supra*, at 835.

In a more recent decision, *Brackin v. Trimmier Law Firm*, 897 So. 2d 207 (Ala. 2004), the Alabama Supreme Court again refused to embrace ALA. CODE § 12-24-1 and § 12-24-2 as valid and enforceable. There, a motion to recuse a justice was filed contemporaneously with an application for rehearing. The motion to recuse stated that while the justice was running for re-election for a seat on the Alabama Supreme Court, the Alabama Bankers Association contributed $45,000 to her campaign. The recusal motion asserted that an additional $9,000 was contributed to the justice's campaign by the same entity a few days before the original opinion was issued. The plaintiff's argument was not persuasive. The Alabama Supreme Court declared ALA. CODE § 12-24-1 and § 12-24-2 had not yet obtained pre-clearance from the United States Justice Department under the Voting Rights Act of 1965 and their unenforceability had been documented by the Alabama Supreme Court. 897 So. 2d at 233. In denying the motion to recuse, the opinion further stated that, "I am not aware of any opinions in which this Court has resolved the issue of the enforceability of § 12-24-1 and § 12-24-2 ALA. CODE 1975 . . . ." *Id.* at 234. *See also Caperton v. A.T. Massey Coal Co., Inc.,* 556 U.S. ——, No. 08-22 (Jun. 8, 2009) (the United States Supreme Court declared that due process required a judge's recusal where the justice received campaign contributions from the principal officer of the corporation who was found liable for damages).

Beyond campaign contributions, an attorney's support of a judge's political campaign is not enough to establish bias on the part of the judge.

Beyond campaign contributions, an attorney's support of a judge's political campaign is not enough to establish bias on the part of the judge. In *Smith v. Alfa Financial Corporation*, 762 So. 2d 843 (Ala. Civ. App. 1997) the court observed:

> The Judges' Association of Alabama has long pushed for bipartisan elections of judges in this state. Unfortunately, the Legislature and other powers that be have continued to require judges to run as members of one political party or another. As long as we are forced to run in partisan elections, situations will arise in which an attorney associated with a specific judge's campaign will have a case come before that judge. If we were to require recusal in such cases, we would be opening Pandora's box leading to untold problems for probate judges, district judges, circuit judges, and appellate judges, all of whom have had numerous attorneys associated with their campaigns.

Id. at 849-50.

H. Financial Interests of the Judge

When a judge has a material financial interest in the outcome of the case, he or she should disqualify himself. The interest must be direct, personal, substantial and pecuniary. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986). In *Aetna Life*, Aetna brought an appeal after suffering a

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$3.3 million dollar verdict for bad faith. The appellant determined that one of the justices on the Alabama Supreme Court "had filed two actions in the Circuit Court of Jefferson County, Alabama against insurance companies for bad-faith failure to pay a claim." *Id.* at 817. The United States Supreme Court found recusal was required given the similarity of the suit being heard by the justice as compared to the two actions being prosecuted on the justice's behalf.

In a case involving insurance coverage, the plaintiff moved for a new trial after the trial court entered a judgment in favor of State Farm Mutual Automobile Insurance Company. *Ex parte Dooley*, 741 So. 2d 404, 405 (Ala. 1999). The plaintiff argued that the judge should have recused himself "because he held an insurance policy issued by State Farm." The trial judge stated the following in the recusal hearing:

> I've been a State Farm policyholder all of my life, my entire term as district judge and a circuit judge. I've had I don't know how many cases involving State Farm before me [during] all of this time. It's a mutual company, sure, but it has millions of policyholders. And this case would not even make one cent's worth of difference in what might or might not happen with regard to that mutual company. It's not a large case at all. If it was a $10-million case or a $20-million case, it might be different. It might make one or two cents' worth of difference in some sort of dividend check. But a case of this size has no effect at all.

Id. at 405-06. Because this case would not materially affect the trial judge's insurance policy or financial interest, the Supreme Court of Alabama held that the trial judge did not err in denying the motion to recuse.

Likewise, in *Ex parte Potts*, 814 So. 2d 836 (Ala. 2001), the trial judge was not required to recuse himself because he owned a building in which office space was leased to the prosecuting attorney. After being convicted of murder, Potts claimed he had been denied due process of law when the trial judge failed to disqualify himself because of a landlord/tenant relationship the defendant claimed to have existed between the judge and the prosecutor. The lease agreement was signed on behalf of the State of Alabama by one of the prosecutors. Nevertheless, however, the trial judge refused to disqualify himself and said ruling was affirmed on appeal. The appellate court determined the judge's financial interest in the building was not affected by the success or failure of the district attorney's office because the district attorney's office was not financially dependent upon the outcome of the case. In issuing its opinion, the court did note that the Alabama Judicial Inquiry Commission (JIC) had issued an advisory opinion, No. 99-719 (1999) wherein the JIC suggested that the judge recuse himself if an attorney in the case before the judge is renting property directly from the judge or from the judge's spouse. In that instance, however, the judge's impartiality may be reasonably questioned because the judge received income as a financial benefit from an attorney occupying a building owned by the judge, and the financial benefit of the judge may be dependent in part upon the financial success of the attorney.

Conclusion

The law in Alabama is well settled that judges are presumed to be competent and qualified to preside over all matters. Instances where the recusal is clear is most often limited to the existence of family relationships, being a witness or having appointed the party to a position which is now the subject of litigation. Determining whether a recusal is warranted is, however, much more difficult when the grounds are based upon bias, prior involvement in the litigation or a relationship among the attorneys and parties. There is simply, in Alabama, a lack of uniform decisions beyond the pronouncement of general premises of law. Each case must be decided on the totality of the facts. While the burden is high when seeking a recusal, the down side is even greater if a judge, for whatever reason, chooses to maintain a case when the facts and principal suggest otherwise.

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