**RECUSAL MOTIONS**

1. Today’s episode will deal with an issue that causes judges some significant concern and worry. Don’t worry, we are going to provide a step-by-step analysis of how to handle this prickly situations.
2. ***RECUSAL MOTIONS***
3. There really is a step-by-step process that a judge should consult when a recusal motion is filed.
4. Remember that we post written outlines of our notes on our website, GoodJudgePod.com

**DO NOT GET ANGRY!**

1. When a judge receives a motion to have him/her recused from a case, it is common for a judge to react with anger.
2. DO NOT DO THAT!
3. It is a normal, human reaction. A party is suggesting that the judge has prejudged the case, has a personal relationship that would disqualify the judge or, for some reason, should not be allowed to hear the case.
4. Judges value their independence and integrity and these recusal motions suggest that the judge has done something wrong or at least “shady.”
5. As you will learn during the episode, even blatantly false allegations cannot be responded to by the judge.
6. If you did not want to be recused in the first place, you can almost guarantee that you will be recused if you respond to the allegations in the motion.
7. The trial judge may not respond to a recusal motion, even where the allegations are “gratuitously defamatory.”[[1]](#footnote-1)
   1. “The judge whose recusal is sought may not respond to the motion or attempt to refute the allegations, which ‘stand denied automatically’ no matter how false or even defamatory the judge might know or perceive the allegations to be.”[[2]](#footnote-2)
   2. Where the trial judge whose recusal is sought defends himself/herself or otherwise attempts to refute or clarify the allegations contained in the recusal motion, that act alone will result in recusal.[[3]](#footnote-3)
   3. “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 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.”[[4]](#footnote-4)
8. Let’s look at the ***proper*** way for judges to respond to a recusal motion.

**THE CORRECT PROCESS**

1. When presented with a motion to disqualify or recuse[[5]](#footnote-5) a trial judge, the judge must do the following:
   1. When a motion to recuse is filed, the trial judge shall temporarily cease to act upon the merits of the case and immediately determine:
      1. The timeliness of the motion;
      2. The legal sufficiency of the affidavit; and
      3. The legal sufficiency of the grounds
   2. THE JUDGE HAS NO POWER TO DO ANYTHING ELSE IN THE CASE.”[[6]](#footnote-6)
2. After receiving the written motion to recuse that is filed with the court, the trial judge must immediately cease taking any further action on the underlying case and evaluate the motion under the three grounds set forth above.[[7]](#footnote-7)
3. If all 3 criteria are met, another judge shall be assigned to hear the motion to recuse.[[8]](#footnote-8)

**TIMELINESS OF MOTION**

1. Pursuant to USCR 25.1, all motions to recuse or disqualify a judge must be made in writing and must be accompanied by an affidavit.
2. It is important to stress that the party who becomes aware of an issue that could lead to the recusal or disqualification of a trial judge must raise the issue promptly upon learning of the issue. “To hold otherwise would promote gamesmanship.”[[9]](#footnote-9) The defendant may not become aware of an issue that could require disqualification, take his chances with that judge and then later raise the disqualification issue.[[10]](#footnote-10)
3. All such motions must be filed with five (5) days after the affiant first learned of the alleged grounds for disqualification, and not less than ten (10) days prior to any trial or hearing unless good cause can be shown for failure to meet the time requirements.
4. Failure to timely file a motion to recuse the trial judge may result in the recusal motion to be denied.[[11]](#footnote-11) However, it should be noted that if “good cause” is shown to justify the delay in filing the motion, the court may allow a late filed motion and affidavit.[[12]](#footnote-12)

**LEGAL SUFFICIENCY OF AFFIDAVIT**

**(FORM AND NOT SUBSTANCE)**

1. The affidavit must set forth specific reasons for the belief that bias or prejudice exists and must be more than mere conclusions and opinions.[[13]](#footnote-13)
2. There is no doubt that an affidavit is required which sets forth facts in support of the motion to recuse.[[14]](#footnote-14)
3. “To be legally sufficient, an affidavit accompanying a recusal motion must contain ‘the three elements essential to a complete affidavit: ‘(a) a written oath embodying the facts as sworn by the affiant; (b) the signature of the affiant; and (c) the attestation by an officer authorized to administer the oath that the affidavit was actually sworn by the affiant before the officer.’”[[15]](#footnote-15)
4. However, the form of the affidavit does not control and where there is “substantial compliance” with the elements normally associated with an affidavit, the affidavit should be considered sufficient as to form.[[16]](#footnote-16)

**LEGAL SUFFICIENCY OF GROUNDS FOR RECUSAL**

**(SUBSTANCE AND NOT FORM)**

1. The trial court that is presented with a recusal motion must assume that all of the facts contained within the affidavit are true.[[17]](#footnote-17)
2. If, assuming some or all the facts within the timely affidavit are true, the trial judge finds that the affidavit would support a finding that he/she should be disqualified, the trial judge must take steps to have another judge assigned to hear the matter.[[18]](#footnote-18)
3. There is no requirement that the trial judge conduct an evidentiary hearing to determine the sufficiency of the motion and accompanying affidavit. That initial determination is a matter of law for the trial judge to decide.[[19]](#footnote-19)
4. If any one of the conditions is not met, the trial court may deny the motion.[[20]](#footnote-20)
5. However, the trial judge is not allowed to make any discretionary determination on the matter and must arrange to have the matter heard by another judge if the three conditions listed above are met.[[21]](#footnote-21)
6. The trial judge is not allowed to make a determination as to whether the facts contained in the motion are true and is also not allowed to make any determination as to the motivation of the pleader, regardless of the trial judge’s personal knowledge to the contrary.[[22]](#footnote-22)

**ANY ALLEGED BIAS MUST COME FROM EXTRA-JUDICIAL SOURCE**

1. The prohibited bias that would support a motion to recuse must be from an extra-judicial source.
   1. A judicial ruling adverse to a party is not disqualifying.
2. Bias that would support disqualification “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.”[[23]](#footnote-23)

**HEARING BY ANOTHER JUDGE**

1. Once the trial judge determines that the three criteria set forth above are met, the trial judge must make arrangements to have the case heard by another judge.[[24]](#footnote-24)
2. The judge hearing the motion to disqualify/recuse (“Hearing Judge”) may decide the case on the affidavit or, in his/her discretion, may elect to hear evidence on the motion.[[25]](#footnote-25)
3. The Hearing Judge shall make written findings and conclusions and, if the motion is sustained, another judge shall be assigned to hear the underlying case.[[26]](#footnote-26)
4. The trial judge always has the right to voluntarily recuse himself/herself upon the motion of any of the parties or on the court’s own motion.[[27]](#footnote-27)

**JUDGE CAN ALWAYS VOLUNTARILY RECUSE**

1. The trial judge may have a duty to disqualify themselves *sua sponte* under the judge’s ethical duties where facts are uncovered that suggest recusal would be appropriate.[[28]](#footnote-28)
2. However, there is no obligation for the trial judge to recuse himself/herself *sua sponte* absent a violation of a specific standard of OCGA §15-1-8 or the Code of Judicial Conduct.[[29]](#footnote-29)
   1. And we have held that “impartiality might reasonably be questioned” means “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.”[[30]](#footnote-30)
3. “Even where the facts in an affidavit do not warrant recusal if assumed true, a judge still maintains an ethical duty to recuse himself when he is independently aware of grounds to do so.”[[31]](#footnote-31)

**BUT DO NOT SIMPLY RECUSE EVERY TIME A MOTION IS FILED!**

1. “Some may worry that trial judges presented with a motion to recuse will simply disqualify themselves voluntarily without evaluating the validity of the motion, with the effect of delaying the case until a new judge can be assigned. But that would be a dereliction, as ‘ ‘[i]t is as much the duty of a judge not to grant the motion to recuse when the motion is legally insufficient as it is to recuse when the motion is meritorious.’’”[[32]](#footnote-32)

**SOME SPECIFIC EXAMPLES**

1. Where a criminal defendant is alleged to have plotted to kill the trial judge, the trial judge is not required to be recused.[[33]](#footnote-33)
   1. If such a threat could always form the basis for recusal, all criminal defendants could manipulate the system by threatening judges which would “…undermine our notions of fair play and justice and damage the public’s perception of the judiciary.”[[34]](#footnote-34)
2. Where the trial judge is merely acquainted with an alleged victim, without more, the motion to recuse is insufficient.[[35]](#footnote-35)
   1. “The focus here is not on bias in fact but whether the judge's impartiality might reasonably be questioned, keeping in mind the reality that any judge will have come to the bench after having had extensive contacts with the community and the legal profession. Any analysis of the necessity for recusal is necessarily fact-bound, requiring an examination of the nature and extent of any business, personal, social or political associations, and an exercise of judgment concerning just how close and how extensive (and how recent) these associations are or have been.”[[36]](#footnote-36)
3. Therefore, there is no required recusal where trial judge had professional encounters with victim’s mother while they both worked at the courthouse.[[37]](#footnote-37)
4. It is also not an automatic disqualification for the trial judge to have had a regular working relationship with the victim.[[38]](#footnote-38)
5. No recusal required where judge involved in a traffic accident with a member of the defendant’s family 10-12 years before trial, the family member was not involved with the trial and there was no evidence to suggest judge was even aware that the person involved in the wreck was related to the defendant.[[39]](#footnote-39)
6. Where judge orally finds a party in contempt and, before the written order is entered, a motion to recuse the judge is filed, the judge errs when he/she signs a written order memorializing the oral pronouncement without first addressing the recusal motion.[[40]](#footnote-40)

**TRIAL JUDGE AS FORMER DA OR ADA**

1. A trial judge must always be recused where the trial judge previously served as counsel in the controversy at issue.[[41]](#footnote-41)
   1. Therefore, if a trial judge formerly worked in the district attorney’s office, the judge would be recused if he/she had any actual involvement in a defendant’s case, regardless of whether that involvement occurred before or after indictment.[[42]](#footnote-42)
   2. However, if the trial judge was merely a former assistant district attorney who never had any actual involvement in the underlying criminal case and had no supervisory authority over any lawyers in the office, there is no requirement that the trial judge be recused.[[43]](#footnote-43)
      1. Even where it is alleged that the trial judge, because of his/her former employment by the sitting district attorney, owed a debt of gratitude or similar allegiance to the district attorney whose office is prosecuting the case, those facts do not support recusal of the trial judge.[[44]](#footnote-44)
   3. Where the trial judge formerly served as ***the*** district attorney, “a Georgia district attorney is of counsel in all criminal cases or matters pending in his or her circuit and, therefore, …a trial judge should not preside over a particular criminal matter that was addressed in any fashion by his or her office while he or she was serving as the district attorney.”[[45]](#footnote-45)
      1. This disqualification is true even where the trial judge/former district attorney never had any actual involvement in the underlying case. The reasoning is that there is an “appearance of partiality” based upon the supervisory authority that a district attorney has over all cases then pending in the office.[[46]](#footnote-46)
      2. This same rationale applies to any ***senior*** assistant district attorney ***with supervisory authority*** over any of the lawyers who had actual involvement in any aspect of the underlying matter.[[47]](#footnote-47)
2. If the trial judge was a former prosecutor and the case involves prior convictions which were obtained while the trial judge was a prosecutor (i.e. 404(b) evidence, prior convictions used in aggravation of punishment or in the context of a probation revocation), that prior employment does not, standing alone, require recusal of the trial judge.[[48]](#footnote-48)
   1. “The mere fact that [the trial judge] had participated in one of [defendant’s] several prior prosecutions does not give rise to a presumption that she was somehow biased against [the defendant].”[[49]](#footnote-49)
   2. The fact that the trial judge, as a former prosecutor, was involved with the prosecution of the defendant for another charge not presently before the court is not, standing alone, a ground for disqualification.[[50]](#footnote-50)
   3. This principle is true even where the trial judge was formerly a prosecutor who ***actually*** handled the case which resulted in the defendant’s prior conviction.[[51]](#footnote-51)

**WHERE A PARTY OR LAWYER FINANCIALLY SUPPORTED TRIAL JUDGE’S POLITICAL CAMPAIGN**

1. “Georgia has judicial elections, elections mean campaigns, and to be successful, campaigns require support, financial and otherwise. As a practical matter, ‘most donors [in judicial campaigns] are lawyers and litigants who may appear before the judge they are supporting.’”[[52]](#footnote-52)
2. “Although a trial judge should recuse himself or herself from presiding over a case involving a party who has previously made an ***exceptionally-large*** campaign contribution, we hold that recusal is not required because the judge previously received *any* campaign contribution from a party.”[[53]](#footnote-53)
3. “Allegations that a party or a party’s attorney made unexceptional campaign contributions or provided commonplace forms of non-monetary support during a judge’s election campaign ordinarily are insufficient to require referring a recusal motion for reassignment to another judge.”[[54]](#footnote-54)
4. However, where a party or a lawyer for a party served as the ***campaign treasurer*** for the judge, **there is sufficient evidence to warrant having the matter referred to another judge for hearing so that relevant facts can be determined**.[[55]](#footnote-55)
   1. Where a party or lawyer served as treasurer for the judge’s campaign, the judge is not automatically disqualified but, depending on the level of involvement of the treasurer, that fact alone may require recusal.[[56]](#footnote-56)

**CONCLUSION**

1. When presented with a recusal motion:
   1. ***Do not*** get angry!
   2. ***Do not*** automatically recuse just because it is easier to do so
   3. ***Do not*** respond to any factual allegations (even if they are “gratuitously defamatory”)
2. Instead:
   1. ***Stop taking any action in the case*!**
   2. Look to 3 required criteria for such a motion (get out U.S.C.R. 25):
      1. Timeliness;
      2. Legal sufficiency of the affidavit; and
      3. Legal sufficiency of grounds
3. Assuming everything in the motion is true, would recusal be warranted?
4. If yes, have another judge (assigned by your chief judge) to hear the motion
5. If no, enter a written order with findings as to the deficiency in the motion (not factual disputes—merely procedural findings)
6. Thanks for listening and remember that we post outlines of these podcasts on our website, goodjudgepod.com
7. We would really appreciate it if you would rate and review the podcast and tell us how we are doing. We realize we will never be a “most followed” podcast but it does help us know how to improve and how to better serve you.

**ENDNOTES**

1. *Post v. State*, 298 Ga. 241, 244 (2015); citing *Horn v. Shepherd*, 294 Ga. 468, 473 (2014). [↑](#footnote-ref-1)
2. *Post v. State*, 298 Ga. 241, 244 (2015); citing *Isaacs v. State*, 257 Ga. 126, 128 (1987). [↑](#footnote-ref-2)
3. *Post v. State*, 298 Ga. 241, 257 (2015). [↑](#footnote-ref-3)
4. *Post v. State*, 298 Ga. 241, 258 (2015); citing *Isaacs v. State*, 257 Ga. 126, 128 (1987). [↑](#footnote-ref-4)
5. The “terms ‘recuse’ or ‘recusal’ and ‘disqualify’ or ‘disqualification’ are used interchangeably in this context.” *Post v. State*, 298 Ga. 241, n. 3 (2015). [↑](#footnote-ref-5)
6. *Robinson v. State*, 332 Ga. App. 240, 241 (2015); citing *Baptiste v. State*, 229 Ga. App. 691, 698 (1997), USCR 25.2. *Serdula v. State*, 344 Ga. App. 587, 589 (2018). [↑](#footnote-ref-6)
7. USCR 25.3. [↑](#footnote-ref-7)
8. *Serdula v. State,* 344 Ga. App. 587, 589 (2018). [↑](#footnote-ref-8)
9. *State v. Hargis*, 294 Ga. 818, 822 (2014). [↑](#footnote-ref-9)
10. *Pyatt v. State*, 298 Ga. 742, 749-750 (2016). [↑](#footnote-ref-10)
11. *Ballweg v. Ga. Dept. of Human Services*, 336 Ga. App. 372, 374 (2016); *State v. Hargis*, 294 Ga. 818, 821-822 (2014); *GeorgiaCarry.Org, Inc. v. James*, 298 Ga. 420, 421 (2016); *Henderson v. State*, 295 Ga. 333, 335 (2014). [↑](#footnote-ref-11)
12. USCR 25.1. [↑](#footnote-ref-12)
13. USCR 25.2. [↑](#footnote-ref-13)
14. *Birt v. State*, 256 Ga. 483, 484-485 (1986); *Hunnicutt v. Hunnicutt*, 248 Ga. 516 (1981); *State v. Fleming*, 245 Ga. 700, 702 (1980). [↑](#footnote-ref-14)
15. *Post v. State*, 298 Ga. 241, 243 (2015). [↑](#footnote-ref-15)
16. *Birt v. State*, 256 Ga. 483, 485 (1986). [↑](#footnote-ref-16)
17. USCR 25.3. [↑](#footnote-ref-17)
18. USCR 25.3. Rule 25.4 sets forth the manner in which the “hearing judge” should be selected/appointed in great detail. [↑](#footnote-ref-18)
19. *Daker v. State*, 300 Ga. 74 (2016); citing *Mayor & Aldermen of City of Savannah v. Batson-Cook*, 291 Ga. 114, 116 (2012). [↑](#footnote-ref-19)
20. *Mayor & Aldermen of City of Savannah v. Batson-Cook*, 291 Ga. 114, 119 (2012); *Henderson v. McVay*, 269 Ga. 7 (1998). [↑](#footnote-ref-20)
21. *Price v. Reish*, 335 Ga. App. 491, 494-495 (2015). [↑](#footnote-ref-21)
22. *Price v. Reish*, 335 Ga. App. 491, 495 (2015). [↑](#footnote-ref-22)
23. *Patel v. State*, 289 Ga. 479, 486-487 (2011); *Daker v. State*, 300 Ga. 74 (2016); *Berry v. State*, 267 Ga, 605 (1997). [↑](#footnote-ref-23)
24. USCR 25.3; *Post v. State*, 298 Ga. 241, 243 (2015). [↑](#footnote-ref-24)
25. USCR 25.6. [↑](#footnote-ref-25)
26. USCR 25.6. [↑](#footnote-ref-26)
27. USCR 25.7. [↑](#footnote-ref-27)
28. *Battle v. State*, 298 Ga. 661, n.3 (2016); *Ellicott v. State*, 320 Ga. App. 729, 734-735 (2013). [↑](#footnote-ref-28)
29. *Lemming v. State*, 292 Ga App. 138, 141 (2008); *Shelton v. State*, 350 Ga. App. 774, 782 (2019). [↑](#footnote-ref-29)
30. *Shelton v. State*, 350 Ga. App. 774, 782 (2019). [↑](#footnote-ref-30)
31. *Serdula v. State*, 344 Ga. App. 587, 590 (2018). [↑](#footnote-ref-31)
32. *Mondy v. Magnolia Advanced Materials, Inc.*, 303 Ga. 764, 775 (2018). [↑](#footnote-ref-32)
33. *Battle v. State*, 298 Ga. 661, 666 (2016). [↑](#footnote-ref-33)
34. *Battle v. State*, 298 Ga. 661, 666 (2016). [↑](#footnote-ref-34)
35. *Marlow v. State*, 339 Ga. App. 790 (2016). [↑](#footnote-ref-35)
36. *Marlow v. State*, 339 Ga. App. 790 (2016) [↑](#footnote-ref-36)
37. *Turner v. State*, 280 Ga. 174, 175 (2006). [↑](#footnote-ref-37)
38. *Smith v. State*, 189 Ga. App. 27, 32 (1988). [↑](#footnote-ref-38)
39. *Shelton v. State*, 350 Ga. App. 774, 783 (2019) (In *Shelton*), the defendant did not raise the issue until after the trial and, on appeal, was claiming “plain error.” [↑](#footnote-ref-39)
40. *Mondy v. Magnolia Advanced Materials, Inc.*, 303 Ga. 764, 774 (2018). [↑](#footnote-ref-40)
41. *Gude v. State*, 289 Ga. 46, 48 (2011); citing *King v. State*, 246 Ga. 386 (1980). [↑](#footnote-ref-41)
42. *Gude v. State*, 289 Ga. 46, 48 (2011). [↑](#footnote-ref-42)
43. *Gude v. State*, 289 Ga. 46, 49 (2011); *Post v. State*, 298 Ga. 241, 248 (2015). [↑](#footnote-ref-43)
44. *Gude v. State*, 289 Ga. 46, 49-50 (2011). [↑](#footnote-ref-44)
45. *Gude v. State*, 289 Ga. 46, 48-49 (2011). [↑](#footnote-ref-45)
46. *Gude v. State*, 289 Ga. 46, 49 (2011). [↑](#footnote-ref-46)
47. *Gude v. State*, 289 Ga. 46, 49 (2011). [↑](#footnote-ref-47)
48. *Brown v. State*, 307 Ga. App. 99, 105 (2010); citing *Lemming v. State*, 292 Ga. App. 138, 141-142 (2008). [↑](#footnote-ref-48)
49. *Lemming v. State*, 292 Ga. App. 138, 142 (2008). [↑](#footnote-ref-49)
50. *Leverette v. State*, 291 Ga. 834, 835 (2012). [↑](#footnote-ref-50)
51. *Rembert v. State*, 324 Ga. App. 146, 154 (2013). [↑](#footnote-ref-51)
52. *Post v. State*, 298 Ga. 241, 248 (2015). [↑](#footnote-ref-52)
53. *Gude v. State*, 289 Ga. 46, 50 (2011) [↑](#footnote-ref-53)
54. *Post v. State*, 298 Ga. 241, 248 (2015); citing *Patterson v. Butler*, 187 Ga. App. 740, 740-741 (1988). [↑](#footnote-ref-54)
55. *Post v. State*, 298 Ga. 241, 251 (2015). [↑](#footnote-ref-55)
56. *Post v. State*, 298 Ga. 241, 251 (2015). [↑](#footnote-ref-56)