Unraveling the Woolsack:
How to Recuse or Reverse a Biased Kansas Judge

by Daniel E. Monnat & Paige A. Nichols

"The more modern view recognizes the possibility of human fallibility even in one seated upon the woolsack…."[1]

There is nothing difficult about seeking a judge's recusal. The process requires little more than an allegation of bias and a request that the judge step down. Seeking recusal is just one more action that lawyers are sometimes required to take to protect their clients. And so why not seek recusal when facing a biased judge—what's the worst thing that could happen?

Surely no Kansas judge would respond as did the federal Rhode Island judge who was so infuriated by a recusal motion that he both initiated disciplinary proceedings against the moving lawyer and asked the United States attorney to consider indicting the lawyer for perjury.[2] Fortunately, the First Circuit vindicated the lawyer when it reversed his resulting disciplinary sanction and promised that "[l]awyers using professional care, circumspection and discretion in exercising [recusal rights] need not be apprehensive of chastizement or penalties for having the advocative courage to raise such a sensitive issue to assure the client's right to a fair trial and the integrity of our system for administering justice."[3]

[L]awyers have a duty *to their clients* to seek recusal of judges who the lawyers suspect cannot grant their clients a fair trial.

Kansas law is similarly protective of lawyers who seek recusal, directing that "[n]o judge or court shall punish for contempt anyone making, filing or presenting the affidavit provided for by [the recusal statute] or any motion founded thereon."[4]

Of course, statutory safeguards or the anticipation of appellate vindication may be small comfort to the lawyer going toe to toe with a vengeful judge. Lawyers are understandably reluctant when it comes to recusing judges, often excusing their own inaction on the theory that an unsuccessful motion will anger the judge and do the client (or, more likely, the lawyer!) more harm than good. In response to this reluctance, at least one author has argued that lawyers have a duty *to the profession* to seek recusal of biased judges, noting that "an institution that cannot tolerate criticism is inherently unhealthy. A lack of criticism leads inevitably to distorted self-perceptions. An institution that cannot hear criticism will lose opportunities to correct errors and improve, and will never achieve its full potential."[5]

Even more importantly, as the First Circuit emphasized in the Rhode Island case, lawyers have a duty *to their clients* to seek recusal of judges who the lawyers suspect cannot grant their clients a fair trial:

> A motion to recuse a trial judge is inherently offensive to the sitting judge because it requires the moving party to allege and substantiate bias and prejudice—traits contrary to the impartiality expected from a mortal cloaked in judicial robe. Yet the fair

Daniel E. Monnat *of Monnat & Spurrier, Chtd., has been a practicing criminal defense lawyer for the past 30 years in his hometown of Wichita, Kan. A* cum laude *graduate of California State University, San Francisco, he received his J.D. from the Creighton University School of Law. Monnat frequently lectures throughout the United States on a variety of criminal defense topics and has been listed in* The Best Lawyers In America *for the past decade. This year he was listed as one of the top 100 Super Lawyers for Kansas and Missouri for 2005. Monnat is a past two-term president of the Kansas Association of Criminal Defense Lawyers, a former member of the Board of Directors of the National Association of Criminal Defense Lawyers, a member of the KTLA Board of Governors and Executive Committee, a graduate of the Gerry Spence Trial Lawyer's College, and a Fellow of the American College of Trial Lawyers.*

Paige A. Nichols *is a research and appellate attorney practicing in Lawrence, Kan. She received her J.D. in 1993 from Northeastern University in Boston, and an LL.M. in criminal law in 2002 from the University of Missouri–Kansas City.*

> administration of justice requires that lawyers challenge a judge's purported impartiality when facts arise which suggest the judge has exhibited bias or prejudice.[6]

Understanding this duty is easier than carrying it out. On the assumption that procedural knowledge begets courage in litigation, the remainder of this article will be dedicated to guiding readers through the process of recusing and reversing biased judges in the Kansas state courts.

Judging the Judge

One of the tasks that should appear on every lawyer's trial-preparation checklist is to investigate whether there is any reason to remove the assigned judge from the case. Kansas law directs that the judge "*shall* be disqualified" if related by a certain degree to an attorney or a party in a case.[7] Additionally, the judge *may* be disqualified if he or she was previously involved in the action as counsel prior to becoming a judge; if he or she is a material witness in the action; or if he or she has a financial interest in the case, an extrajudicial bias for or against a party or counsel, or a bias for or against one party's cause.[8]

These statutory bases for disqualification are consistent with the requirement of judicial impartiality demanded by constitutional due-process principles and the Judicial Code of Conduct.[9] Claims of bias must be based on "extrajudicial" evidence; claims based on a judge's prior adverse orders in the case—even if erroneous—will not be sufficient.[10]

An initial inquiry into a judge's background may be readily accomplished if counsel keeps track of local judges' affiliations and interests by collecting biographies and articles about the judges.[11] Counsel might also learn more about an assigned judge by conducting online searches for articles written by the judge and opinions authored by the judge, originating from the judge's court, or listing the judge's name as attorney of record before he or she ascended to the bench. Counsel will want to consider all of counsel's own past dealings with the judge, and should inquire of both the client and significant witnesses whether they have any history with the judge.

Even if counsel's initial inquiry reveals no grounds for disqualification, it is counsel's continuing duty to observe the judge throughout the proceedings for signs of bias that might disqualify the judge from the case.

Invitation to Recuse

As soon as a basis for disqualification is apparent and counsel or the client "believes that the judge to whom an action is assigned cannot afford that party a fair trial in the action," counsel must comply with K.S.A. 20-311d by filing a motion with the target judge requesting a change of judge.[12] The law directs that this initial motion "shall *not* state the grounds for the party's or attorney's belief," and there is no requirement that this motion be accompanied by an affidavit.[13] The target judge is required to hear the motion "promptly," "informally," and "upon reasonable notice to all parties."[14]

Timeliness when initiating a motion for a change of judge is crucial. The motion must be filed either within seven days "after pretrial," within seven days "after receiving written notice of the judge before whom the case is to be heard," or "as soon as [counsel] becomes aware of the facts giving rise to the challenge."[15] Failure to make a timely motion will be deemed a waiver of the right to challenge the judge.[16]

If the target judge grants the motion, the chief administrative judge of the district "shall" assign another judge to the case.[17]

Ask and Ye Shall Receive

If the target judge denies the motion, the next step is to seek an order of recusal "immediately"[18] from the chief administrative judge of the district by filing an affidavit pursuant to K.S.A. 20-311d(b). The Kansas Supreme Court discussed the procedural requirements for this step in detail in *Hulme v. Woleslagel*,[19] which, read in conjunction with the current statute, yields the following simple rules:

1. The affidavit must set forth with specificity grounds giving "fair support" for recusal under one of the bases set forth in the statute;

2. The affidavit must be signed by either counsel or the client; and

3. The chief administrative judge (or another non-target judge assigned for this purpose) must determine only the legal sufficiency of the affidavit, and *not* the truth of the claims therein.

Since *Hulme*, the Kansas Court of Appeals has announced one additional rule:

4. The judge determining the legal sufficiency of the affidavit may consider information external to the affidavit, with two caveats: First, the external information may only be considered for the purpose of determining the legal sufficiency of the affidavit, and not the truth of the claims therein; second, the judge should make a record of any external information considered for the benefit of the appellate courts.[20]

The standard for "legal sufficiency" is

> whether the charge of lack of impartiality is grounded on facts that would create reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself, or even, necessarily, in the mind of the litigant filing the motion, but rather in the mind of a reasonable person with knowledge of all the circumstances.[21]

If the affidavit is legally sufficient, "the case shall be assigned to another judge."[22]

In addition to invoking the recusal statute and filing an affidavit, counsel might remind the chief judge in the recusal motion that he or she has the authority to assign a new judge to the case even in the absence of cause for recusal. The Judicial Reapportionment Act directs that the chief judge "shall have general control over the assignment of cases within the district."[23]

To Mandamus or Not to Mandamus?

If the judge considering the affidavit concludes that it is not legally sufficient and that assigning another judge is not otherwise warranted, the case will likely be returned to the target judge. At this point, counsel and the client must decide between two

courses of action: proceed to trial with the target judge and appeal any adverse result on grounds of failure to recuse; or immediately seek an order of mandamus directing recusal by way of an original action in the Kansas Supreme Court.[24] The Kansas appellate courts have never suggested that a mandamus action is required to preserve the recusal issue, and thus counsel is free to choose whichever course of action is consistent with the client's interests (i.e., a speedy but potentially risky trial, or a delayed trial with one more opportunity to secure the target judge's recusal).

Framing the Direct Appeal

If the client bypasses mandamus and loses at trial, the recusal issue can be raised on direct appeal. Framing the issue carefully on appeal is just as crucial as following the correct procedural steps in the district court. The issue might be framed as a due-process constitutional claim (i.e., the appellant's trial by a biased judge violated due process) or as a simple statutory claim (i.e., the administrative judge's rejection of the appellant's legally sufficient affidavit violated the recusal statute).

Each type of claim has its own advantages. A constitutional claim may be necessary in a criminal case to "federalize" the issue in the event collateral review by the federal courts becomes necessary. A constitutional claim may also improve the appellant's chances for reversal if counsel failed to follow the statutory procedure in the district court.[25] But a constitutional claim may prove more difficult to win than a simple statutory claim, as will be illustrated below.

Statutory Claims

In *State v. Clothier*,[26] the defendant followed the statutory procedure for recusal in the district court. The target judge in *Clothier* had indicated prior to a hearing on a motion to modify the defendant's sentence that he had already decided to deny the defendant's motion because he felt other judges had inappropriately "coddled" the defendant in prior cases.[27] The defendant had then filed an affidavit pursuant to the recusal statute, and the judge assigned to consider the affidavit denied the defendant's recusal request.[28]

On review, the Court of Appeals undertook a purely statutory analysis of the defendant's recusal claim.[29] The court concluded that the allegations in the affidavit "create[d] a reasonable doubt concerning the judge's impartiality in the mind of a reasonable person," and that the affidavit was therefore legally sufficient.[30] The court reversed the order on the defendant's affidavit and remanded the case with directions for a new hearing on the defendant's motion to modify before a different judge.[31]

The strictness with which the Kansas Courts have interpreted the recusal statute is even more apparent in *Carpenter v. State*.[32] In *Carpenter*, the State appealed a district court order under K.S.A. 60-1507 overturning the petitioner's second-degree murder conviction and granting him a new trial. The original judge assigned to hear the petition had denied relief, and the order appealed from was entered by another judge after the petitioner successfully recused the original judge under K.S.A. 20-311d.

On review, the Kansas Supreme Court concluded that the affidavit in support of recusal was untimely as to one basis for recusal and legally insufficient as to the other. In a ruling suggesting that a party opposing recusal has statutory rights as strong as the party seeking recusal, the Court vacated the order reversing the petitioner's conviction and remanded the case to the original judge with instructions to "proceed from the stage of litigation existing when [the original judge] was disqualified."[33]

Constitutional Claims

Constitutional recusal claims are usually more difficult to win on appeal. In *State v. Alderson*,[34] the defendant was convicted by a jury of felony-murder and aggravated battery, and appealed his convictions on grounds that the judge was biased and should have recused himself. The trial judge had revealed to the parties the day before trial that the car involved in the crimes "belonged to the judge's brother and was stolen from the judge's father's home."[35]

Noting that the defendant had not sought recusal under K.S.A. 20-311d, the Kansas Supreme Court reviewed the judge's failure to recuse himself from the trial under the constitutional due-process standard.[36] Under this standard, the Court required not merely a showing that the judge should have recused himself because of "reasonable doubt concerning the judge's impartiality" (i.e., *potential* bias—the statutory recusal standard applied in *Clothier*), but a heightened showing of "*actual* bias or prejudice."[37] The defendant could not meet this difficult standard, and the Court affirmed his convictions.[38, 39]

The more difficult due-process standard invoked in *Alderson* was premised in part upon the fact that "it was the jury which convicted the defendant, not the judge."[40] But the defendant raised a judicial-bias claim to challenge his sentence as well, and the Court applied a standard more akin to the statutory standard to grant the defendant relief on that claim:

> Simply stated, a majority of this court is of the opinion that a reasonable person having full knowledge of the facts would reasonably question the impartiality of the judge if the judge was about to sentence a defendant when the judge's brother was the victim of a theft involving the defendant being sentenced. We do not question the trial judge's actual impartiality in this case. Nor do we question the sentence imposed as being unduly harsh. It may well be that a different judge will impose the same sentence. What we do question is the public perception of impartiality. It is vital to the legal system that the public perceive the system as impartial. The majority of this court is of the opinion a reasonable person with knowledge of all the facts would have reasonable doubt as to the judge's impartiality. We therefore vacate the sentence and remand the case to the trial court for resentencing by a different judge.[41]

It would thus appear less important for appellate purposes to follow the statutory procedure for recusing a judge from non-jury proceedings such as motions, bench trials, sentencing hearings, and post-judgment proceedings. But given the appellate courts'

demonstrated preference for statutory compliance, there is no reason to take the risk of not proceeding under the statute at the first opportunity.

Prejudice & Judicial-Misconduct Claims

One last mistake counsel should avoid on appeal is mischaracterizing a recusal claim as a judicial-misconduct claim. The standard for judicial-misconduct claims obligates the appellant to show both that there was an error in the district court and that the error prejudiced the appellant.[42] In contrast, recusal claims—whether statutory or constitutional—are claims of structural error: Once the appellant demonstrates that the judge below was biased (potentially or actually, depending on the standard), the ruling below is *per se* reversible.[43]

While some types of judicial misconduct will merit reversal under the error/prejudice standard and without reference to recusal standards,[44] other types of misconduct may only merit reversal if the misconduct is properly characterized as evidence of bias necessitating recusal—a claim requiring no proof of prejudice.[45]

Conclusion

United States Supreme Court Justice Scalia recently reminded us that our judicial system was built on the Framers' understanding that "judges, like other government officers, could not always be trusted to safeguard the rights of the people."[46] Challenging a judge's trustworthiness by way of a recusal motion is no different from challenging a witness' trustworthiness by way of cross-examination: Both are time-honored duties of lawyers to their clients. Counsel will be successful in carrying out the duty to seek recusal by being alert for signs of bias, complying with the recusal statute, and carefully framing the recusal issue on appeal. ❖

Endnotes

1 *Hulme v. Woleslagel*, 208 Kan. 385, 395 (1972). "The woolsack" refers to the wool-stuffed seat on which the Lord Chancellor of Great Britain sits; the term is also used "[b]y extension… in the general sense 'a seat of justice.'" Bryan A. Garner, A Dictionary of Modern Legal Usage (2d ed.1995).

2 *See* Carl T. Bogus, *Culture of Quiescence*, 9 Roger Williams U. L. Rev. 351, 362 (Spring 2004) (recounting the saga of one defense attorney's experience as an out-of-town lawyer in Federal District Judge Ronald Lagueux's court).

3 *United States v. Cooper (in re Zalkind)*, 872 F.2d 1, 5 (1st Cir. 1989).

4 K.S.A. 20-311e.

5 Bogus, *Culture of Quiescence*, 9 Roger Williams U. L. Rev. at 394 (arguing that lawyers, especially in states with smaller legal communities, are far too wary of criticizing judges: "Saying that lawyers treat the judges with deference fails to capture the interaction; it is more accurate to say that lawyers bow and scrape. Some lawyers have elevated fawning to an art form, pulling it off with subtle elegance. Others are grotesquely obsequious. But few tell a judge she is wrong").

6 *Cooper*, 872 F.2d at 3-4.

7 K.S.A. 20-311.

8 *See* K.S.A. 20-311d(c).

9 *See Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (holding that trial judge's bias violated defendant's right to due process under the Fourteenth Amendment); Kan. Sup. Ct. R. 601, Canon 3(C)(1)(a)-(b) (requiring recusal in the face of personal bias or knowledge about the case).

10 K.S.A. 20-311d(d); *see also State ex rel. Miller v. Richardson*, 229 Kan. 234, 238 (1981); *Logan v. Logan*, 23 Kan. App. 2d 920, 931 (1997).

11 *See* The American Bench: Judges of the Nation (Forster-Long, Inc. 2006); Judicial Staff Directory (CQ Press 2005); BNA's Directory of State and Federal Courts, Judges, and Clerks (BNA Books 2006); biographies included on the court's own website (*see* links to webpages for Kansas district courts at http://www.kscourts.org).

12 K.S.A. 20-311d(a).

13 *Id*. (emphasis added).

14 *Id*.

15 K.S.A. 20-311f; *Carpenter v. State*, 223 Kan. 523, 525 (1978) ("In a situation where a judge is already assigned to a case and events transpire which cause the litigant to believe the judge has become prejudiced the litigant is under an obligation to file the affidavit as soon as he becomes aware of the facts giving rise to the challenge.").

16 *See, e.g., State v. Brown*, 266 Kan. 563, 570 (1999) (motion to recuse based on history of animosity between judge and defense counsel was untimely when filed months after counsel knew which judge was assigned to case; untimely motion barred consideration of issue on appeal); *State v. Snedecor*, 9 Kan. App. 2d 454, 458 (1984) (defendant waived right to change of judge by filing untimely motion); *In re Adoption of Smith*, 6 Kan. App. 2d 575, 577-78 (1981) (motion to recuse filed fifty-six days after party requested assignment of judge was untimely and waived issue); *Carpenter*, 223 Kan. at 525 (K.S.A. 60-1507 petitioner waived right to challenge K.S.A. 60-1507 judge on basis known to petitioner during original trial, or, at very latest, prior to filing petition); *State v. Timmons*, 218 K. 741, 749 (1976) (no error in judge's refusal to recuse self where defendant knew of basis for recusal six weeks before filing motion).

17 K.S.A. 20-311d(a).

18 Again, timeliness is crucial. *See* cases cited *supra*, note 16.

19 208 Kan. 385 (1972).

20 *See State v. Clothier*, 20 Kan. App. 2d 994, 997 (1995).

21 *Id*. at 996, *quoting State v. Griffen*, 241 Kan. 68, 72 (1987).

22 K.S.A. 20-311d(b).

23 K.S.A. 20-329.

24 *See Hulme*, 208 Kan. at 388 (holding that mandamus is proper remedy for denial of right to recusal of biased judge). The procedural rules for mandamus actions are contained in Kansas Supreme Court Rule 9.01.

25 While all litigants—civil or criminal—have a due-process right to an unbiased judge, *see Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), the Kansas courts have thus far only considered due-process claims notwithstanding a failure to comply with the recusal statute in criminal cases. *Compare Alderson*, 260 Kan. 445 (1996) (considering criminal defendant's constitutional recusal claim notwithstanding failure to comply with statute), *with In re Andover Antique Mall, L.L.C.*, 33 Kan. App. 2d 199, 204-05 (2004) (refusing to hear county's appellate claim that judge failed to recuse himself, despite fact that judge's comments "press[ed] the envelope," where county "could have filed the affidavit [required by statute] but chose not to do so"), *and Bond v. Albin*, 29 Kan. App. 2d 262, 265 (2000) (refusing to consider recusal argument not presented by way of affidavit in the district court).

26 20 Kan. App. 2d 994 (1995).

27 *Id*. at 995.

28 *Id*.

29 The words "due process" and "constitution" appear nowhere in the opinion.

30 *Id*. at 998.

31 *Id*.

32 223 Kan. 523 (1978).

33 *Id*. at 527.

34 260 Kan. 445 (1996).

35 *Id*. at 453, 469.

36 *Id*. at 452-54.

37 *Id*. at 454; *see also State v. Logan*, 236 Kan. 79, 88 (1984) (even if trial judge should have recused himself because son's employment as prosecutor created appearance of bias, reversal of convictions was

not necessary absent showing of "bias or prejudice"; affirming denial of postconviction motion for new trial). The Court uses the term "prejudice" as a synonym for "bias." *See Alderson*, 260 Kan. at 454 (explaining that "[b]ias and prejudice exist if a judge harbors a 'hostile feeling or spirit of ill will against one of the litigants, or undue friendship or favoritism toward one'") (citation omitted).

[38] *Alderson*, 260 Kan. at 454-55.

[39] The United States Supreme Court has held that a judge's direct financial interest in the outcome of a case is sufficient to establish an actual bias. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (appellate justice's participation in insurance appeal while simultaneously engaged in similar lawsuit against other insurance companies violated due process); *Tumey v. Ohio*, 273 U.S. 510 (1927) (system under which mayor acting as judge was only compensated if defendant was convicted and fined violated due process). The lower federal courts have recognized that an egregious "appearance of bias" may be so serious as to create a conclusive presumption of actual bias. *See, e.g., Fero v. Kerby*, 39 F.3d 1462, 1478-79 (10th Cir. 1994) (discussing when appearance of bias rises to level of constitutional violation).

[40] *Alderson*, 260 Kan. at 454-55.

[41] *Id*. at 469.

[42] *See State v. Patton*, 280 Kan. 146, 181 (2005).

[43] *See Tumey*, 273 U.S. at 535 (rejecting argument that unconstitutional bias was harmless in light of defendant's "clear[]" guilt: "No matter what the evidence was against him, he had the right to have an impartial judge"); *Chapman v. California*, 386 U.S. 18, 23, 23 n.8 (1967) (recognizing the right to an impartial judge as among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error"). In other words, if the appellant successfully makes a bias claim, appellate nullification of the target judge's ruling (whether that ruling constitutes a judgment, a sentence, or something else) is automatic, and no showing of prejudice or harm is required. "Prejudice" in this context denotes harm to the appellant's cause, not prejudice (meaning bias) against the appellant.

[44] *See State v. Hayden*, ___ Kan. ___, 130 P.3d 24 (Kan. Mar. 17, 2006) (judicial misconduct throughout trial did not demonstrate bias towards defendant, but nonetheless prejudiced defendant and necessitated reversal).

[45] *Compare State v. Lake*, 12 Kan. App. 2d 275 (1987) (rejecting judicial-misconduct challenge because defendant failed to show prejudice; sua sponte considering if reversal necessary on recusal grounds, but consideration weak where defendant neither complied with recusal statute nor raised recusal on appeal), *with Alderson*, 260 Kan. at 469 (reversing sentence on recusal grounds even without showing of prejudice).

[46] *Crawford v. Washington*, 541 U.S. 36, 67 (2004) (concluding that whether an unavailable witness's testimonial statement is reliable cannot be left in judicial hands and adopting new confrontation-clause analysis).

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