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Civil and Criminal Procedure - Disqualification of District Judges for Prejudice in Wyoming

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CIVIL AND CRIMINAL PROCEDURE-- DISQUALIFICATION OF DISTRICT JUDGES FOR PREJUDICE IN WYOMING

Laws dealing with disqualification of judges for prejudice or bias have been a prolific source of controversy in the United States.[1] Historically, the question debated was whether prejudice or bias should be a sufficient ground for disqualification.[2] In recent years, the questions have concerned the wisdom of particular procedures establised to obtain recusation[3] of the prejudiced judge.[4] The task of this comment will be to examine the merits of Wyoming's civil vis-a-vis Wyoming's criminal procedure for disqualifying a district judge. In order to fully understand the potential effects these procedures may have in Wyoming, some references will be made to the effect similar procedures have had in foreign jurisdictions.

BACKGROUND

Although a court decision ideally represents the application of the "law", rather than the opinion of an individual judge, the demand for impartial justice has necessitated methods of disqualifying a biased judge.[5] Recognizing the fallibility of the judiciary, Wyoming's territorial legislators enacted disqualification statutes to assure the litigant a fair trial.[6] The United States Supreme Court has since insisted that a lack of the requisite impartiality violates due process of law.[7] The right of a litigant to an unbiased judge is thus firmly established. However, the boundaries of that right have been defined by each state. The lack of a prescribed procedure has resulted in disqualification laws that vary from

1. *See, Disqualification of Judges for Prejudice or Bias—Common Law Evolution, Current Status and The Oregon Experience.* 48 ORE. L. REV. 311, 407 (1969). *See also* 38 IND. L. J. 289 (1963).
2. State ex rel Barnard v. Bd. of Educ., 19 Wash. 8, 18, 52 P. 317, 321 (1898).
3. To "recuse" a judge is to disqualify him on grounds of interest, partiality or other incompetency. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1900 (1961).
4. *See* 38 IND. L. J. 289 (1963).
5. ". . . Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine." In re J. P. Linahan, 138 F.2d 650, 651-652 (2nd Cir. 1943).
6. WYO. STAT. § 1-53 (1957). This statute has been in force since 1877. WYO. STAT. § 1-59 (1957). This statute was enacted in 1877 but superseded in 1968.
7. Sheppard v. Maxwell, 384 U.S. 333, 357 (1966). *Cf.* Tumey v. Ohio, 273 U.S. 510, 523 (1927).

state to state.[8] It has also resulted in variegated civil and criminal disqualification requirements for Wyoming.

Presently, a statute governs recusation of the biased judge in civil litigation,[9] while a rule promulgated by the Supreme Court of Wyoming binds criminal prosecutions.[10] The following synopses will serve to illustrate the relevant provisions.

Synopsis of Wyoming Statute § 1-53.

Either party may file an affidavit of a belief of prejudice in the presiding judge that would preclude a fair trial. Within ten days after filing, the presiding judge must call on another to preside in the case.

Synopsis of Rule 23(d) of Wyoming Rules of Criminal Procedure.

The state or the defendant, 15 days prior to the date set for trial, may move for a change of district judge on the ground that the presiding judge is prejudiced against the movent. The judge shall forthwith call in another district judge to whom the same objections do not apply to preside in the case. No more than one change of judge for either party shall be granted.

There are significant differences between the two procedures. The most important and controversial difference is the lack of a requirement of an affidavit of prejudice in the criminal rule. This is particularly noteworthy since the require-

8. *Disqualification of Judges for Prejudice or Bias—Common Law Evolution, Current Status and The Oregon Experience.* 48 ORE. L. REV. 311, 332 (1969).

9. WYO. STAT. § 1-53 (1957). The relevant portion of the statute follows: "Whenever either party to a civil action in any district court of the state shall file an affidavit in the case, stating one or more of the following causes: . . .
3. That the person making the affidavit believes that on account of the bias, or prejudice, or interest of the presiding judge he cannot obtain a fair trial; . . . In either case the court in term or the judge in vacation shall, within ten days after filing such affidavit, make and enter an order changing the venue in such action or calling on some other judge of the district court of the state to preside in the trial of the case as hereinafter provided; provided, the presiding judge may on his own motion grant at any time a change of judge or change of venue, when it appears that the ends of justice would be promoted thereby.

10. WYO. R. CRIM. P. 23(d).
The state or the defendant within the time fixed in (a) above (15 days prior to the date set for trial) may move for a change of district judge on the ground that the presiding judge is biased or prejudiced against the movent and thereupon such judge shall forthwith call in another district judge to whom the same objections do not apply to preside in the case; but no more than one change of judge on behalf of either party shall be granted.

ment of only an affidavit of prejudice in the civil statute (without facts supporting the allegation) is itself highly controversial.[11] The other differences to be discussed are that the civil statute itself does not include a time of filing requirement,[12] a limit on the number of judges that may be disqualified,[13] nor a concern over whether the "same objections" apply to the replacement judge. These differences need to be considered in some detail.

AFFIDAVIT OF PREJUDICE[14]

Civil Statute

In Wyoming the statutory civil procedure for change of judge requires an affidavit containing a general allegation of prejudice.[15] "[THE] filing of an affidavit of prejudice deprives the original judge of . . . jurisdiction."[16] No facts as to the basis of the moving party's belief of prejudice are included.[17] The judge is ipso facto disqualified without a hearing on the truth or legal sufficiency of the allegation.[18] The prejudice which disqualifies a district judge in civil cases is thus unproved statutory prejudice. This civil statute does not seem to be concerned with whether the moving party's apprehensions are unreasonable or ill-founded.

In contrast, the federal legislators apparently deemed it necessary that the moving party demonstrate some basis for his allegation of prejudice. The federal statute requires, in any proceeding, an allegation of the facts and reasons underlying the moving party's belief that bias or prejudice exists.[19] The Supreme Court in *Berger v. United States*[20] asserted that this requirement is a "precaution against abuse . . . and adds to the certificate . . . the supplemental aid of the penalties at-

11. *See* 38 IND. L. J. 289 (1963).
12. WYO. STAT. § 1-53 (1957). The time of filing requirement is found in Wyoming Statute Section 1-56 (1957).
13. WYO. STAT. § 1-53 (1957). A limit on the number of judges existed in Section 1-63 but that statute was superseded by Rule 23(d) in 1968.
14. Prejudice is "(A) forejudgment; bias; preconceived opinion . . . That (condition of mind) which disqualifies a judge . . . which sways his judgment and renders a judge unable to execute his functions impartially in (a) particular case." BLACK'S LAW DICTIONARY 1343 (4th ed. 1951).
15. WYO. STAT. § 1-53 (1957).
16. Leitner v. Lonabaugh, 402 P.2d 713, 718 (Wyo. 1965).
17. State *ex rel* Petro v. Sheridan County, 389 P.2d 921 (Wyo. 1964).
18. Huhn v. Quinn, 21 Wyo. 51, 128 P. 514 (1912).
19. 28 U.S.C. 144 (1964).
20. 255 U.S. 22, 33 (1921).

tached to perjury." This requirement does not increase the burden upon the federal courts since there is ordinarily not a hearing on the merits of the allegation of prejudice.[21] If sufficient facts and reasons are included in the affidavit the judge is disqualified from proceeding further in the case.[22]

Although the requirement that facts be set out may not overburden the federal courts, it may in fact disrupt the administration of justice. There is some evidence that including facts which are believed to be the basis of a judge's prejudice may cause prejudice. In *State ex rel Brown v. Dewell*[23] the court noted that petitions to recuse the trial judge in a criminal case were "given wide publicity in the press, were commented unfavorably to the trial judge, and this aroused his resentment to the cause."[24] Arguably, presenting allegations reflecting on a judge's motives and integrity unsettles even the most impartial judge.[25] Yet, if the judge finds the allegations lacking in legal sufficiency he can continue in the case.[26]

It appears that the attempt to restrain one evil produces another. The attempt to restrain a party from disqualifying an unbiased judge may impair another party's chance for a fair trial.

Wyoming's statutory civil procedure seemingly permits the parties to freely choose their own judge. No showing is required and no factual reasons need be given for stripping the judge of his functions. Conceivably, an attorney might disqualify a particular judge because of a prior opinion in a similar case. The only actual safeguard preventing an allegation of non-existent prejudice is the individual attorney's integrity. The affidavit of prejudice itself, however, probably has some effect. For although the civil statute contemplates no sanctions or penalties for abusing the statute, the required affidavit probably inhibits excessive abuse.

21. *Id.* This court held that a trial judge does have the power to pass on the legal sufficiency of the affidavit filed against him.
22. Wolfson v. Palmieri, 396 F.2d 121 (9th Cir. 1968).
23. 131 Fla. 566, 179 So. 695 (1938).
24. *Id.* In this case the prosecution filed the affidavit of prejudice.
25. For evidence that judges may resent the allegation of prejudice in an affidavit see; JUDICIAL COUNCIL OF CALIFORNIA, PROCEEDINGS OF PRESIDING JUDGES WORKSHOP 68-69 (1965).
26. *Supra* note 20, at 33.

Criminal Rule

Rule 23(d) contains no statement that an affidavit of prejudice must be appended to the motion for a change of judge.[27] On its face the rule requires only that the party move for a change of judge on the ground that the presiding judge is prejudiced against the movent.[28] This deficiency in the rule may aggravate the abuses to which the statutory civil procedure is subjected. For under the rule, nothing prevents the overzealous advocate from "shopping for judges." Also under the rule in Wyoming the motion for a change of judge has become a tactic which can be utilized to secure a delay or other advantage for the moving party.[29]

CONSTITUTIONALITY[30]

The question of the constitutionality of these laws has not been adjudicated in Wyoming. Similar laws have been litigated in other jurisdictions, however, and they at least serve as guideposts. The usual attack has been to allege a usurpation by the legislature of a power reserved to the judiciary; the doctrine of separation of powers.[31] These arguments, however, concede that the legislature has plenary power to define the grounds which shall constitute the disqualification of a judge. But they hold that the parties themselves cannot be given the power to decide on the merits and fairness of a motion to change the judge.[32]

Civil Statute

Language similar to the Wyoming statute has been deemed satisfactory by a New Mexico court.[33] It was held that a charge of bias or prejudice under oath is at least an im-

27. WYO. R. CRIM. P. 23(d).
28. In an interview, Judge Vernon G. Bentley indicated that affidavits have customarily been filed along with the motion. Interview with Judge Bentley on October 7, 1970. Judge Bentley presides over the Second Judicial District of Wyoming.
29. *Id.*
30. No attempt has been made to treat this subject exhaustively. It has been included to illustrate policy statements about Wyoming's present laws on disqualification.
31. Daigh v. Schaffer, 23 Cal. App.2d 449, 73 P.2d 927 (1937).
32. *Id.*
33. Moruzzi v. Federal Life and Casualty Co., 42 N.M. 35, 75 P.2d 320 (1938).

putation of such disqualification sufficient to save the statute from successful attack on constitutional grounds.[34]

Criminal Rule

A California criminal statute similar to the Wyoming rule was successfully attacked as being unconstitutional.[35] The court in *Austin v. Lambert*[36] held that a statute providing that a party may peremptorily challenge a judge assigned to hear the cause, whereupon, without any further act or proof another judge shall be assigned, is unconstitutional as an unwarranted interference with the powers and duties of the courts. And in *Daigh v. Schaffer*[37] the court insisted that the legislature could not delegate to a private citizen the right to terminate a judge's authority, based upon his own peculiar desires, wishes, or antipathies.

As noted above, Wyoming's criminal rule as to change of judge was promulgated by the Supreme Court of Wyoming. As such, there is no invasion of the judiciary's power by the legislature. It is not likely that the statute or the criminal rule will be successfully attacked on constitutional grounds. But as these cases illustrate there may be serious policy reasons for re-evaluating the power granted to the private citizen by the legislature and the judiciary.

TIME OF FILING

Time of filing requirements have been enacted to provide for the practical administration of justice. They also serve to protect against dilatory tactics and promote society's right to have cases adjudicated with the greatest possible dispatch.[38]

Civil Statute

The civil statute itself does not mention a time requirement for filing the affidavit of prejudice.[39] The provision for time of filing is stated in Wyoming Statute Section 1-56.[40]

34. *Id.*
35. Austin v. Lambert, 11 Cal.2d 73, 77 P.2d 849 (1938).
36. *Id.*
37. Daigh v. Schaffer, *supra* note 31.
38. Interview with Judge Vernon G. Bentley *supra* note 28.
39. WYO. STAT. § 1-53 (1957).
40. WYO. STAT. § 1-56 (1957).

There it is provided that "if a change of judge shall be desired by either party, the affidavit required by law and the motion for a change of judge shall be filed not less than *five* days before trial."[41] No case law has determined whether this statute precludes untimely filing for good cause.

Criminal Rule

The criminal rule requires filing for a change of judge *fifteen* days prior to the date set for trial.[42] There has been no case law interpretation of untimely filing under this law either.

A related issue presented by these laws on filing requirements is the interpretation of the meaning of "date set for trial". The trial date as contemplated in these laws is not clear. The only interpretation found in Wyoming case law held that "trial . . . begins when any controverted question of law or fact is presented to the court for determination."[43] This interpretation precludes filing after the judge has ruled upon any motion, petition or demurrer.[44] This could work hardship in cases where the trial is not held until long after the judge rules upon these preliminary matters. The party may discover the facts during such period which give rise to a belief that the judge is prejudiced.

The federal statute has been interpreted to permit disqualification even though the affidavit is filed after the statutory time has expired, if good cause for late filing is shown.[45] If the court feels the objection is being used merely for the purpose of delay, the attempted disqualification can be defeated.[46]

It would seem that if a party is able to prove actual or probable prejudice on the part of the judge, his remedies ought not to be wholly withdrawn even if the time for filing has run.

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41. WYO. STAT. § 1-56 (1957).
42. WYO. R. CRIM. P. 23(d).
43. Murdica v. State, 22 Wyo. 196, 137 P. 574 (1913).
44. In the interview with Judge Bentley, *supra* note 28, he stated that affidavits have been filed and accepted after these preliminary matters.
45. Hurd v. Letts, 80 App. D.C. 233, 152 F.2d 121 (1945).
46. Eisler v. United States, 83 App. D.C. 315, 170 F.2d 273 (1948).

NUMBER OF JUDGES

A limitation on the number of judges that may be disqualified serves as a safeguard for the administration of the courts. If there were no such limitation under the automatic disqualification procedures in Wyoming, a party might attempt to disqualify all of the district judges.

Civil Statute

No such limitation on the number of judges exists under the statutory procedure for change of judge.[47] Multiple objections may apparently be made in civil cases in Wyoming. Formerly, Wyoming law stated that only one change of judge could be granted in both civil and criminal cases, but that provision was replaced in 1968 by Rule 23(d).[48]

Criminal Rule

Rule 23(d) states that no more than one change of judge on behalf of either party shall be granted.[49] However, a potential safeguard for the moving party exists in the rule. Although not permitted to disqualify more than one judge, the moving party at least seems to have a choice as to the replacement judge. The rule declares that the presiding judge must call in another judge "against whom the same objections do not apply".[50] These two clauses are obviously contradictory and ambiguous. Either case law interpretation or legislative correction is needed to clarify this meaning.

Under a law that permits disqualification without an affidavit of prejudice a reasonable limit on the number of judge-changes seems desirable. In an Arizona case the court held that the right of a party to disqualify judges is "exhausted when a request for disqualification is honored without an affidavit of prejudice".[51] This limitation places a responsibility on the replacement judge to be particularly ready to disqualify himself if there is any chance that he may not

47. WYO. STAT. § 1-53 (1957).
48. WYO. STAT. § 1-63 (1957). This was probably not an intentional omission. This statute was superseded by Rule 56 of the Wyoming Rules of Criminal Procedure.
49. WYO. R. CRIM. P. 23(d).
50. WYO. R. CRIM. P. 23(d).
51. American Buyers Life Ins. Co. v. Superior Court of Maricopa County, 84 Ariz. 377, 329 P.2d 1100 (1958).

be impartial. But it would seem that if a party is able to prove actual or probable prejudice on the part of the judge his remedies ought not to be wholly withdrawn even if he has previously discharged a judge for prejudice. In at least one jurisdiction, it has been held that if a party desires to disqualify a subsequent judge, he can do so by setting out the facts showing prejudice.[52]

CONCLUSION

"Any tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias."[53] Wyoming law presently acquiesces in this command; perhaps too enthusiastically.

The following are proposed to remedy some of the more apparent problems in Wyoming laws dealing with disqualification of judges for prejudice.

1) The laws in both civil and criminal cases should be harmonized. Unless substantial policy reasons support variations in time of filing and judge-change procedures, the civil and criminal procedures are unnecessarily confusing.

2) An affidavit of prejudice with a certificate of good faith should be required to disqualify the presiding judge. This requirement is not overly burdensome to the moving party. In practice it may even be issued rather mechanically. But, it will serve to remind the parties of the seriousness of their actions.

3) Only one judge-change should be permitted under a procedure that permits disqualification without a showing of facts.

4) Some mechanism should be established in which a party can present facts of actual prejudice if the time for filing has passed or if the party has previously discharged a judge. Technicalities should not stand in the way of justice.

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52. Home Owners Loan Corp. v. Stookey, 59 Idaho 267, 81 P.2d 1096 (1938).

53. Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968).

Admittedly these proposals will not be a panacea. However, they may mitigate some of the abuses while maintaining the image of impartial justice.

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APPENDIX A--PROPOSAL

DISQUALIFICATION OF JUDGES FOR PREJUDICE IN CIVIL AND CRIMINAL CASES

Either party or side to an action may file an affidavit of prejudice against the presiding judge 15 days prior to the date set for trial. The affidavit shall state that either the party or his counsel believes a fair and impartial trial is precluded because of the prejudice or bias of the presiding judge. The affidavit shall also contain or have appended thereto a certificate that such affidavit is made in good faith. The presiding judge shall forthwith call in another district judge to try the case. Only one change of judge on behalf of either party shall be granted without a hearing.

However, a hearing shall be granted if a litigant insists that good cause for late filing can be shown; or a hearing shall be granted if a litigant insists that facts of actual prejudice by a replacement judge can be shown.