

Sharon Magill

From: William Dorsaneo [wdorsane@mail.smu.edu]
Sent: Friday, March 08, 2002 11:03 AM
To: smagill@mail.smu.edu
Subject: FW: amicus briefs and recusal

-----Original Message-----

From: PAMELA BARON [mailto:PBARON1@austin.rr.com]
Sent: Tuesday, February 26, 2002 3:24 PM
To: Paula Sweeney (E-mail); wdorsane@post.cis.smu.edu; sarah.duncan@courts.state.tx.us; jan.patterson@3rdcoa.courts.state.tx.us; nathan.hecht@courts.state.tx.us; Chris Griesel; Charles Babcock; Skip Watson; fgilstrap@hillgilstrap.com; Nina Cortell; martinj@tdaw.com; wedwards@edwardsfirm.com
Subject: amicus briefs and recusal

My memory is slipping away quickly. The recusal on amicus issue is more complicated than I indicated at the meeting today. Here is what I wrote on the subject last year. Pam

D. Participation by an amicus may necessitate disqualification or recusal of a judge. Rules governing disqualification and recusal are not limited just to parties. Under Tex. R. Civ. P. 18b, applicable to appeals through Tex. R. App. P. 16.2, disqualification is mandatory if a judge has "served as a lawyer in the matter in controversy." Tex. R. Civ. P. 18(1)(a). This would include representation of an amicus by the judge or his or her former law firm. Similarly, recusal is necessary if the judge (or certain relatives) has an "interest that could be substantially affected by the outcome of the proceeding." Tex. R. Civ. P. 18(2)(f)(ii). A amicus with a similar suit pending is likely to be substantially affected, thus necessitating recusal. Finally, recusal is required if the judge (or certain relatives) has acted as a lawyer "in the proceeding." Tex. R. Civ. P. 18b(2)(g). This phrase is broad enough to encompass participation by an amicus. The parties may, however, waive any ground for recusal. Tex. R. Civ. P. 18b(5).

There are no statistics on how often participation by an amicus has necessitated recusal of an appellate judge. One publicized incident, though, underscores the complexities of determining when recusal is mandated or simply advisable. In *Gifford-Hill & Co. v. Wise County Appraisal Dist.*, the daughter of a sitting justice served as a lobbyist for an amicus. Although the Court overruled the motion of a party to require recusal on rehearing, 35 Tex. Sup. Ct. J. 463 (Feb. 19, 1992), the matter developed into an issue in the justice's subsequent election campaign. See *Super Tuesday Scramble*, The Texas Lawyer 1 (Mar. 2, 1992).