BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY THE SUPREME COURT OF TEXAS

No. 30648

IN THE MATTER OF ALTO V. WATSON, III

OPINION AND ORDER

Heard November 14, 2003

COUNSEL:

For Movant, Alto V. Watson, III, Vincent Lee Marable III, Paul Webb, P.C., Wharton, Texas

For Respondent, State Bar of Texas Commission for Lawyer Discipline, Linda A. Acevedo, Assistant Disciplinary Counsel, Austin, Texas; J.G. Molleston, Assistant Disciplinary Counsel, Houston, Texas.

Board of Disciplinary Appeals members Karen L. Watkins and Kathy J. Owen not participating.

OPINION:

Pending before the Board is Movant Alto Watson's Motion to Declare the September 2, 1999, Board of Disciplinary Appeals Judgment Void based on the alleged disqualification of former Board member Alex Gonzales. For the reasons set forth below, we have determined that the motion should be denied.

In 1999 we suspended Beaumont attorney Alto Watson's law license for five years after finding that he had violated the terms and conditions of a 1995 disciplinary judgment.[1] Watson now collaterally asks us to declare the 1999 judgment that suspended his license void on the ground that BODA member Alexander J. Gonzales ("Gonzales") was constitutionally disqualified from hearing the probation revocation. Watson asserts several bases for the alleged disqualification including Article V, Section 11 of the Texas Constitution and its statutory equivalent, Texas Rules of Civil Procedure 18b(1) ("TRCP"), as well as recusal grounds including various Canons of the Texas Code of Judicial Conduct,[2] the Due Process Clause of the United States Constitution,[3] and TRCP 18b(2). Watson did not move to disqualify or recuse Gonzales at any time while the revocation proceeding was pending before BODA.

Because we conclude that Gonzales was not constitutionally disqualified pursuant to TRCP 18b(1)(b), and because recusal (as opposed to disqualification) cannot support a collateral attack on a judgment, we deny the motion.

Procedural History

In 1995 Watson and the State Bar of Texas agreed to a disciplinary judgment that imposed a five-year suspension from practicing law but fully probated the suspension so long as Watson met certain terms and conditions.[4] In April 1999 the State Bar Commission for Lawyer Discipline

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[1] BODA Cause No. 17112; *In re Alto V. Watson, III* (September 2, 1999).

[2] *Reprinted in* TEX. GOV'T CODE ANN., tit.2, subtit. G app. B (Vernon 1998).

[3] Watson does not provide additional citation or annotation for this ground.

[4] The 1995 judgment found that Watson mishandled client funds, and the terms and conditions of probation prohibited him from having custody of any client funds or maintaining a

petitioned this Board to revoke the probation and actively suspend Watson's license.[5] To facilitate scheduling pre-trial motions and the hearing on the merits, the chairman assigned the matter to a three-member panel.[6] On July 22, 1999, a panel on which Gonzales served heard a motion argued by the Commission for Lawyer Discipline and joined by Watson's former firm, Reaud, Morgan & Quinn, Inc., to quash Watson's discovery motions.

During the hearing on the merits in August 1999, Watson testified that he had commingled client funds, used trust funds for personal purposes, and admitted other conduct which violated the terms and conditions of his probation. We found that Watson had committed material violations and revoked the probation, thereby actively suspending his law license. Watson appealed to the Supreme Court of Texas which affirmed our judgment without opinion.[7]

Watson then filed a motion for rehearing in the Supreme Court and a motion to remand the case to BODA for development of a record concerning the alleged constitutional disqualification of Gonzales, which Watson raised for the first time. The sole ground asserted for the alleged disqualification in both motions was that Gonzales' law firm represented a client that Watson was suing in litigation unrelated to the disciplinary proceeding. The Commission for Lawyer Discipline

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client trust account. Additionally, all Watson's work was to be supervised by another attorney, and he could only appear in court to assist lead counsel.

[5] BODA has jurisdiction pursuant to TEXAS RULES OF DISCIPLINARY PROCEDURE (TRDP) 2.20 and 7.08J to hear petitions to revoke disciplinary judgments of probated suspension entered pursuant to TRDP Part II (judgments other than those entered by a district court). If we determine that the attorney has materially violated a term or condition of the probation, we must actively suspend the attorney from the practice of law for the period of time originally assessed without credit for any period of probation served.

[6] BODA Order signed July 20, 1999. Pursuant to TRDP 7.05, a panel of three BODA members may hear any matter.

objected that Watson had failed to show any facts alleging a constitutional disqualification and had, at best, argued that Gonzales was subject to recusal. The Court overruled both of Watson's motions, and the judgment became final.[8]

More than one year later, Watson brought a declaratory judgment action against the State Bar of Texas and BODA in Jefferson County District Court seeking to declare our judgment suspending his license void due to Gonzales' alleged disqualification.[9] Watson's ground for the alleged disqualification was identical to that raised on rehearing before the Supreme Court. Watson maintained that the district court had jurisdiction to hear a collateral attack on a final BODA judgment asserting that one of the panel members was constitutionally disqualified. The district court overruled pleas that a district court did not have jurisdiction under disciplinary procedure to interfere with a final BODA judgment and granted Watson a partial summary judgment declaring the BODA judgment of suspension void.

The State Bar and BODA then petitioned the Supreme Court to mandamus the district court to vacate its judgment, and the State Bar obtained emergency relief prohibiting the district court from taking any further action in the case. *In re State Bar of Texas,* 113 S.W.3d 730 (Tex. 2003) (orig. proceeding). In conditionally granting the writ, the Court held that the district court's order effectively revoking the BODA suspension judgment was an abuse of discretion but noted,

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[7] *In re Alto V. Watson, III*, Case No. 99-0867 (January 6, 2000).

[8] *In re Alto V. Watson, III*, Case No. 99-0867 (May 11, 2000).

[9] *Alto V. Watson, III v. State Bar of Texas and Texas Board of Disciplinary Appeals*, Case No. B165204, District Court of Jefferson County, Texas, 60th Judicial District. Watson also sought additional relief in the form of organizational changes to the Texas attorney

however, that Watson could raise the "*disqualification* issue before BODA in accordance with its procedural rules." *Id.* at 734 (emphasis added). This motion by Alto Watson followed.

Watson's Argument

Watson's factual basis for the alleged disqualification involves linking together a chain of events unrelated to the parties or facts underlying the 1999 revocation proceeding. Watson maintains that Gonzales was disqualified because, at the time of the revocation hearing in August 1999, Gonzales was a partner in the law firm of Hughes & Luce, LLP, that listed Wal-Mart Stores, Inc., as one of its representative clients in a legal directory. In April 1999, Watson had obtained a large sanctions award against Wal-Mart in a premises liability suit.[10] Following the sanctions award, Wal-Mart sent correspondence to certain unidentified lawyers and law firms stating that it had "retained an attorney who practices solely in suing other attorneys for professional malpractice to see if there is anything we can do in regard to the Plaintiff's attorney or this judge."[11] Watson was not named in this correspondence.

From these facts alone, Watson argues that Gonzales' partnership in a firm representing a party adverse to Watson's client in an unrelated case constitutes an "interest" sufficient to disqualify him in the disciplinary matter.

Judicial Disqualification

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disciplinary system, including financial disclosure requirements for volunteers serving on boards such as BODA, which he does not raise here.

[10] *Meissner v. Wal-Mart Stores, Inc*., Cause No. A-159,432, 58th District Court of Jefferson, County, Texas ("the Meissner case").

[11] Exhibit V to Watson's Motion to Declare September 2, 1999 Board of Disciplinary Appeals Judgment Void Due to Disqualification of Judge Alex Gonzales.

Judges are presumed to be qualified unless and until evidence is offered to the contrary. *Sparkman v. Peoples Nat'l Bank,* 553 S.W.2d 680, 681 (Tex. Civ. App.—Tyler, 1977, writ ref'd n.r.e.). "All judges have the duty to sit and decide matters before them unless a basis exists for disqualification or recusal." *In re K.E.M.,* 89 S.W.3d 814, 819 (Tex. App.—Corpus Christi 2002, no pet.) citing *Monroe v. Blackmon,* 946 S.W.2d 533, 536 (Tex. App.—Corpus Christi 1997, orig. proceeding). The obligation to hear a case absent grounds for disqualification or recusal is as compelling as the requirement to step down when there is a reason to do so. *Rogers v. Bradley,* 909 S.W.2d 872, 879 (Tex. 1995) (Enoch, J., concurring).

The procedural rules governing the Texas attorney disciplinary system incorporate the constitutional standard for judicial disqualification. *See,* TRDP 7.07. BODA INTERNAL PROCEDURAL RULE 2.03(a) provides that the disqualification of BODA members is governed by TRCP 18b which sets out the three exclusive bases for disqualifying judges:

> Judges shall disqualify themselves in all proceedings in which:
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> > (a) they have served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter; or
> >
> > (b) they know that, individually or as a fiduciary, they have an interest in the subject matter in controversy; or
> >
> > (c) either of the parties may be related to them by affinity or consanguinity within the third degree.

TRCP 18b(1).[12] Texas courts have consistently held that these three grounds are the exclusive bases for disqualification. *Love v. Wilcox*, 119 Tex. 256, 28 S.W.2d 515, 518 (Tex. 1930) (orig. proceeding); *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 843-844 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (Code of Judicial Conduct does not provide rounds for judicial disqualification), citing *Manges v. Guerra*, 673 S.W.2d 180 (Tex. 1984).[13]

Disqualifying "Interest" Under TRCP 18b(1)(b)

In the context of disqualification, "interest" is narrowly defined as "that interest, however small, which rests upon a direct pecuniary or personal interest in the result of the case presented to the judge or court." *Cameron v. Greenhill*, 582 S.W.2d 775, 776 (Tex. 1979) (per curiam). The interest in the subject matter of the litigation must be direct, real, and capable of an estimated value that the judge may gain or lose by the judgment rendered. *Maxey v. Citizens Nat'l Bank of Lubbock*, 489 S.W.2d 697, 702 (Tex. Civ. App.—Amarillo 1972), *rev'd on other grounds*, 507 S.W.2d 722 (Tex. 1974). If the judge's interest in the case in question is indirect, uncertain, or remote, and the result of the case will not necessarily subject him to a personal gain or loss, he is not disqualified to sit. *Hidalgo County Water Improvement Dist. No. 2 v. Blalock*, 157 Tex. 206, 301 S.W.2d 593, 596 (1957) (orig. proceeding). Thus, the pecuniary gain or loss to the judge must be an immediate result

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[12] Disqualification of appellate judges is also governed by the Texas Constitution, and is set out in TEXAS RULES OF APPELLATE PROCEDURE 16.1. In a revocation proceeding, BODA sits as a trial court.

[13] See also, Bleil & King, *Focus on Judicial Recusal: A Clearing Picture*, 25 TEX. TECH L. REV. 773, 789 (1994) (citing Calvert, *Disqualification of Judges*, 47 TEX. B. J. 1330, 1337 (1984) which also discussed the *Manges v. Guerra* decision as resolving the question whether the Code of Judicial Conduct should be considered as grounds for disqualification by limiting the grounds to those listed in the Texas Constitution).

of the judgment to be rendered in the pending case. *Narro Warehouse, Inc. v. Kelly,* 530 S.W.2d 146, 149 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

As a matter of law, Gonzales was not disqualified. Watson's argument relies on allegations which he admits are not proven. Watson concedes that there is no evidence that Gonzales knew about the Meissner litigation; or that Gonzales knew that Watson was suing Wal-Mart or had obtained a sanctions award against Wal-Mart; or that Gonzales knew of the Wal-Mart correspondence to its "flat fee attorneys" which does not identify Watson by name. Watson admits that there is no evidence that Hughes & Luce was a "flat fee attorney," or that it received the Wal-Mart correspondence concerning the sanction, or that Gonzales or Hughes & Luce was actively representing Wal-Mart in any matter at the time of the sanctions award or the disciplinary hearing. Watson further concedes that the Meissner case had no relationship to the revocation proceeding and that Hughes & Luce did not represent Wal-Mart in the Meissner case.

Despite the lack of any direct evidence that Gonzales knew about what Watson characterizes as a "stated policy" by Wal-Mart, Watson maintains that Gonzales had a fiduciary duty to Wal-Mart to help it "do anything" it could to him. According to Watson, if Gonzales failed to act in accordance with Wal-Mart's best interest, Wal-Mart could terminate its relationship with Hughes & Luce, thereby potentially affecting the firm and Gonzales' income. This speculative loss of income to Hughes & Luce, Watson contends, created an interest in the disciplinary action sufficient to constitutionally disqualify Gonzales.

Clearly, when applying the applicable definition of "interest" under TRCP 18b(1)(b), Watson has misconstrued the interest required under Texas law to disqualify a judge. Watson has not shown that Gonzales or his firm would immediately gain or lose any direct pecuniary interest as

a result of a judgment suspending or not suspending Watson's law license. As a matter of law, Gonzales did not have an "interest" in the subject matter of the disciplinary proceeding, which was Watson's conduct in the cases giving rise to the revocation – not his Wal-Mart litigation.

Watson also has mischaracterized the nature of an attorney's fiduciary obligation to a client. Under Watson's theory, Gonzales' fiduciary duty to his firm's client, Wal-Mart, required that Gonzales vote to revoke Watson's probation. The fiduciary obligation arising from the attorney-client relationship does not, it seems to us, extend nearly that far. Texas courts have described the obligation as follows: "Attorneys owe their clients a fiduciary duty of 'most abundant good faith,' requiring absolute perfect candor, openness and honesty, and the absence of any concealment or deception."

Deutsch v. Hoover, Bax & Slovacek, L.L.P., 97 S.W.3d 179, 196-97 (Tex. App.—Houston [14 Dist.] 2002, no pet.). This obligation was not threatened by Gonzales' participation in the Watson revocation proceeding nor by Gonzales' potential vote in favor of Watson in the proceeding. In fact, Watson admits that Wal-Mart would not have had a breach of fiduciary duty claim against Gonzales had Gonzales known of the Meissner litigation and the sanctions award and failed to vote to revoke Watson's probation. (R.R. 35). Moreover, Watson's interpretation of Gonzales' fiduciary duty to a client unrelated to the disciplinary proceeding in effect requires that Gonzales violate his duty as a Board member to sit and determine cases impartially.

Recusal, distinct from disqualification, cannot render BODA's prior judgment void. In an attempt to broaden his grounds for relief, Watson now asks us to consider his motion "in the nature of a bill of review." (R.R. 50). By recasting his motion in the guise of a bill of review, Watson attempts to broaden the scope of his argument beyond pure disqualification to include what are

actually recusal issues. Although disqualification and recusal are frequently used interchangeably, such failure to distinguish them is "grievous error."[14]

Watson's attempt to impose a disqualification result with a recusal standard fails for two reasons. First, Watson seeks to declare our judgment suspending his law license void, not voidable. At all times during the proceeding in Jefferson County District Court, Watson characterized his attack on our prior judgment as a collateral one in an attempt to establish jurisdiction in that court. Only judgments rendered by a judge who is constitutionally disqualified, and not merely subject to recusal, are void and without effect. *In re Union Pacific Resources Co.,* 969 S.W.2d 427, 428 (Tex. 1998) (orig, proceeding). If a judgment is not void, but merely erroneous or voidable, it is not subject to collateral attack. *Cook v. Cameron,* 733 S.W.2d 137, 140 (Tex. 1987). Moreover, only disqualification may be raised at any time. *Buckholts Indep. School Dist. v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982); *Fry v. Tucker,* 146 Tex. 18, 202 S.W.2d 218, 222 (1947). Recusal is waived if not timely raised.[15] TRCP 18a; *Union Pacific*, 969 S.W.2d at 428.

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[14] Kilgarlin & Bruch, *Disqualification and Recusal of Judges,* 17 ST. MARY'S L.J. 599, 601 (1986).

[15] Watson incorrectly argues that *Sun Exploration & Prod. Co. v. Jackson,* 783 S.W.2d 202 (Tex. 1989) (Spears, J., concurring) allows him to raise these grounds outside the time prescribed by TRCP 18a. That case is distinguishable because it was still on direct appeal. In addition, the language Watson relies on in *Sun Exploration* is advisory only. Thus, even were Watson within the four year limit for filing a bill of review, his attempt to raise a recusal issue which existed at the time of the original hearing would be questionable. *See, Keene Corp. v. Rogers,* 863 S.W.2d 168, 172 (Tex. App.—Texarkana 1993, no writ) (good cause existed for filing a late motion to recuse when the basis of the motion did not exist at the time the trial began); and *Enterprise-Laredo Assocs. v. Hachar's, Inc.,* 839 S.W.2d 822, 840-841 (Tex. App.— San Antonio), *writ denied*, 843 S.W.2d 476 (Tex. 1992) (per curiam) (TRCP 18a requirement that motion for recusal be filed ten days before trial mandatory and rule allows no exception even for good cause).

Second, a bill of review must be filed within four years of the date the judgment in question was signed. TEXAS CIVIL PRACTICE & REMEDIES CODE § 16.051; *Caldwell v. Barnes*, 975 S.W.2d 535, 538 (Tex. 1998). Watson filed this motion on October 6, 2003, more than four years from the date of the judgment revoking his probation, and has provided no grounds for extending or excusing the time limit.

Watson's other arguments advocate policy changes that are far beyond the scope of this collateral attack on a judgment. Watson urges that the standard for disqualification should be changed in the context of the Texas disciplinary system. However, such changes would require revisions to the State Bar Act[16] and the Texas Rules of Disciplinary Procedure, and are therefore beyond the jurisdiction of this body.

Accordingly, we find that Watson has not demonstrated that Gonzales was constitutionally disqualified to hear Watson's revocation of probation proceeding in 1999, and we today deny Watson's Motion to Declare September 2, 1999 Board of Disciplinary Appeals Judgment Void.

IT IS SO ORDERED.

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[16] TEXAS GOVERNMENT CODE ANN. § 81.001 *et seq.* (Vernon 1998).

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S. Jack Balagia, Jr., Chairman

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James S. Frost, Vice Chairman

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William D. Greenhill

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Robert Flowers

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Paul D. Clote

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Yolanda de León

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Clement H. Osimetha

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Jose I. Gonzalez-Falla

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Thomas E. Pitts

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Carol E. Prater

OPINION DELIVERED: January 22, 2004