



## Difficult Choices

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Since reading of the controversy between attorney Stephen J. Dennis and Workers' Compensation Court Judge George E. Healy, Jr., I have been thinking about the difficult choices facing an attorney when the natural tension between lawyer and judge escalates (or degenerates) into personal animosity.

Stephen Dennis is a vigorous and respected advocate for his clients, who are, for the most part, employees seeking redress for injuries in the Rhode Island Workers' Compensation system. Judge Healy, equally respected, is a vigorous champion and one of the architects of the procedural and substantive changes in the Workers' Compensation system that, among other things, have substantially reduced the cost of Workers' Compensation Insurance in Rhode Island. Attorney Dennis is one of several claimants' attorneys who have criticized these changes as prejudicial to injured workers. He has also criticized and challenged the leadership of the Court, which includes Judge Healy, for authoring and advocating for what he perceives to be prejudicial reforms.

This conflict forms the context in which Stephen Dennis filed a motion asking Judge Healy to recuse himself after the Judge sent him a copy of one of the court-authored reforms with a personal note including text which Stephen interpreted as indicating the Judge's animosity toward him. Judge Healy denied the motion to recuse and fined the attorney for filing a frivolous motion.

What follows is not a commentary on the Dennis/Healy situation but is rather some thoughts on the Hobson's choice facing any lawyer who becomes convinced, rightly or wrongly, that a judge before whom the lawyer is appearing harbors great personal animosity toward the lawyer.

First, of course, the lawyer must decide whether or not the judge's per-

ceived animosity could prejudice the client's cause. If the lawyer decides that there is a substantial possibility that it could, the lawyer has two options: 1) ask the judge to recuse; or 2) withdraw from the case – neither an attractive option. Obviously, the client's wishes must be followed, but which option – attempt to remove the judge, or change lawyers – to recommend?

Withdrawal and substitution of new counsel (even assuming it is possible) is expensive to both lawyer and client and may, in itself, prejudice the client. But is an attempt to force recusal any better? The case law on recusal for judicial bias against an attorney seems to suggest that the personal animosity between a judge and a lawyer form a basis for recusal, but only if the animosity stems from an extra-judicial relationship (e.g., an altercation on the golf course). However, even if the attorney is convinced he or she has grounds for a motion to recuse, the fact is, such motions have an extremely low success rate, and, if denied, is it not at least somewhat likely that the motion itself may exacerbate the controversy and, thus, actually increase the likelihood of prejudice to the client?

Indeed, if the lawyer has reached a good-faith belief that the judge's personal animosity towards him or her could be prejudicial to the client, is the lawyer bound to withdraw from the case, or at least attempt to do so, before filing a motion that could exacerbate the situation? And, what if the motion is filed and denied, can the lawyer nonetheless continue to represent the client in the case,

given the lawyer's belief that his or her appearance may be prejudicial to the client?

Finally, what about subsequent cases? If the lawyer is convinced that a judge has a personal bias, can the lawyer ever, at least as long as so convinced, enter an appearance on behalf of a client in a subsequent case before that judge?

Tough questions, and as Stephen Dennis' case demonstrates, not always theoretical ones.

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On another matter, several prosecutors took umbrage at my characterization of the government as "angry and vengeful" in my inaugural President's message praising the efforts of defense attorneys such as Robert Mann, Joel Chase and Jeffrey Pine in extraordinarily controversial cases. The lawyers, named and unnamed, that I sought to recognize are those who defend extremely unpopular clients in cases where public and political sentiment against the defendant runs high, and the defense attorney is forced to defend the client in a poisonous climate and often simultaneously in multiple forums. I intended no criticism of the prosecutors in such cases, whose job is often complicated by the same public and political pressures as defense attorneys. I recognize the vital role prosecutors play in an ordered society and give thanks and praise for the quality and integrity of Rhode Island's prosecutors; municipal, state and federal.