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# JUDICIAL DISQUALIFICATION BASED ON A CONFLICT OF INTEREST

## I. INTRODUCTION

The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. We must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.<sup>1</sup>

The reasoned opinion of a judge guides the search for truth in the courtroom. The concern that this opinion be brought to bear fully and fairly on reliable facts is reflected most visibly in the rules of evidence. These rules control what may be brought into the courtroom by the litigants. But there is also the danger that a judge may upset the balance of impartiality in the judicial process. The danger exists not because of any lack of diligence on the part of the judge but because the judge is human, and the duty of constant, reasoned disinterestedness is a heavy one.

To prevent influences upon the judge that might taint the judicial process, despite the greatest diligence and rectitude, Congress has identified by statute the circumstances in which a judge must disqualify himself from hearing a matter.<sup>2</sup> Though statutory provisions for dis-

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1. *Public Util. Comm'n v. Pollak*, 343 U.S. 451, 466-67 (1952) (separate opinion of Frankfurter, J.).

2. 28 U.S.C. § 144 (1976) provides:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

28 U.S.C. § 455 (1976) provides:

qualification of a judge have been in effect since almost the turn of the

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

century,<sup>3</sup> the Supreme Court's recent unavoidable difficulties with the "reasonable appearance of disinterestedness"<sup>4</sup> have forced Congress to reevaluate the mechanisms established to protect that appearance in the federal judiciary.<sup>5</sup> The concerns reflected by Congress in the 1974 revision of 28 U.S.C. section 455 can be broken down into seven major areas: the judge's interest in the outcome of the litigation,<sup>6</sup> the interest of a member of the judge's family in the outcome of the litigation,<sup>7</sup> the judge's prior professional involvement in the litigation,<sup>8</sup> the judge's knowledge of evidentiary facts,<sup>9</sup> the judge's relationship to persons involved in the litigation,<sup>10</sup> the judge's impartiality in fact,<sup>11</sup> and the ap-

3. 28 U.S.C. §§ 144 and 455 (1976) were originally passed by Congress in 1911. See ch. 231, §§ 20-21, 36 Stat. 1090 (1911).

4. See text accompanying note 1 *supra*.

5. Though the events precipitating the amendment of 28 U.S.C. § 455 and the amendment itself have been discussed extensively, see, e.g., *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236 (1978); Note, *Disqualification of Judges and Justices in Federal Courts*, 86 HARV. L. REV. 736 (1973); Note, *Justice Rehnquist's Decision to Participate in Laird v. Tatum*, 73 COLUM. L. REV. 106 (1973); Rehnquist, *Sense and Nonsense about Judicial Ethics*, REC. A.B. N.Y. CITY 694 (1973); Traynor, *Forward: The Code Is Clear*, 1972 UTAH L. REV. 333; Armstrong, *The Code of Judicial Conduct*, 26 SW. L.J. 708 (1972); Ainsworth, *Judicial Ethics—A Crisis Abates*, 45 TUL. L. REV. 245 (1971); Edwards, *Commentary On Judicial Ethics*, 38 FORDHAM L. REV. 259 (1969), a short summary of those events might be helpful. On May 14, 1969, Justice Abe Fortas resigned his seat on the United States Supreme Court. His action was taken because a man with whom he had had financial dealings was about to be indicted by a federal grand jury. Clement F. Haynsworth was nominated by President Nixon to take the seat vacated by Justice Fortas. However, the Senate refused to consent to the nomination because Judge Haynsworth had failed to disqualify himself in situations where his decision to hear the case created what appeared to be conflicts of interest. See, e.g., NOMINATION OF CLEMENT HAYNSWORTH, JR., S. EXEC. REP. NO. 91-12, 91st Cong., 1st Sess. 24-53 (1969). During this time, the American Bar Association (ABA) began a review of its Canons of Judicial Ethics, appointing a committee which was chaired by Roger Traynor, former Chief Justice of the Supreme Court of California. In 1972, the ABA promulgated the work of this committee as the ABA CODE OF JUDICIAL CONDUCT. See 58 A.B.A. J. 1207 (1972). The ABA Code was adopted without substantial revision by the Judicial Conference of the United States in April, 1973. See H.R. REP. NO. 93-1453, 93d Cong., 2d Sess. 2 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6353. Also in 1972, Justice Rehnquist refused to disqualify himself in *Laird v. Tatum*, 408 U.S. 1 (1972), (memorandum of Rehnquist, J. at 409 U.S. 824 (1972)) despite the fact that he had publicly expressed views on the matters relating to the case while he was an Assistant Attorney General. See generally Note, *Justice Rehnquist's Decision to Participate in Laird v. Tatum*, 73 COLUM. L. REV. 106 (1973). It was against this background that Congress in 1974 enacted Pub. L. 93-512, amending 28 U.S.C. § 455.

6. See notes 14-56 *infra* and accompanying text.

7. See notes 57-65 *infra* and accompanying text.

8. See notes 66-82 *infra* and accompanying text.

9. See notes 83-100 *infra* and accompanying text.

10. See notes 101-22 *infra* and accompanying text.

11. See notes 123-53 *infra* and accompanying text.

pearance of the judge's impartiality.<sup>12</sup> The revision was made in 1974<sup>13</sup> and its practical effects have not yet been fully explored. Certain preliminary questions have been resolved, however, and some critical comment is possible.

## II. JUDGE'S INTEREST IN THE OUTCOME OF THE PROCEEDING

Prior to its amendment in 1974, 28 U.S.C. section 455 provided that "[a]ny justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest."<sup>14</sup> Disqualification for substantial interest was mandatory. The courts usually had interpreted "substantial interest" to mean a pecuniary or beneficial interest<sup>15</sup> and had further excluded small pecuniary or beneficial interests as non-disqualifying under a *de minimis* rule.<sup>16</sup> Disqualification was required only if the substantial interest would be affected by the judge's decision in the litigation before him.<sup>17</sup> So, while ownership of stock in a corporate defendant probably required disqualification,<sup>18</sup> ownership in a corporation, which was the complaining witness in a prosecution for bank robbery, did not require disqualification.<sup>19</sup>

Of course, an interest can be substantial without being financial in nature. The judge could have a penal, economic, or professional interest in the outcome of the case. Although a penal interest could be

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12. See notes 154-77 *infra* and accompanying text.

13. The effective date of the amendment to § 455 was December 5, 1974. Pub. L. 93-512, § 3, 88 Stat. 1609, 1610.

14. 28 U.S.C. § 455 (1948), ch. 646, § 1, 62 Stat. 908.

15. See *Barry v. United States*, 528 F.2d 1094, 1099 n.15 (7th Cir.), *cert. denied*, 429 U.S. 826 (1976), and cases cited therein.

16. *Tumey v. Ohio*, 273 U.S. 510, 531 (1927); *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 403 F.2d 437, 440 (5th Cir. 1968), *on remand* 324 F. Supp. 1371 (S.D. Tex. 1969), *aff'd on appeal*, 441 F.2d 631 (5th Cir.), *cert. denied*, 404 U.S. 941 (1971). See also *In re Virginia Electric & Power Co.*, 539 F.2d 357, 368 (4th Cir. 1976).

17. *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 403 F.2d 437, 440 (5th Cir. 1968), *on remand* 324 F. Supp. 1371 (S.D. Tex. 1969), *aff'd on appeal*, 441 F.2d 631 (5th Cir.), *cert. denied*, 404 U.S. 941 (1971). Despite the fact that the wife of the judge facing recusal earned income from long-term leases to defendant corporation, the income was held not to be of consequence since it could not conceivably be affected by the outcome of the patent infringement claims which were the heart of the action before the judge. Nor would prior arm's length transactions between defendant and the judge require disqualification if they were unrelated to the subject matter of the action.

18. *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 324 F. Supp. at 1376.

19. *United States v. Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970) (ownership of 325 of over five million outstanding shares not substantial even though stock value was between \$10,000 and \$15,000). But such an interest could properly move the judge to recuse himself under the discretionary clause of § 455 prior to the 1974 amendment. See notes 101-11 *infra* and accompanying text.

viewed as pecuniary since criminal liability often involves a fine or gives rise to civil parallel liability in tort for damages,<sup>20</sup> the question of disqualification for a penal interest is not heavily litigated and may never be. Economic interests, such as that of a consumer in a products liability action, can easily be regarded as pecuniary or beneficial; but they are just as easily disregarded under the *de minimis* rule.<sup>21</sup>

The least desirable consequence of construing "substantial" as pecuniary or beneficial was that certain professional interests were not regarded as disqualifying. Though a judge could not hear the appeal of a case he had tried,<sup>22</sup> no similar rule governed the actions of judges who had taken to the bench from the executive or legislative branches, or from a position of significant impact on legal policy while in the private sector. Disquieting results arose when a judge or justice was required to pass on the merits of some program, legislation, or national issue in which he had previously been involved. The prosecutor who attempts a novel application of existing criminal laws,<sup>23</sup> the Senator who sponsors legislation,<sup>24</sup> and the professor who publishes a leading treatise on a question of national import<sup>25</sup> might all be said to have a substantial interest in any case that challenges the constitutional legitimacy of the fruits of their prior actions. Should these persons, once appointed to the federal bench, disqualify themselves from sitting on any case that, in effect, attacks their own actions and beliefs? The answer was usually a "no" under the mandatory "substantial interest" disqualification clause of section 455 before its amendment.<sup>26</sup> This answer was dictated by the tendency of the courts to read "substantial interest" as meaning pecuniary or beneficial interest. The inability of this or any other part of the statute to permit a judge or justice to step away gracefully from this apparent conflict without shirking his duty was a factor in pushing

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20. Cf. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 673-74 (2d ed. 1972).

21. See note 16 *supra* and accompanying text.

22. 28 U.S.C. § 47 (1968).

23. See *Barry v. United States*, 528 F.2d 1094, 1100 (7th Cir.), *cert. denied*, 429 U.S. 826 (1976).

24. See *Laird v. Tatum*, 409 U.S. 824, 831-33 (1972) (memorandum of Rehnquist, J., discussing the participation of Justice Black in *United States v. Darby*, 312 U.S. 100 (1941), despite the fact that Justice Black, while in the Senate, had played no small part in the enactment of the legislation under review in *Darby*).

25. See *id.* at 831-32 (discussing Justice Frankfurter's academic writings on labor and his role in the drafting of federal labor legislation in light of his participation in *United States v. Hutcheson*, 312 U.S. 219 (1941)), a case interpreting the scope of that particular legislation.

26. See text accompanying note 14 *supra*; *Laird v. Tatum*, 409 U.S. 824, 831-33 (1972) (memorandum of Rehnquist, J.). See also *Barry v. United States*, 528 F.2d 1094 (7th Cir.), *cert. denied*, 429 U.S. 826 (1976); *Utah-Idaho Sugar Co. v. Ritter*, 461 F.2d 1100 (10th Cir. 1972).

through the amendment.<sup>27</sup>

The 1974 amended version of section 455 provides a much more detailed breakdown of disqualifying interests than its predecessor. The judge has a duty to stay aware of his financial interests, whether personal or fiduciary.<sup>28</sup> The amended statute defines "financial interest" as "ownership of a legal or equitable interest, however small. . . ."<sup>29</sup> The de minimis rule is thus abrogated.<sup>30</sup> Disqualification is required if the judge knows that he has a "financial interest in the subject matter in controversy or in a party to the proceeding."<sup>31</sup> Disqualification is also required if the judge knows that he has "a financial interest . . . that could be substantially affected by the outcome of the proceeding."<sup>32</sup> Finally, disqualification is required if the judge knows that he has "any other interest that could be substantially affected by the outcome of the proceeding."<sup>33</sup> This provision has the effect of overruling those circuits which had read "substantial interest" in the earlier version of the statute solely to mean a pecuniary or beneficial interest.<sup>34</sup>

What emerges from this 1974 revision is that, whether the interest is financial or not, it must still be shown that the interest involved will be more or less directly affected by the outcome of the proceeding before disqualification is required. For example, recusal was properly denied where the defendant corporation was a twice-removed subsidiary of a corporation that did business with a company in which the judge held stock.<sup>35</sup> The judge had no financial interest in the subject matter in controversy before him,<sup>36</sup> nor in any party to the proceeding;<sup>37</sup> and any

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27. The "duty to sit" rule compelled a judge who was not disqualified to sit in all matters legitimately before him. A judge had to have a valid reason for recusation. Upon timely objection by a party, a judge's decision to refuse to act on a case was subject to review. Under the pressure of this duty to sit, most judges disqualified themselves infrequently, and only when strictly necessary. See *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (memorandum of Rehnquist, J.); *Edwards v. United States*, 334 F.2d 360 n.2 (5th Cir. 1964). This duty has been removed by the enactment of the amended section 455. See H.R. REP. NO. 93-1453, 93d Cong., 2d Sess. 2 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6353, 6355.

28. 28 U.S.C. § 455(c) (1976), *supra* note 2.

29. *Id.* § 455(d)(4).

30. See note 16 *supra* and accompanying text.

31. 28 U.S.C. § 455(b)(4) (1976), *supra* note 2.

32. *Id.* § 455(b)(5)(iii).

33. *Id.* § 455(b)(4).

34. See note 15 *supra* and accompanying text.

35. *Mavis v. Commercial Carriers, Inc.*, 408 F. Supp. 55, 63 (C.D. Cal. 1975) (the court found that the judge's stock ownership was not an interest substantially affected by the outcome of the lawsuit).

36. *Id.* at 62. The suit did not involve any transactions between defendant's grandparent corporation and Union Oil, in which the judge held stock.

interest the judge did have could not have been substantially affected by the outcome of the proceeding.<sup>38</sup> As long as the interest is financial, the analysis of mandatory disqualification will do little to disturb prior case law.<sup>39</sup> At the same time, the explicit definitions contained in the amended statute<sup>40</sup> should make the analysis clearer. However, the provision that any other interest also disqualifies if substantially affected by the outcome of the proceeding will cause difficulties.

A matter was commenced before a district judge involving the Virginia Electric and Power Company (VEPCO),<sup>41</sup> before the effective date of the amendment,<sup>42</sup> but after the adoption of the ABA Code of Judicial Conduct by the Judicial Council of the United States.<sup>43</sup> The judge was a customer of VEPCO, as any resident of the VEPCO service area would be, and the judge disqualified himself.<sup>44</sup> The fact that company customers might receive rebates or credits if VEPCO prevailed in the action before him was held by the judge to be a disqualifying interest under the amended section 455.<sup>45</sup> Since pre-trial proceedings had been going on for some time prior to the disqualification, VEPCO sought an interlocutory appeal of the order recusing the judge, seeking in the alternative a writ of mandamus to compel the judge to hear the case.<sup>46</sup> The court of appeals held that the judge had erroneously ap-

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37. *Id.* The judge held stock in Union Oil, which was not a party to the suit.

38. *Id.* The proceeding would not affect the value of Union Oil stock in any way.

39. See notes 15-19 *supra* and accompanying text. The major change is the elimination of any de minimis exception. See notes 16, 29-30 *supra* and accompanying text.

40. A disqualifying financial interest may be personal or fiduciary in nature. 28 U.S.C. § 455(b)(4) (1976), *supra* note 2. The statute also describes certain common investment properties and the circumstances in which they are disqualifying. *Id.* § 455(d)(4).

41. See Pub. L. No. 93-512, § 3, 88 Stat. 1609, 1610 (1974). The amended act does not apply to the trial of any proceeding commenced prior to the effective date of the Act, nor to appellate review of any proceeding which was fully submitted to the reviewing court prior to the date of the Act. The latter provision does not refer to application by the appellate court of the new statute to lower court judges, but to the disqualification of appellate judges themselves. *But see* Parrish v. Board of Comm'rs, 524 F.2d 98 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976), where the revised § 455 was erroneously applied by the court of appeals to a trial which commenced before the effective date of the amendment because it thought that the fact that the appeal commenced after the effective date made the statute applicable to the trial judge. No harm was done since disqualification was not required.

42. The ABA Code of Judicial Conduct was adopted by the Judicial Council of the United States in April, 1973. See note 5 *supra*.

43. Virginia Elec. & Power Co. v. Sun Shipbuilding & Drydock Co., 407 F. Supp. 324 (E.D. Va.), *vacated*, 539 F.2d 357 (1976).

44. *Id.* at 334.

45. *Id.* at 329-34.

46. *In re* Virginia Elec. & Power Co., 539 F.2d 357, 363 (4th Cir. 1976).



plied the amended section 455,<sup>47</sup> but since the applicable Canons of the ABA Code of Judicial Conduct so closely paralleled the amended statute, and since the judge had considered the Canons in making his ruling, the court of appeals went on to discuss whether the trial judge had a disqualifying interest in the matter before him.<sup>48</sup>

First, the court dismissed the notion that the interest of a customer of a utility company was a financial interest. The judge held at most a "bare expectancy,"<sup>49</sup> which is not ownership of a legal or equitable interest and therefore not a disqualifying financial interest.<sup>50</sup> The court then ruled that this interest was not one that would be substantially affected by the outcome of the proceeding.<sup>51</sup> In so ruling, the court relied upon a dual-axis test articulated by Professor Charles Wright.<sup>52</sup> The remoteness of the interest and its extent are to be examined. The more the interest resembles a direct interest, the smaller its extent may be and still disqualify a judge.<sup>53</sup> While it is clear that the most direct interest is ownership, which is a "financial interest" and therefore disqualifying whatever its scope,<sup>54</sup> what is equally clear is that the court intends to retain a *de minimis* test in analyzing "other interests" that are less direct than ownership.<sup>55</sup> As the interest becomes less direct, the threshold below which the interest is *de minimis* steadily increases. The court held that a bare expectancy of recovering at most \$100 over a period of 40 years would be *de minimis* under this test, vacated the district judge's order recusing himself, and remanded with instructions to reconsider recusal only if the district judge felt his interest as a consumer would "cloud his impartiality."<sup>56</sup>

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47. The matter had begun in the district court before the effective date of the amendment. *Id.* at 366.

48. *Id.* at 366-68.

49. *Id.* at 366-67.

50. *Id.* at 367.

51. *Id.* at 367-68.

52. *Id.* at 368 n.16 (citing C. WRIGHT, A. MILLER, & E. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 3547, 365 (1975)). Professor Wright himself relied in part on another commentary. See Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736 (1973).

53. *In re Virginia Elec. & Power Co.*, 539 F.2d 357, 368 (4th Cir. 1976).

54. 28 U.S.C. § 455(b)(4) & (d)(4) (1976), *supra* note 2.

55. *In re Virginia Elec. & Power Co.*, 539 F.2d 357, 368 (4th Cir. 1976).

56. *Id.* at 369. This alternative use of the "reasonable appearance of impartiality" would be entirely proper should the trial judge elect to recuse himself on these grounds; however, it is unlikely that this judge would have done so. *Virginia Elec. & Power Co. v. Sun Shipbuilding & Drydock Co.*, 407 F. Supp. 324, 329 (E.D. Va.), *vacated*, 539 F.2d 357 (1976).

### III. INTEREST OF THE JUDGE'S FAMILY IN THE OUTCOME OF THE PROCEEDING

Until 1974, section 455 did not require a judge to examine the interests of his family in deciding whether disqualification was required.<sup>57</sup> The emphasis was on the judge's own "substantial interest." Though an argument could easily be made that a judge has a substantial interest in property, real and otherwise, of his spouse,<sup>58</sup> the interests of a judge's parents, children, or other relatives would be more difficult to determine within the scope of section 455 prior to its amendment in 1974.<sup>59</sup> Nor was any interest worthy of consideration that was not pecuniary or beneficial.<sup>60</sup>

Congress changed this drastically in the 1974 amendment of section 455. All interests of a spouse of the judge, or of the judge's minor child residing in the judge's household, are as disqualifying as the judge's own interest.<sup>61</sup> The judge simply steps into their place and evaluates their interests as his own. He is also under a duty to make a reasonable effort to learn of the financial interests of such spouse or minor child.<sup>62</sup>

In addition, the judge must disqualify himself if any person within the third degree<sup>63</sup> of relationship to him or his spouse, or the spouse of one of these persons, has an interest *known to the judge* that could be substantially affected by the outcome of the proceeding.<sup>64</sup> No distinction is made between financial and other interests, and the *de minimis*

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57. 28 U.S.C. § 455 (1948), ch. 646, § 455, 62 Stat. 908 (1948) (current version at 28 U.S.C. § 455 (1976) provided that:

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

58. See note 17 *supra*.

59. Whether the judge lived in a common law or community property state, he would have certain rights in property owned by his spouse. The interest might be joint in nature, or contingent: but it is an interest nonetheless.

60. See notes 15-19 *supra* and accompanying text.

61. 28 U.S.C. § 455(b)(4) (1976), *supra* note 2.

62. *Id.* § 455(c).

63. Children of siblings are first cousins of one another; children of first cousins are second cousins of one another; children of second cousins are third cousins of one another; and so forth. The children of one's first cousin are one's first cousins once removed; the children of those children are one's first cousins twice removed; and so forth. The degrees of relationship are computed by adding the degree of cousinship and the degree of removal. So the interests of a third cousin would disqualify, while those of a third cousin once removed would not; nor would those of a second cousin twice removed, i.e., the grandchildren of one's second cousin.

64. 28 U.S.C. § 455(b)(5)(iii) (1976), *supra* note 2.

rule probably still applies.<sup>65</sup> The requirement that the interest be known to the judge seems designed to lessen the extension of disqualifying interest so far into the judge's family.

#### IV. JUDGE'S PRIOR PROFESSIONAL INVOLVEMENT IN THE LITIGATION

Judges are usually attorneys by profession; this is especially true in the federal judiciary.<sup>66</sup> If an attorney is handling a matter for a client and is appointed to the bench, it is unquestionable that he should not adjudicate that matter. It is too much to ask anyone, no matter how self-disciplined, to shift from the role of advocate to that of impartial arbiter in a single controversy. This concern was reflected in the provision of section 455, which, prior to its amendment, required a judge to "disqualify himself in any case in which he . . . has been of counsel."<sup>67</sup> Any attorney involved in a case was to disqualify himself if the same case came before him after appointment to the judiciary. In the majority of situations, this rule was not difficult to follow. The judge and at least one of the parties would be aware of the relationship and could easily provide for reassignment.

Most of the "of counsel" cases that arose prior to the 1974 amendment involved criminal cases and judges who were former United States Attorneys. The statute setting forth the duties of a United States Attorney<sup>68</sup> has been interpreted to mean that the attorney is "of counsel" in *any* prosecution within his district.<sup>69</sup> Consequently, the judge

65. The abrogation of the de minimis rule applies only to financial interests. *See* notes 55-56 *supra* and accompanying text. The problem is that by using "substantially affected" in describing family interests that are disqualifying under 28 U.S.C. § 455(b)(5) (1976), Congress subjects these interests, whether financial or not, to the de minimis rule expressed in *Tumey v. Ohio*, 273 U.S. 510, 531 (1927). *See* note 16 *supra* and accompanying text.

66. H. CHASE, S. KRISLOV, K. BOYUM, & J. CLARK, BIOGRAPHICAL DICTIONARY OF THE FEDERAL JUDICIARY, xviii, xx (1976).

67. 28 U.S.C. § 455 (1948), ch. 646, § 455, 62 Stat. 908 (amended 1974) (current version at 28 U.S.C. § 455 (1976)). *See* note 57 *supra*.

68. 28 U.S.C. § 547 (1966) provides, in part:

Except as otherwise provided by law, each United States attorney, within his district, shall—

- (1) prosecute for all offenses against the United States;
- (2) prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned.

69. The seminal case in this area is *United States v. Vasilick*, 160 F.2d 631, 632 (3d Cir. 1947), which has been cited as authority for more than thirty years. *Vasilick* was interpreting a different, although substantially equivalent statute. *See also In re Grand Jury Investigation*, 486 F.2d 1013, 1015 (3d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974) (disqualification not required in case different from that in which judge was of counsel); *Gravenmire v. United States*, 469 F.2d 66, 67 (9th Cir. 1972) (disqualification only required when judge was

was required to disqualify himself when assigned to any case involving the United States Attorney's office that was initiated while he was in charge of the office.<sup>70</sup> Most of the litigation in this area involved attempts to determine when the criminal case begins. What emerges from the decisions is a rule that a case does not begin until prosecution is formally opened against a named defendant.<sup>71</sup> Prosecution formally begins at least upon arrest or indictment,<sup>72</sup> not upon investigation of particular persons.<sup>73</sup> The United States Attorney need not make any actual contribution to a case in order to be subject to disqualification.<sup>74</sup> Former assistants in the office were "of counsel" only if they worked on the case itself.

There was no reason to limit application of this "United States Attorney rule" to criminal cases since it is based entirely upon the wording of a federal statute,<sup>75</sup> nor has it been so limited. Federal public defenders are not creatures of congressional enactment as such since they usually manage their offices under authority of the judiciary to provide counsel where constitutionally required; by clinging to the statutory rationale of the U.S. Attorney rule, federal public defenders probably are not "of counsel" to every case their offices handle.

Although an attorney in private practice could reasonably be deemed "of counsel" to every case handled by any member of his firm,<sup>76</sup> thereby requiring recusal by the judge in every case handled by that firm during the judge's employment with that firm, the problem apparently did not arise under the earlier section 455.

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of counsel in same case); *United States v. Amerine*, 411 F.2d 1130, 1133 (6th Cir. 1969) (where judge was of counsel as former U.S. Attorney in pending case, disqualification was mandatory); *Adams v. United States*, 302 F.2d 307, 310 (5th Cir. 1962) (disqualification not required where judge has been prosecutor at trial out of which prosecution for perjury arose, and judge is unaware of that fact).

70. See, e.g., *Barry v. United States*, 528 F.2d 1094, 1099 n.14 (7th Cir.), *cert. denied*, 429 U.S. 826 (1976); *In re Grand Jury Investigation*, 486 F.2d 1013, 1015 (3d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974); *Gravenmier v. United States*, 469 F.2d 66, 67 (9th Cir. 1972); *United States v. Wilson*, 426 F.2d 268, 269 (6th Cir. 1970); *United States v. Amerine*, 411 F.2d 1130, 1133-34 (6th Cir. 1969).

71. *United States v. Wilson*, 426 F.2d 268, 269 (6th Cir. 1970). See *In re Grand Jury Investigation*, 486 F.2d 1013, 1015-16 (3d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974).

72. *United States v. Wilson*, 426 F.2d 268, 269 (6th Cir. 1970).

73. *Barry v. United States*, 528 F.2d 1094, 1099 (7th Cir.), *cert. denied*, 429 U.S. 826 (1976) ("mere questioning of a few individuals" is not enough).

74. See *United States v. Amerine*, 411 F.2d 1130, 1133 (6th Cir. 1969).

75. The statutory responsibility of the United States Attorney extends beyond criminal prosecutions to all civil cases involving the United States. 28 U.S.C. § 547 (1966), *supra* note 68.

76. The principles of agency law make an appearance by the firm an appearance by every lawyer in the firm. See *SCA Services v. Morgan*, 557 F.2d 110, 114 (7th Cir. 1977).

The 1974 amendment to section 455 recognizes a difference between former practice in government employment<sup>77</sup> and in the private sector.<sup>78</sup> If the judge had served in government employment and in such capacity *participated* as counsel or adviser concerning the proceeding, disqualification would be required.<sup>79</sup> However, the addition of "participated" has been held not to affect the United States Attorney rulings under the older version of section 455.<sup>80</sup> If this is so, there is no reason that the amended section 455 cannot require the disqualification of former United States Attorneys in civil cases, or of former state attorneys where the recognized rationale applies.

The former private practitioner must disqualify himself if he or a lawyer with whom he practiced law did, during such association, serve "as a lawyer in the matter in controversy."<sup>81</sup> The amended statute thus provides for disqualification expressly where the older statute would have had to resort to principles of agency law.<sup>82</sup> But section 455 as now in force really does not expand the reach of its predecessor; it merely clarifies it.

#### V. JUDGE'S KNOWLEDGE OF EVIDENTIARY FACTS

If a judge is a material witness to facts at issue in a case, the judge faces a difficult task if required to sit in that case for two reasons. First, if the judge is called by a party to testify, it is improbable that the judge or jury can evaluate the credibility of the judge's testimony. Second, even if the judge is not called as a witness, it is equally as difficult for him to differentiate between personal recollections and the actual facts in evidence. For these reasons, and to preserve the integrity of the trial, both the amended section 455 and its predecessor provide that a judge who is a material witness must disqualify himself.

Prior to 1974, section 455 provided that any "justice or judge of the United States shall disqualify himself in any case in which he is or has been a material witness."<sup>83</sup> The mere fact that a judge was familiar

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77. 28 U.S.C. § 455(b)(3) (1976), *supra* note 2.

78. *Id.* § 455(b)(2).

79. *Id.* § 455(b)(3).

80. *See* United States v. Kelly, 556 F.2d 257, 262-63 (5th Cir. 1977), *cert. denied*, 434 U.S. 1017 (1978), in which recusal was denied where the judge was on the bench before the offense was discovered, investigated, or prosecuted. This may be an expansion of the older rule. *See* notes 70-75 *supra* and accompanying text.

81. 28 U.S.C. § 455(b)(2) (1976), *supra* note 2.

82. *See* note 76 *supra* and accompanying text.

83. 28 U.S.C. § 455 (1948), ch. 646, § 455, 62 Stat. 908 (amended 1974) (current version at 28 U.S.C. § 455 (1976)). *See* note 57 *supra*.

with the procedural and factual background of a case by reason of having served as a judge in earlier, related cases does not require recusal.<sup>84</sup> Such knowledge must be extrajudicial in nature before a judge may be disqualified.<sup>85</sup> This requirement is nothing more than a categorical application of a personal knowledge standard, for without such personal knowledge a judge cannot be a material witness. Usually, exhibits and testimony brought before a judge during litigation deal substantively with events and other facts not directly experienced by the judge. A judge presiding at a second trial of the same action because of a mistrial or remand would therefore not be disqualified as a material witness by reason of having participated in the first trial.<sup>86</sup>

If the judge is asked to adjudicate the propriety of his own judicial behavior, it would seem that the "extrajudicial source" rule should not be invoked, as the judge's personal knowledge now encompasses events relevant to the issue he must decide. Prior to the 1974 amendment, a substantial number of the disqualification-as-material-witness cases involved petitions by criminal defendants for relief from sentencing pursuant to 28 U.S.C. section 2255.<sup>87</sup> This is a request directed to the trial judge that petitioner's sentence be vacated, set aside, or corrected when passed in violation of the petitioner's rights. In these situations it seems obvious that a trial judge would be a witness to material facts concerning the granting of a section 2255 petition. The courts have discerned in the statute, however, a congressional intent to give a section 2255 hearing the benefit of the trial judge's familiarity with the sentencing under attack.<sup>88</sup> One circuit has attempted to strike a balance between these apparently conflicting statutes by allowing the trial judge to pass upon the legal sufficiency of the petition, but disqualify himself as soon as it is determined that a factual hearing is necessary.<sup>89</sup>

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84. *Smith v. United States*, 360 F.2d 590, 592 (5th Cir. 1966); *Weber v. Garza*, 570 F.2d 511, 512 n.1 (5th Cir. 1978).

85. In general, judges are presumed to be impartial; thus unless facts are presented which allege personal as opposed to judicial bias, the judge need not recuse himself. See *United States v. Patrick*, 542 F.2d 381, 390 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); *United States v. Bernstein*, 533 F.2d 775, 785 (2d Cir.), *cert. denied*, 429 U.S. 998 (1976).

86. Cf. notes 138-40 *infra* and accompanying text (cases cited include factual situations in which judge's knowledge did not require recusal).

87. 28 U.S.C. § 2255 (1948) (amended 1949). This is often referred to as a petition for a "writ of error coram nobis," one of the ancient writs. Strictly speaking, the writ has been replaced by the 28 U.S.C. § 2255 procedure. See generally 18 AM. JUR. *Coram Nobis and Allied Statutory Remedies* § 6 (1965).

88. See *Hoffa v. United States*, 471 F.2d 391, 394 (6th Cir. 1973), *cert. denied*, 414 U.S. 880 (1974); *United States v. Smith*, 337 F.2d 49, 53 (4th Cir. 1964), *cert. denied*, 381 U.S. 916 (1965).

89. See *Halliday v. United States*, 380 F.2d 270, 272-74 (1st Cir. 1967).

It has also been ruled that even if the judge is a material witness, he may issue preliminary orders without disqualification.<sup>90</sup> This broad assertion, while perhaps justified under the older versions of section 455, is no longer the law.<sup>91</sup>

The amended section 455 provides for judicial disqualification when the judge has "personal knowledge of disputed evidentiary facts concerning the proceeding"<sup>92</sup> if, while in private practice, he was a material witness concerning the matter in controversy,<sup>93</sup> or if, while in government employment, he participated as a government employee as a material witness concerning the proceeding.<sup>94</sup> The amended text of section 455 has not been extensively litigated. What the courts will do with the specific provisions regarding knowledge gained while in private practice or government employ is open to conjecture.<sup>95</sup> Yet, the change in section 455(b)(1) from "material witness" to "personal knowledge of disputed evidentiary facts" may be most helpful. By splitting the notion of "material witness" into its component parts, that is, competence and relevance of any proposed testimony of the judge-witness, the statute clearly shows that the "extra-judicial source" rule is not to be abandoned;<sup>96</sup> but it also seems just as clear that a number of circuits should consider modification of their handling of section 2255 petitions.<sup>97</sup> Moreover, by defining proceeding to include all "stages of litigation," the statute probably precludes all preliminary rulings that are not solely rulings of law.<sup>98</sup>

Contempt proceedings may be affected by the new statute. Although summary contempt in open court remains a judicial power undisturbed by section 455,<sup>99</sup> criminal contempt is a different matter. One of the

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90. *See* *Panico v. United States*, 412 F.2d 1151, 1156 (2d Cir. 1969), *cert. denied*, 397 U.S. 921 (1970).

91. The revised § 455 expressly applies to preliminary stages of litigation. 28 U.S.C. § 455(d)(1) (1976), *supra* note 2.

92. *Id.* § 455(b)(1).

93. *Id.* § 455(b)(2).

94. *Id.* § 455(b)(3).

95. How these situations would not be covered by the provisions of § 455(b)(1) is difficult to imagine. *See* note 92 *supra* and accompanying text. Perhaps both were included in the private and public practice subsections to "flesh out" Congress' perception of the scope of a lawyer's involvement in the matters he undertakes.

96. *See* notes 83-86 *supra* and accompanying text.

97. The practice of the First Circuit is perhaps the best solution. *See* note 89 *supra* and accompanying text.

98. 28 U.S.C. § 455(d)(1) (1976), *supra* note 2.

99. The legislative history clearly indicates this to be the case. *See* H.R. REP. NO. 93-1453, 93d Cong., 2d Sess. 2 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6353, 6355.

issues in an action for criminal contempt is the judicial order that was allegedly disobeyed by the defendants. That order is almost certain to be disputed, and the issuing judge would have personal knowledge of that disputed fact. Because of this personal knowledge, the issuing judge would be disqualified from hearing the criminal contempt action for failure to obey to his order.<sup>100</sup>

## VI. JUDGE'S RELATIONSHIP TO PERSONS INVOLVED IN THE LITIGATION

Before 1974, section 455 provided that any justice or judge of the United States should "disqualify himself in any case in which he . . . is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."<sup>101</sup> Although the section's other three bases for disqualification were mandatory, *i.e.*, the judge had a substantial interest,<sup>102</sup> had been of counsel,<sup>103</sup> or had been a material witness,<sup>104</sup> disqualification under this clause was clearly discretionary. "Whether a judge is so connected with the litigation as to make it improper for him to sit is a matter confined to the consideration and discretion of the judge himself."<sup>105</sup> This gave wide latitude to the judges and enabled them to sit on cases where ideally they should have recused themselves; indeed, any desire a judge might have had to remove himself from the controversy was saddled by the "duty to sit."<sup>106</sup> Reversal of a judge's refusal to recuse himself was nearly impossible under the discretionary "so-related" test without a showing of gross abuse of discretion.<sup>107</sup> Relationships regarded as sufficient to disqualify were family ties,<sup>108</sup>

100. *See* *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 107 (5th Cir. 1974). A district court judge heard a criminal contempt case arising out of defendants' disobedience to the judge's own order at another trial. Upon conviction, the defendants appealed, claiming they had been denied a fair trial. The court of appeals reversed and remanded for a new trial before a different judge. *Id.* at 109. The court made mention of the "keener interest" of a judge in the outcome of a trial for contempt of his own order. *Cf.* the "substantial interest" and "any interest substantially affected" cases at notes 14-56 *supra*.

101. 28 U.S.C. § 455 (1948), ch. 646, § 455, 62 Stat. 908 (amended 1974) (current version at 28 U.S.C. § 455 (1976)). *See* note 57 *supra*.

102. *See* notes 14-19 *supra* and accompanying text.

103. *See* note 67 *supra* and accompanying text.

104. *See* note 83 *supra* and accompanying text.

105. *Shadid v. Oklahoma City*, 494 F.2d 1267, 1268 (10th Cir. 1974) (citing *Weiss v. Hunna*, 312 F.2d 711 (2d Cir.), *cert. denied*, 374 U.S. 853 (1963)).

106. *See* notes 24-27 *supra* and accompanying text.

107. *See, e.g.*, *Bumpus v. Uniroyal Tire Co.*, 385 F. Supp. 711 (E.D. Pa. 1974).

108. *In re Eastonton Electric Co.*, 120 F. 1010 (S.D. Ga. 1903).



financial involvement,<sup>109</sup> or employment.<sup>110</sup> These connections, however, had to be substantial before any need for recusal arose.<sup>111</sup> The result of all this was that the discretionary power of recusal was rarely exercised.

In 1974, Congress amended section 455 to compel disqualification for certain relationships between the judge and a party to the proceeding,<sup>112</sup> the lawyers involved,<sup>113</sup> or witnesses who might be called to testify.<sup>114</sup> If the judge or the judge's spouse is a party,<sup>115</sup> or if a person within the third degree of relationship<sup>116</sup> to either of them, or that person's spouse, is a party, disqualification is required.<sup>117</sup> If any of these persons is an officer, director, or trustee of a party, disqualification is required.<sup>118</sup> If any of these persons is acting as a lawyer,<sup>119</sup> or is to the judge's knowledge likely to be a material witness in the proceeding,<sup>120</sup> disqualification is required. Finally, the judge must disqualify himself if a lawyer with whom he practiced law is a material witness.<sup>121</sup>

By adding witnesses to the group of persons with whom the judge's out-of-court relationship requires recusal, Congress has lifted the heavy burden of forcing the judge to make impartial assessments of the credibility of persons close to him. There is little doubt that a federal judge would in fact strain to make an impeccably fair evaluation of such persons if called as witnesses before them.<sup>122</sup> There is no reason to risk,

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109. *United States Fidelity & Guaranty Co. v. Lawrenson*, 34 F.R.D. 121 (D. Md.), *aff'd*, 334 F.2d 464 (4th Cir.), *cert. denied*, 379 U.S. 869 (1964).

110. *Laird v. Tatum*, 409 U.S. 824 (1972) (memorandum of Rehnquist, J.).

111. *See United States v. Seiffert*, 501 F.2d 974 (5th Cir. 1974) (judge had attended a related bankruptcy proceeding while in private practice and had asked one of the parties to the suit now before him at most one question; held not so related to that party as to require disqualification). *See also Scarrella v. Midwest Fed. Sav. & Loan*, 536 F.2d 1207 (8th Cir.), *cert. denied*, 429 U.S. 885 (1976) (petitioner attempted to disqualify the court of appeals judges because of their relationship to the legal profession and the financial workings of Minnesota (perhaps petitioner forgot that he was in federal court); held not sufficient interest, even if petitioner had filed suit against the American and Minnesota State Bar Associations).

112. 28 U.S.C. § 455(b)(5)(i) (1976), *supra* note 2.

113. *Id.* § 455(b)(5)(ii).

114. *Id.* § 455(b)(5)(iv).

115. *Id.* § 455(b)(5)(i).

116. *See* note 63 *supra*.

117. 28 U.S.C. § 455(b)(5)(i) (1976), *supra* note 2.

118. *Id.*

119. *Id.* § 455(b)(5)(ii).

120. *Id.* § 455(b)(5)(iv).

121. *Id.* § 455(b)(2).

122. Indeed, some judges might be more critical of those close to them than of people they did not know. *See also* note 1 *supra* and accompanying text.

however, the possibly adverse effects to the judge's personal and social life by demanding that such assessments be made.

## VII. JUDGE'S IMPARTIALITY IN FACT

Until its amendment in 1974, section 455 contained no provision for disqualification of a judge because of prejudice or bias towards a party. Such a disqualification was possible, however, under 28 U.S.C. section 144.<sup>123</sup> The party desiring disqualification filed with the court an affidavit demonstrating the bias or prejudice of the judge before whom the matter was pending.<sup>124</sup> The judge originally assigned could take no further action on the matter, and the proceeding was assigned to another judge.<sup>125</sup> This remedy, though still available after the 1974 amendment of section 455, is available only at the district court level.<sup>126</sup>

If the proceeding is pending, such an affidavit would quite normally come before the very judge who is the target of the party's allegations of bias. It might be said that the judge should disqualify himself from taking the affidavit under consideration, let another judge rule on its sufficiency, and then proceed to hear the matter or not as dictated by the findings of his colleague. However, in *Berger v. United States*,<sup>127</sup> the United States Supreme Court interpreted the version of section 144 then in effect to mean that the judge against whom the affidavit was directed could properly pass upon the legal sufficiency of the affidavit, and should recuse himself from any further participation in the underlying proceeding if the affidavit "show[s] the objectionable inclination or disposition of the judge."<sup>128</sup> The judge was not to examine the facts alleged for their truth.<sup>129</sup> Though the potential for abuse by an affiant willing to lie was recognized, the Court left this problem to Congress,<sup>130</sup> and the statute has been so applied ever since.<sup>131</sup>

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123. 28 U.S.C. § 144 (1976), *supra* note 2.

124. *Id.*

125. *Id.*

126. *Id.*

127. 255 U.S. 22 (1921).

128. *Id.* at 35.

129. *Id.* at 36.

130. *Id.* at 36-37. Congress was not as concerned as the dissenters in *Berger*, for it has not amended the statute to correct what those justices thought was a defect in the majority holding.

131. See *United States v. Azhocar*, 581 F.2d 735, 739 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 1213 (1979); *King v. United States*, 576 F.2d 432, 437 (2d Cir.), *cert. denied*, 439 U.S. 850 (1978); *United States v. Haldeman*, 559 F.2d 31, 131 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 902 (1977). But see *Parrish v. Board of Comm'rs*, 524 F.2d 98, 105-06 (5th Cir. 1975) (Gee, J., dissenting), *cert. denied*, 425 U.S. 944 (1976).

The facts that are legally sufficient to require a judge to recuse himself must be discussed. The facts must be sufficient to convince a reasonable person that the judge possesses bias or prejudice in the matter.<sup>132</sup> That this places a substantial burden on the moving party is undeniable.<sup>133</sup> Additionally, "[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source, and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."<sup>134</sup> This requirement stems from the statutory language that declares that the bias or prejudice must be *personal*.<sup>135</sup> Finally, the facts must be alleged specifically in the affidavit; mere conclusionary language of bias or prejudice will not suffice.<sup>136</sup>

It is not sufficient, therefore, to show that the judge has ruled adversely to the interests of a party,<sup>137</sup> presided at the proceeding in a related matter,<sup>138</sup> retried the case after a hung jury<sup>139</sup> or reversal and remand by an appellate court,<sup>140</sup> or made strong comments about a party, as long as no showing can be made that the feelings expressed by the judge were based on something other than what he has learned while presiding over the matter.<sup>141</sup> Nor is it sufficient to show that the

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132. *Mims v. Shapp*, 541 F.2d 415, 417 (3d Cir. 1976); *Parrish v. Board of Comm'rs*, 524 F.2d 98, 100 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *Curry v. Jensen*, 523 F.2d 387, 388 (9th Cir.), *cert. denied*, 423 U.S. 998 (1975); *United States v. Baker*, 441 F. Supp. 612, 616 (M.D. Tenn. 1977).

133. *United States v. Baker*, 441 F. Supp. 612, 616 (M.D. Tenn. 1977); *Molinara v. Watkins-Johnson CEI Division*, 359 F. Supp. 474, 476 (D. Md. 1973); *United States v. Thomas*, 299 F. Supp. 494, 498 (E.D. Mo. 1968).

134. *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966).

135. 28 U.S.C. § 144 (1978), *supra* note 2.

136. *United States v. Anderson*, 433 F.2d 856, 860 (8th Cir. 1970).

137. *See Berger v. United States*, 255 U.S. 22, 31 (1921); *United States v. Azhocar*, 581 F.2d 735, 740 (9th Cir. 1978), *cert. denied*, 99 S.Ct. 1213 (1979); *Maret v. United States*, 332 F. Supp. 324, 325-26 (E.D. Mo. 1971). Even if such rulings are erroneous, the proper remedy is reversal on appeal, not disqualification.

138. *See United States v. Gullion*, 575 F.2d 26, 29 (1st Cir. 1978) (judge presided at trial of co-defendants); *United States v. Partin*, 552 F.2d 621, 639 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977) (judge took guilty plea of a co-defendant); *United States v. Cowden*, 545 F.2d 257, 265 (1st Cir. 1976), *cert. denied*, 430 U.S. 909 (1977) (likening a separate trial of a co-defendant to an evidence suppression hearing as to its effect on a judge's presumed lack of prejudice).

139. *See United States v. Partin*, 552 F.2d 621, 639 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977).

140. *See NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 236 (1947); *Mayberry v. Maroney*, 558 F.2d 1159, 1162 (3d Cir. 1977); *United States v. Partin*, 552 F.2d 621, 639 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977). *But cf.*, *Webbe v. McGhie Land Title Co.*, 549 F.2d 1358, 1360 (10th Cir. 1977) (court reversed a summary judgment awarded by trial judge and remanded the proceeding to a different trial judge since the circumstances of the granting of the motion for summary judgment indicated prejudgment by first trial judge).

141. *United States v. Azhocar*, 581 F.2d 735 (9th Cir. 1978), *cert. denied*, 440 U.S. 907

judge in attempting to resolve the conflict before the court has indicated his opinion of the strength of a party's case,<sup>142</sup> or has taken actions reasonably designed to move the matter along or preserve the decorum of the proceedings.<sup>143</sup> Nor is mere prior knowledge of facts concerning a party sufficient to require disqualification.<sup>144</sup>

Section 144 has severe limitations, however. First, it does not apply to judges above the district court level.<sup>145</sup> Second, absent good cause, the affidavit must be filed at least ten days before the beginning of the term at which the proceeding is to be heard.<sup>146</sup> Such a time requirement allows the judge to find a waiver of the right to petition for recusal under section 144. Lastly, there is no requirement in the statute that the judge recuse himself when he is aware of facts that would, if drafted into an affidavit, be sufficient to warrant recusal.<sup>147</sup>

When Congress amended section 455 in 1974, it included a requirement that *any* judge or justice of the United States must "disqualify himself . . . where he has a personal bias or prejudice concerning a party."<sup>148</sup> This amendment and section 144 have been construed to be

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(1979). The trial judge told petitioner's co-defendant at the co-defendant's arraignment that he should not rely on petitioner as a witness. This was held not to be personal bias or prejudice since the source of the judge's opinion was not extrajudicial. Nor was it evidence of bias that the judge told the petitioner that he would receive the maximum sentence if convicted. *Id.* at 739-40. *See* *United States v. Baker*, 441 F. Supp. 612, 618-20 (M.D. Tenn. 1977); *United States v. Corr*, 434 F. Supp. 408 (S.D.N.Y. 1977).

142. *See* *United States v. Grinnell Corp.*, 384 U.S. 563, 582-83 (1966).

143. *See In re Georgia Paneling Supply, Inc.*, 581 F.2d 520, 522 (5th Cir. 1978) (ex parte conferences with other parties without more is not sufficient to show collusion and bias); *United States v. Franks*, 511 F.2d 25 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975) (citing defendant for contempt is at most *judicial* bias); *United States v. Corr*, 434 F. Supp. 408 (S.D.N.Y. 1977) (suggesting a stipulation to the testimony of a witness to save defendant's lawyer a conflict of interest problem is not evidence of bias or prejudice); *Lazofsky v. Somerset Bus Co., Inc.*, 389 F. Supp. 1041, 1043 (E.D.N.Y. 1975) (admonishing plaintiff, who was also an attorney, to behave while on the witness stand is not evidence of bias).

144. *See* *United States v. Patrick*, 542 F.2d 381, 390 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); *United States v. Baker*, 441 F. Supp. 612, 618 (M.D. Tenn. 1977). A prior adversary relationship to a party is apparently not sufficient either, without more. *See In re Continental Vending Mach. Corp.*, 543 F.2d 986, 995, 996 (2d Cir. 1976) (judge had testified against defendant; his refusal to recuse himself was not reversed, but he was strongly urged to reconsider his decision); *United States v. Maroney*, 280 F. Supp. 277, 279 (W.D. Pa. 1968) (the presiding judge, while district attorney, had tried a criminal case against defendant which resulted in acquittal).

145. 28 U.S.C. § 144 (1976), *supra* note 2.

146. *Id.*

147. *Id.* The matter was left to the conscience of the trial judge. *See* note 1 *supra* and accompanying text.

148. 28 U.S.C. § 455(b)(1) (1976), *supra* note 2.

equivalent.<sup>149</sup> While this is probably a workable result, it may militate against Congress' attempt to repair certain shortcomings in section 144.<sup>150</sup> The courts have recognized that the inclusion of bias or prejudice grounds in section 455 expands the alternatives by which a party may seek relief, and also requires the judge to recuse himself if he is aware not only of bias in fact, but of facts that make a reasonable showing of bias.<sup>151</sup> Because the requirement of personal bias remains unchanged,<sup>152</sup> the cases establishing the extrajudicial bias rule are still in force, and the statistical likelihood of bias or prejudice disqualification is slight.<sup>153</sup>

### VIII. APPEARANCE OF JUDGE'S IMPARTIALITY

The 1974 amendment of section 455 begins: "Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."<sup>154</sup> This is the heart of the revised statute, and is essentially an enactment of the general principles of recusal as formulated by Justice Frankfurter.<sup>155</sup> Though the specific situations requiring disqualification are simply legislative determinations that certain circumstances fall within the general standard,<sup>156</sup> in practice the "appearance of impartiality" test functions as a backdrop to the other provisions.<sup>157</sup>

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149. *Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1052 (5th Cir. 1975); *Parrish v. Board of Comm'rs*, 524 F.2d 98, 102 n.8 (5th Cir. 1975).

150. By so construing the two statutes, do the courts intend to preclude the judge from making an evidentiary inquiry under § 455(b)(1), which is forbidden under § 144? See notes 127-30 *supra* and accompanying text.

151. See *Parrish v. Board of Comm'rs*, 524 F.2d 98, 102 n.8 (5th Cir. 1975), and cases cited therein.

152. 28 U.S.C. § 455(b)(1) (1976), *supra* note 2.

153. The likelihood that persons whom a judge knows and dislikes off the bench will come before him as litigants is not great; when the requirement that the motion for recusal make some showing of facts indicating bias or prejudice is added, the likelihood that this section will be used successfully becomes even smaller.

154. 28 U.S.C. § 455(a) (1976), *supra* note 2.

155. See note 1 *supra* and accompanying text.

156. H.R. REP. NO. 93-1453, 93d Cong., 2d Sess. 2 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6353, 6355.

These specific situations in subsection (b) are in addition to the general standard set forth in subsection (a). Thus, by setting specific standards, Congress can eliminate the uncertainty and ambiguity arising from the language in the existing statute and will have aided the judges in avoiding possible criticism for failure to disqualify themselves. All the situations in subsection (b) are circumstances in which the judge's impartiality might reasonably be questioned.

157. See *id.* at 6354.

In *SCA Services, Inc. v. Morgan*,<sup>158</sup> a district judge refused to recuse himself despite the fact that one of the parties before him was represented by a law firm in which the judge's brother was a partner. The petitioner sought a writ of mandamus to compel the judge to assign the case to another judge. Three justifications for recusal were examined. Though the petition was granted, the court of appeals declined to hold that a disqualifying relationship existed between the judge and the lawyer from his brother's firm.<sup>159</sup> The court construed "acting as a lawyer in the proceeding"<sup>160</sup> to require active participation,<sup>161</sup> but issued the writ on the grounds that the judge's brother had an interest that would be substantially affected by the outcome of the lawsuit.<sup>162</sup>

Although not directly presented in *SCA Services*, the Seventh Circuit also indicated that the judge's refusal to recuse himself was reversible since a judge must disqualify himself in any proceeding in which his impartiality might reasonably be questioned.<sup>163</sup> The court recognized that the use of a "reasonableness" test meant that the circumstances would have to be viewed objectively. Considering the relevant facts and circumstances, the test is whether a reasonable person could infer that the judge's impartiality might be questionable.<sup>164</sup> The existence of a reasonable inference of partiality is sufficient to disqualify a judge.<sup>165</sup> Applying this test or its equivalent, the court in *SCA Services* held that the fact that the trial judge's brother's law firm represented a party raised a reasonable question of the judge's impartiality.<sup>166</sup>

The general standard of impartiality established in section 455(a) "is designed to promote public confidence in the impartiality of the judicial process."<sup>167</sup> This purpose would not be effectuated by viewing the

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158. 557 F.2d 110 (7th Cir. 1977).

159. *Id.* at 114.

160. 28 U.S.C. § 455(b)(5)(ii) (1976), *supra* note 2.

161. 557 F.2d at 114. Compare this with the judge's prior participation in the action. The standard is much stricter on the judge. See notes 77-82 *supra* and accompanying text.

162. 557 F.2d at 115-16. See 28 U.S.C. § 455(b)(5)(iii) (1976), *supra* note 2.

163. 557 F.2d at 115-16. See 28 U.S.C. § 455(a) (1976), *supra* note 2. However, a petition for writ of mandamus is only granted to overturn a refusal to disqualify on mandatory grounds. The "appearance of impartiality" requirement is not strictly mandatory, for a reasonableness test applies; therefore, by granting the writ of mandamus, the court renders its language on the "appearance of impartiality" as dictum.

164. *Parrish v. Board of Comm'rs*, 524 F.2d 98, 103 (5th Cir. 1975). The Fifth Circuit did not have an easy time applying its own test, however. In fact, it should not have applied it at all. *Id.*, at 104-05 (Roney, J., specially concurring).

165. *Id.* at 103-04.

166. 557 F.2d at 116.

167. H.R. REP. NO. 93-1453, 93d Cong., 2d Sess. 2 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6353, 6355.

matter from the perspective of a reasonable judge or lawyer rather than that of a lay person. In *United States ex rel. Weinberger v. Equifax, Inc.*,<sup>168</sup> however, the Fifth Circuit seems to have used a narrow standard of reasonableness. In that case, the judge's son was an associate of the law firm representing one of the parties. The court distinguished *SCA Services* on the grounds that an associate's interest in the firm is not as great as a partner's and so would not be as substantially affected.<sup>169</sup> Perhaps this holding is justified.<sup>170</sup> But the court's further refusal to consider the facts as raising a reasonable question of the judge's impartiality is nothing less than an avoidance of the expressed purpose of the amendment.<sup>171</sup> While the consequences of so holding would possibly put a burden upon any firm which hires the relatives of a judge,<sup>172</sup> it is a simple matter to avoid the problem.<sup>173</sup> But more importantly, in balancing the necessity of public respect for the judiciary with the practicalities of the administration of justice, Congress has implied that the latter must give way to the former.<sup>174</sup>

On the other hand, it is undoubtedly true that a fair portion of the cases interpreting the amended statute will reflect misguided attempts by trial counsel to use the revised provisions as a tool for judge shopping.<sup>175</sup> Such attempts were thwarted under the pre-1974 statute,<sup>176</sup>

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168. 557 F.2d 456 (5th Cir. 1977).

169. *Id.* at 463 ("[i]t is undisputed that the district judge's son *did not* actively participate in Equifax's defense." (emphasis added)).

170. *Id.* The Fifth Circuit termed an associate's salary interest as "too remote" to fall within the "financial interest" provision. It would have been better to have said that a salary interest is not an *ownership* interest. See 28 U.S.C. § 455(d)(4) (1976), *supra* note 2.

171. See 557 F.2d at 464. *Cf.* note 167 *supra* and accompanying text. Congress did not attempt to change the standard of review from discretion of the trial judge, but the Fifth Circuit made no attempt to see a narrower range of discretion after the creation of an objective standard in § 455(a). The approach of the Fifth Circuit makes § 455(a) a dead letter. Considering the ballyhoo involved in revising the statute, their decision to do so is ill-advised. See note 5 *supra*.

172. The firm would be unable to appear before that particular judge.

173. In most districts, there is more than one judge, so that all judges are able to exchange cases. In a one-judge district, the consequences would be more severe. But recall that Justice Tom Clark resigned from the United States Supreme Court so that his son could become United States Attorney General. This is a matter that the family should resolve before the problem comes up.

174. See note 167 *supra* and accompanying text.

175. Congress anticipated this use of the revised statute. See H.R. REP. NO. 93-1453, 93d Cong., 2d Sess. 2 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6353, 6355.

176. See the extrajudicial requirements on material witness and bias disqualifications at notes 83-86 and 132-44 *supra*. Also consider the United States Attorney disqualifications at notes 68-75 *supra*.

and face the same prospects under the current enactment.<sup>177</sup> There is a great hue and cry today about the scarce resources of judicial administration, and any statute providing that certain judges cannot hear certain cases will do nothing to ease those pressures. Furthermore, a disqualified judge is probably not a happy one, because, no matter how it is phrased, recusal under section 455 means that there is something about a particular judge that makers of policy feel prevents him from executing his office in a particular set of circumstances. However, nearly all the stigma could be removed if the trial bar and bench approached the disqualification question with an eye to the primary purpose of the revised statute. Not only would unnecessary strain on the judicial system be avoided, but disqualification might occur more easily and with better results.

*Patrick J. Ryan*

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177. None of the old safeguards have been removed. See notes 80, 96, & 149 *supra* and accompanying text.



