The Journal Of The Section Of Litigation American Bar Association

# Litigation

Vol.22 No.3 Spring 1996


## Losers

# Disqualifying the Judge

by William E. Wegner

If you plan on trying to disqualify a judge, heed the old maxim: When taking a shot at the king (or queen) make damn sure you shoot to kill—and succeed. Every lawyer who has considered challenging a judge's right to continue on a case has probably thought of this. While unsavory, the analogy brings home a truth about judicial human nature. No judge, no matter how cool a judicial temperament he may have, appreciates having his biases or relationships examined, let alone having his impartiality questioned. If you challenge the judge (particularly on impartiality grounds) and lose, you will at least suffer for the rest of the case a nagging doubt about whether a particular ruling might have gone differently, but for your having miffed the judge with an unsuccessful challenge. Moreover, improper challenges waste judicial resources, client's funds, and everyone's time.

There are no guarantees in this business of challenging a federal judge. Every case is fact specific and, unless the grounds for disqualification are *clearly* within one of the specific statutory categories that *requires* disqualification, each attempt employs the judgment and discretion of a judge—usually the one being challenged. This issue comes up more often than you might think. When it does, you must react quickly, or at least move with some deliberate speed.

Unlike many of the state court systems, the federal system does not permit peremptory challenges to judges. Federal statutes provide only three schemes for disqualifying a judge. The first addresses a judge's personal bias or prejudice. The second is a broad provision to allow disqualification where the judge's impartiality might reasonably be questioned even if no actual prejudice is shown. The third is aimed at specific interests or relationships that disqualify the judge.

Two major policy considerations drive the law of judicial recusal: each litigant's right to an impartial judge and the public's confidence in the system. Whether you are bringing or opposing a recusal motion, focus your arguments on these two fundamental reasons behind the federal statutes.

Judicial impartiality is indispensable to our system of justice. Litigants are entitled to a judge without any *pre-existing* bias, prejudice, or interest in the case—both in jury and non-jury trials. The U.S. Supreme Court has found, however, the most compelling public policy consideration underlying judicial disqualification is the promotion of public confidence in the integrity of the judicial process. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 858 (1988).

Obviously, the two policies go hand-in-hand. If the grounds for attempted disqualification cause the average citizen to question the judge's impartiality, not only is the public going to lose confidence in the outcome, but the litigants are not getting a fair shake either.

## Judge Shopping

Apparently, the goal of federal judicial impartiality—while important—is not significant enough to give the litigants a peremptory right to get rid of the judge. In federal court, the parties clearly have no right to a judge of their choice. Some states expressly permit judge shopping, allowing the parties peremptory challenges to the judge. *See, e.g.*, California Code of Civil Procedure, §170.6. While Congress has considered such a federal peremptory challenge, it has never passed such a proposal.

The federal rule against judge shopping through challenges is strictly enforced and not easily circumvented by creative lawyering. An example makes the point: Lawyers for one party, for the apparent purpose of getting a new judge, associated as counsel the brother of the district court judge presiding over the case. The trial judge then decided to recuse himself, but the appeals court disagreed. The Fifth Circuit found that this was a *de facto* peremptory challenge and held that the judge should not have recused himself. The proper remedy was not to disqualify the judge—but to disqualify the lawyer who created the conflict! *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255 (5th Cir. 1983). Although a judgment may be subject to attack if the judge's failure to recuse was such a fundamental defect that it resulted in a miscarriage of justice, matters of judicial disqualification rarely raise issues of violation of due process.

There is no "easy" way to leave your judge. You must

*Mr. Wegner is a partner at Gibson, Dunn & Crutcher LLP in Los Angeles.*

secure disqualification the "old-fashioned" way: "earn it" under either 28 U.S.C. § 144 or 28 U.S.C. § 455.

One way to disqualify a judge under either statute is by showing personal bias or prejudice. To get the ball rolling, you merely file an affidavit stating that the judge "has a personal bias or prejudice either against him or her or in favor of any adverse party." If the affidavit is "timely and sufficient," the judge can proceed no further, and the case *must* be assigned to another judge to determine the merits of the challenge. 28 U.S.C. § 144. This ground for disqualification is duplicated under 28 U.S.C. § 455(b)(1).

## Statutory Differences

While the test for disqualification is the same under both statutes, there are significant differences between the two. First, section 144 is a specific statute that provides for disqualification due to personal bias or prejudice, whereas section 455 provides additional grounds to get rid of your judge. Section 144 is also more narrow in that it applies only to federal district judges; section 455 was passed later and applies to all federal judges, including appellate justices and bankruptcy and magistrate judges.

There are procedural differences between the two statutes as well. Recusal under section 144 can be waived by failing to file a timely and sufficient affidavit. However, the section 455(b) grounds for disqualification (which include personal bias or prejudice along with judicial financial interests and personal knowledge or relationships) *cannot* be waived by the parties or by the court. Section 144 requires the filing of an affidavit to begin the process. Section 455 specifies no procedure for recusal; it is to be "self-enforcing" on the part of the judge. The practical effect of this absence of procedural guidance is that motions to disqualify under section 455 are brought by employing normal motion practice or by counsel simply raising the issue with the judge at a status conference. If the judge, upon learning of the purported grounds, does not *sua sponte* recuse herself, she will often set a schedule for the parties to brief and argue the issue.

Perhaps one of the most significant differences between the statutes involves the question: who decides what? Under section 144, the challenged judge is only to decide the timeliness and sufficiency of the affidavit. The case is then automatically sent to another judge for a determination on the merits. Under section 455(b)(1), there is no provision for referring the matter to another judge. The judge at whom the motion is directed decides the merits of the challenge. Many federal district courts have mercifully relieved the challenged judge of this responsibility by adopting local rules that transfer all challenges to another judge. If your challenge is going to be made under section 455, check the local rules for information about who will be deciding the motion.

Show me a judge who has no biases or prejudices and I'll show you a judge from another planet. Anyone with any life experience is going to have feelings, emotions, and preferences that could be categorized as a bias or prejudice. What constitutes a bias or prejudice that requires disqualification? Is it like pornography, unsuited for precise definition, but you will know it when you see it? The United States Supreme Court recently endeavored to provide some guidance.

Recusal for personal bias or prejudice under either section 144 or 455(b)(1) is required only if the judge's bias or prejudice: (1) is directed against a party (not the lawyer); (2) stems from an extrajudicial source; and (3) casts doubt on the judge's impartiality. *Liteky v. United States*, 114 S. Ct. 1147 (1994).

The first test is simple to understand. If the judge just doesn't like you, too bad. The personal bias or prejudice must relate to one of the parties, not one of the lawyers. There are many examples where lawyers have provoked expressions of strong feelings from federal judges, but the fact the lawyer is the subject of the court's ire is no basis for disqualification for bias or prejudice. Even if the judge calls you (but not your client) a "wise-ass" and "son of a bitch," modify your approach, change your tie or dress, but don't move to disqualify the judge. *See Cinton v. Union Pacific R. Co.*, 813 F.2d 917, 921 (9th Cir. 1987); and *In Re Beard*, 811 F.2d 818, 830 (4th Cir. 1987).

The "extrajudicial source" factor is intended to insulate from grounds for disqualification the biases and prejudices a judge may develop as a result of the proceedings before the court. This factor addresses "the more I get to know you and your case, the more I don't like you (or do like the other side)" situation. Judicial viewpoints developed as the natural and proper consequence of the judge's exposure to the different sides of the case (and other cases) cannot be grounds for disqualification. If a judge does not develop judgments about the participants in the trials he hears, how can he make the decisions judges must make? Likewise, a judge's efforts to run the courtroom are protected. Therefore, expressions from the bench of impatience, dissatisfaction, annoyance, and even anger are immune as bases for finding bias or prejudice.

Court rulings during the proceedings are also seldom grounds for disqualifyng a judge for bias or prejudice. Adverse rulings alone (even if erroneous and extraordinarily high in number) in the pending and prior cases *almost never* constitute a valid basis for a bias or partiality motion under the *Liteky* view. The rationale is that the rulings themselves, without other comments or conduct by the judge, cannot show the interference of an extrajudicial source. The *Liteky*

court also noted that the phrase "extrajudicial source" can be misleading. Its meaning must be viewed in light of the pejorative connotation invoked by the words "bias or prejudice." A judge's attitude toward a party becomes wrongful or inappropriate either because it is undeserved, excessive in degree, or based upon knowledge the judge ought not to possess. *Liteky v. United States, supra* at 1155.

This leads to the issue of whether the judge has become impartial or has developed, in the words of the *Liteky* court, a "clear inability to render fair judgment." *Id.* What casts doubt about the judge's impartiality depends upon each case's facts. It is best discussed by illustration. For example,

- The judge's remark that he felt a "duty to pressure" conscientious objectors into joining the Army required recusal in a case involving a conscientious objector claim. *United States v. Townsend*, 478 F.2d 1072, 1074 (3rd Cir. 1973).
- The judge's statement that "German-Americans'. . . hearts are reeking with disloyalty" in a case where German-Americans were parties, required recusal. *Berger v. United States*, 255 U.S. 22, 28, 41 S. Ct. 230 (1921), cited in *Liteky, supra* at 1157.
- Recusal was required where the judge refused to consider any testimony inconsistent with prior testimony in an earlier case the court of appeal had remanded to the district court for a trial *de novo*. The Seventh Circuit concluded that the judge's refusal to consider testimony from witnesses that had committed perjury in the earlier trial indicated the judge had a closed mind and should be recused. *Peacock Records, Inc. v. Checker Records, Inc.*, 430 F.2d 85, 89 (7th Cir. 1970).
- Refusal to refer to a party who was a Catholic priest as "Father" was insufficient to demonstrate bias or prejudice. *Liteky, supra* at n.3.
- The judge's statement that the defendant (a known brothel owner) was "not good for Reno" did not constitute a sufficient showing of personal bias or prejudice to require disqualification. *United States v. Conforte*, 624 F.2d 869, 881 (9th Cir. 1980).
- A statistical analysis of the judge's rulings in a monopolization case purportedly showing that the rulings were "one-sided" did not support an inference of bias or prejudice. *Southern Pacific Communications v. American Tel. & Tel. Co.*, 748 F.2d 980 (C.A.D.C. 1984).
- The judge's remark that "automobile manufacturers are among the most devious groups of defendants I have ever seen in 21 years on the bench" was not sufficient grounds for recusal because it was based upon the judge's experience as a judge and therefore did not stem from extrajudicial sources! *See Shank v. American Motors Corp.*, 575 F. Supp. 125 (D.C. Pa. 1983).

As you can see, there are no litmus tests here. What we are looking for is conduct by the judge, directed toward a party, which derives from information or the judge's experiences gained outside the performance of judicial duties, which then indicate that the judge's mind is irrevocably closed on issues likely to arise in a particular case. The trial (or reviewing) court must conclude that the judge is incapable of judging a particular controversy fairly on the merits.

The bias or prejudice ground for disqualification is a high hurdle to clear. There is a lower, closely related hurdle which covers situations where, while the judge may be free of bias or prejudice in a particular case, you might still question his impartiality. That situation is governed by 28 U.S.C. § 455(a).

This is the section designed to protect the integrity of and the public's perception of the judicial process. A federal judge must disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." The goal here is to avoid even the appearance of partiality. Section

**If the judge just doesn't like you, too bad.**

455(a) does not require that the judge must be devoid of feelings. It prohibits favoritism that is wrongful or inappropriate in a particular case. While close calls should be resolved in favor of recusal (hence the word "might" in the statute), the judge should not recuse himself simply because a party asserts that the judge may be partial.

Section 455(a) employs an objective, reasonable person test. We are not concerned here with actual bias, only whether an average person, knowing all the facts, would harbor reasonable doubts about the judge's impartiality. Under the statutory interpretation announced in *Liteky*, the extrajudicial source factor comes into play here again. The judge's apparent partiality must emanate from sources outside the performance of his or her judicial duties.

Illustration is, again, the best way to discuss the application of section 455(a):

- Recusal was required where a close cousin of the judge was an important witness in the case. *In re Faulkner*, 856 F.2d 716, 720-721 (5th Cir. 1988).
- After granting a summary judgment motion and awarding fees to a law firm, the judge left the bench and joined the same firm. The judge should have refused the employment or vacated the orders—recusal was required. *In re Continental Airlines Corp.*, 901 F.2d 1259, 1262 (5th Cir. 1990).
- Recusal was required where the judge's law clerk accepted a position at a law firm and continued to work on a case the firm had with the judge. *Miller Industries Inc. v. Caterpillar Tractor Co.*, 516 F. SUPP. 84, 89 (S.D. Ala. 1980). However, in a similar situation the judge avoided recusal when he took the clerk off the case and prevented any communication with the clerk concerning the case. In short, the clerk, not the judge, should be recused when the clerk's participation in the case might raise reasonable doubt about the *court's* impartiality. *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 714 (9th Cir. 1990); *Hunt v. American Bank & Trust Co. of Baton Rouge*, 783 F.2d 1011, 1016 (11th Cir. 1986).
- The trial judge was disqualified under § 455(a) (and

on other grounds) for failure to disclose his interest (as a fiduciary) in the outcome of the case before him *after* he learned of the disqualifying facts and *before* ruling on a motion for summary judgment. *Liljeberg v. Health Services Acquisition Corp., supra*, 486 at 867.

- A judge who was also a Mormon was not required to recuse himself from a case involving the "theocratic power structure of Utah." *Singer v. Wadman*, 745 F.2d 606, 608 (10th Cir. 1984).
- A judge's membership in the Sierra Club (terminated when he took the bench 13 years earlier) was not grounds for disqualification under § 455(a). *Sierra Club v. Simpkins Industries, Inc.* 487 F.2d 1109, 1116-1117 (4th Cir. 1988).
- While a judge's attendance at a legal conference discussing the forensic uses of DNA is not in and of itself grounds for disqualification, *U.S. v. Bonds* 18 F.3d 1327, 1331 (6th Cir. 1994), if the judge's expenses to a conference were indirectly paid for and the conference sponsored by a party who previewed at the conference its case before the same judge, recusal was required. *In re School Asbestos Litigation*, 977 F.2d 764, 781-782 (3rd Cir. 1992).

Disqualification under section 455(a) may be more easily established because even the appearance of partiality is enough. However, it is often more difficult to predict when the judge's "impartiality might reasonably be questioned." A sufficiently contingent, remote, or speculative interest of the judge in the outcome will not require recusal. *In re Billedeaux*, 972 F.2d 104 (5th Cir. 1992).

When approaching a section 455(a) disqualification question, test the waters on somebody else before bringing a motion to disqualify under section 455(a). Remember, the test is objective—whether a reasonable person, fully informed of the facts, might question the judge's impartiality. You and your client are (understandably) likely to be too close to the case to be objective. Ask others what they think about the situation in which the judge finds herself, and whether the facts you have to support the challenge would adversely affect their perception of the integrity of the judicial process.

## Strategy Decision

When you learn of a situation that may present an opportunity for a challenge under section 455(a), you have a strategy call to make. Parties may waive grounds for disqualification under section 455(a), but only after a full disclosure on the record of the basis for disqualification. Don't allow yourself or your client to be pressured into a waiver. It is improper for the judge to ask for, suggest to, or ask opposing counsel for their views on the possibility of a waiver. One appeals court has given the following direction to judges in this situation: "The best practice is to disclose the details that the judge deems significant, to make the decision by one's own lights, and let counsel speak or keep silence as they will." *Matter of National Union Fire. Ins. Co. of Pittsburgh*, 839 F.2d 1226, 1231 (7th Cir. 1988). Consistent with this approach, a judge may decline an offer to waive if in her judgment continued participation in the case might raise concerns about the judge's impartiality. *In re Bernard*, 31 F.3d 842 (9th Cir. 1994).

The third major statutory scheme for disqualification relates to the knowledge, interests, and relationships that a judge has—and how they may impact on your case. Several specific grounds for disqualification are enumerated in section 455(b). These are mandatory, self-enforcing grounds that cannot be waived. They can be raised at any time. It is the responsibility of the judge to keep himself or herself sufficiently informed about the parties and issues brought before the court and his or her interests and relationships to recognize (sooner rather than later) that disqualification is required.

## Disclosing Conflicts

Most judges have their clerks cross-check parties against a current list of the judge's relations, interests, etc. However, it is also counsel's responsibility to identify and disclose conflicts in these areas. It is good practice for the lawyer to provide the clerk with a comprehensive description of the litigation, parties, interests, and interested parties. Also, where there is any question, counsel should check the judge's publicly filed annual financial disclosure reports, required by statute.

If the judge "fits" into any of the following categories, set out in subsections of section 455(b), the judge must recuse himself. First, if the judge has "personal knowledge of disputed evidentiary facts in the proceeding," he has to be taken off the case. The judge's knowledge must be extrajudicial and more than simply background information. Unlike the grounds in other portions of the statute, there is no need to show that the judge is biased, or that his partiality may be questioned as a result of having knowledge of disputed facts in the case. Rather, the objective is to protect the rules of procedure and evidence which could be distorted if the judge presiding over the case has personal knowledge of the events and facts that are at issue. This all makes sense: neither side wants to guess about the effect on the outcome of a judge who was "too close" to the case.

Other categories that lead to disqualification relate to a judge's work, before going on the bench, on the very case or issue now before him or her. If the judge served as counsel in the matter in controversy *or* another lawyer with whom the judge then practiced served during that association as counsel on the matter, the judge must be disqualified. The issue that typically arises is whether the case before the judge concerns "the matter in controversy" on which the judge (or fellow practitioner) provided prior representation. The judge's prior representation of a party in an unrelated matter is (while perhaps grounds under section 455(a)) not *alone* grounds for disqualification under section 455(b). Whether the two prior cases are sufficiently related to be considered the same matter in controversy will often become a question of degree and judicial judgment.

Likewise, if the judge is a former government employee who participated as counsel, advisor, or a material witness, *or* if she expressed an opinion concerning the merits of the controversy, the judge must recuse herself from the case. Recusal is usually required under this subsection if the judge, as a government employee, actually signed a pleading or brief in the case or participated in the case to a point where the judge has prior knowledge of the facts or an interest in the issues in the case. *Mixon v. United States*, 608 F.2d 588 (5th Cir. 1979). But opinions expressed by the judge concerning general propositions of law while a government employee will not disqualify the judge. This handy rule

allowed Chief Justice Rehnquist to participate in a case involving a particular aspect of the U.S. Constitution even though he had, prior to his nomination to the U.S. Supreme Court, expressed his then understanding of the meaning of that portion of the Constitution. *See Laird v. Tatum*, 409 U.S. 824 (1972).

Another disqualifying category is closely related to those involving a judge with personal knowledge and a judge that worked on the case in a previous career. If the judge, or a lawyer with whom the judge previously practiced law, is a material witness in a matter in controversy, recusal is required. Of course, this rule is pretty basic when the judge must testify in the very case pending before the court; he can't sit in the witness box and on the bench at the same time. But this subsection also comes into play when the judge was a material witness in another case related to the lawsuit now before the judge. Again, the question is whether the prior case is sufficiently related to be considered the same matter in controversy. The goal here is to avoid situations where the judge

**No case is worth bringing a meritless challenge; no case is worth denying a meritorious one.**

may be passing on the credibility of his own prior testimony or that his or her prior testimony may affect his decision in the present case. If so, the judge must be recused under section 455(b). But even if the "same matter in controversy" standard cannot be met, consider the situations where a judge previously testified on even a somewhat related matter, thereby creating a challenge under section 455(a).

Another category of interests that disqualify a judge without much controversy are financial interests of the judge or his family in the controversy or a party before the court. Under section 455(b), the judge must *know* that he, individually or as a fiduciary, *or* the judge's spouse or minor child has such a financial interest or *any other interest* that could be substantially affected by the proceeding's outcome. This is one of the few grounds for disqualification that requires the judge to have actual knowledge of the disqualifying facts.

As might be expected, the term "financial interest" is defined broadly in the statute, followed by exceptions. A financial interest is any interest, no matter how small, that constitutes *direct* ownership of a legal or equitable interest, or a relationship as a director, advisor, or other active participant in the affairs of a party. However, the judge's ownership of mutual funds and the like over which the judge exercises no management is excluded from the definition. Nor is the judge's role as an officer in a charitable, religious, or civic organization a basis for disqualification, unless she has a financial interest in securities held by the organization. Where the judge has a nonfinancial interest ("any other interest"), recusal is only required if that interest could be "substantially affected by the outcome of the proceeding."

For example, a judge was not recused from a case where a litigant was arranging financing for the purchase of the judge's wife's business, because there was no connection between that transaction and any issues in the case before the judge. *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307 (2d Cir. 1988).

Finally, family relationships with someone involved in the proceeding before the judge are disqualifying events in some circumstances. Under the statute, there are two sides of the relationship to consider. First, there is the judge, the judge's spouse, someone within the third degree of relationship to either of them, or the spouse of any such person. Disqualification is required if any of those people is: a party (including officers and directors), a lawyer in the proceeding, a likely material witness, or someone known by the judge to have an interest that could be substantially affected by the outcome of the case.

The key here is that the disqualifying relationship must involve the judge or his close family. Therefore, if your opposing party has a family relationship with the judge's former law partner, you cannot disqualify the judge.

The trial and reviewing courts have wide discretion in fashioning a remedy when disqualification occurs or should have occurred. The court can treat the error as harmless and leave all the judge's rulings in place, vacate all prior rulings, vacate only those rulings made after the motion to disqualify, or remand for further hearings to determine the appropriate remedy. Obviously, consider all the alternatives when you ponder whether to try to disqualify a judge well into the case, after rulings may have been made in favor of both sides.

When fashioning a remedy, the court will consider the timeliness of the motion to disqualify. How quickly did either the court or party disclose potential grounds? Any suggestion that a party "sat" on the grounds to wait and see how the judge's rulings would go will most likely be a factor when a losing side moves to vacate any of the judge's rulings prior to disclosure. If the judge fails to disclose after learning of a conflict, there is a strong possibility of vacating all of the judge's rulings, including those made before the judge learned of the conflict.

Under the statutory scheme, it is the responsibility of both the federal judiciary and the lawyers to satisfy themselves that a judge's impartiality cannot reasonably be questioned. Judicial officers have an ethical duty to *sua sponte* satisfy themselves that they are not actually biased and, even if not actually biased, that their impartiality is not subject to reasonable inquiry. Additionally, one court has directed that counsel for a party who believes a judge's impartiality is reasonably subject to question has both a professional duty to the client and an obligation as an officer of the court to raise the matter. *In Re Bernard*, 31 F.3d 842, 847 (9th Cir. 1994). It is helpful, when considering and bringing a motion to disqualify, to remember and to remind the court that you, opposing counsel, and the court are all in this together.

"Disqualification" is an adversarial word, and it comes up in an area of the law where an adversarial attitude is inappropriate. The reputation of the judicial system is in the balance, and is one of the key policy underpinnings for the disqualification statutes. Whenever issues of judicial impartiality come into the case, it is both the lawyer's and judge's duty to protect that reputation. No case is worth bringing a meritless challenge; no case is worth denying a meritorious one.