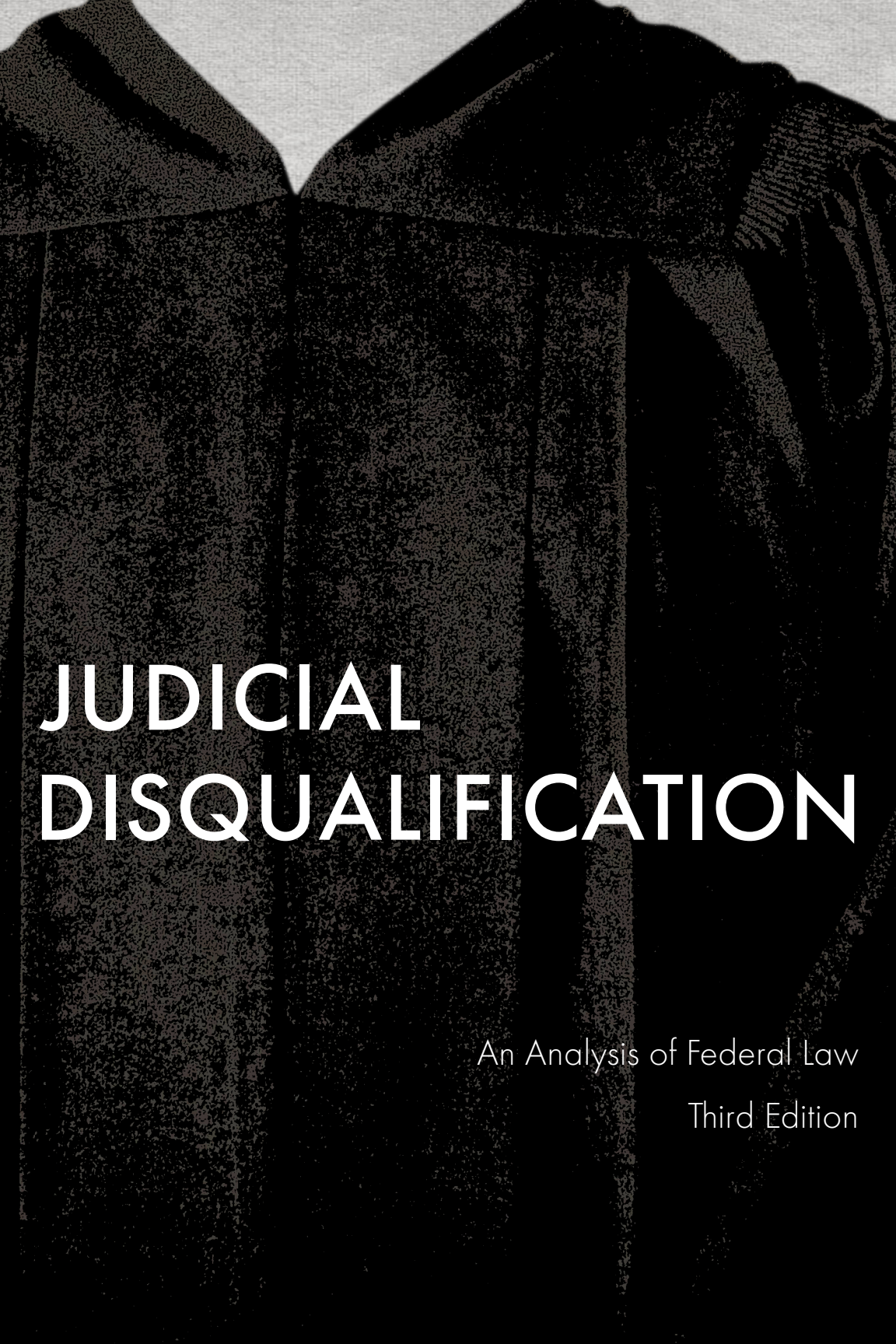

# JUDICIAL DISQUALIFICATION

An Analysis of Federal Law

Third Edition

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## An Analysis of Federal Law

**Third Edition**

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# Preface and Acknowledgments

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# Introduction

For centuries, impartiality has been a defining feature of the Anglo-American judge's role in the administration of justice. The reason is clear: in a constitutional order grounded in the rule of law, it is imperative that judges make decisions according to law, unclouded by personal bias or conflicts of interest. Accordingly, upon ascending the bench, every federal judge takes an oath to "faithfully and impartially discharge and perform all the duties" of judicial office.[1] Moreover, the Due Process Clause of the Fourteenth Amendment has been construed to guarantee litigants the right to a "neutral and detached," or impartial, judge.[2] Lastly, in a democratic republic in which the legitimacy of government depends on the consent and approval of the governed, public confidence in the administration of justice is indispensable. It is not enough that judges *be* impartial; the public must *perceive* them to be so. The Code of Conduct for United States Judges therefore admonishes judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" and to "avoid impropriety and the appearance of impropriety in all activities."[3]

When the impartiality of a judge is in doubt, the appropriate remedy is to disqualify that judge from hearing further proceedings in the matter. In *Caperton v. A.T. Massey Coal Co.*,[4] a case concerning disqualification of a state supreme court justice, the U.S. Supreme Court reaffirmed that litigants have a due process right to an impartial judge, and that under circumstances in which judicial bias is probable, due process requires disqualification. The Court noted, however, that disqualification rules may be and often are more rigorous than the Due Process Clause requires. In the aftermath of *Caperton*, the House Judiciary Committee held a hearing on the state of judicial disqualification in the federal system.[5] Disqualification requirements for federal judges require disqualification not just

1. 28 U.S.C. § 453. Note: All cites to U.S. Code are to the most recent version unless otherwise indicated.

2. Ward v. Village of Monroeville, 409 U.S. 57 (1972).

3. Code of Conduct for United States Judges, Canon 2A.

4. 556 U.S. 868 (2009).

5. *Examining the State of Judicial Recusals after* Caperton v. A.T. Massey: *Hearing Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2009).

when a judge is biased or probably biased, but also when a judge's impartiality "might reasonably be questioned."[6]

This monograph describes its subject as "disqualification," not "recusal," except when "recusal" is embedded in quoted material. In common parlance, "disqualification" and "recusal" are sometimes used interchangeably. Other times, the two terms are distinguished, with "recusal" referring to withdrawal on the judge's own initiative, and "disqualification" meaning withdrawal on the motion of a party. Applicable federal statutes—and the Code of Conduct for United States Judges—however, use "disqualification" broadly to embrace withdrawal both on motion and sua sponte. Because none of the primary sources of applicable law under study here refer to recusal, this monograph follows their lead.

Disqualification has ethical and procedural dimensions. The ethical dimension is governed by Canon 3C of the Code of Conduct for United States Judges,[7] as construed by the Committee on Codes of Conduct of the Judicial Conference of the United States.[8] Readers are encouraged to consult the Code of Conduct, the Published Advisory Opinions[9] of the committee, and the Compendium of Selected Opinions of the committee.

The procedural dimension, in contrast, is governed by four sections in Title 28 of the U.S. Code: §§ 47, 144, 455, and 2106. Although the text of Canon 3C on disqualification is substantially similar to 28 U.S.C. § 455, and both seek to promote public confidence in the judiciary, the focus of the two is different. Whereas the goal of the Code of Conduct—including Canon 3C—is to inform federal judges of their ethical obligations, to the end of advising them on conduct, § 455 is a procedural statute aimed at articulating disqualification standards, to the end of preserving the rights of litigants to impartial justice. This monograph focuses on the procedural dimension of federal judicial disqualification through an analysis of the applicable statutory law.

The two principal statutes governing judicial disqualification are 28 U.S.C. § 455, "Disqualification of justice, judge or magistrate judge" (discussed in section II), and 28 U.S.C. § 144, "Bias or prejudice of judge" (discussed in section III). The relationship between the two has been a source of some confusion. Although the two sections provide overlapping remedies for bias, there are some important differences. First, § 144 aims exclusively at *actual* bias or prejudice, whereas § 455 deals not only with actual bias and other forms of partiality but also with the

6. 28 U.S.C. § 455(a).

7. *See* appendix A for text of Canon 3C.

8. "The Code of Conduct is the law with respect to the ethical obligations of federal judges." *United States v. Microsoft Corp.*, 253 F.3d 34, 113 (D.C. Cir. 2001).

9. *Available at* http://www.uscourts.gov/rules-policies/judiciary-policies.

*appearance* of partiality. Second, § 144 is triggered by a party's affidavit, whereas § 455 may be invoked in a motion by a party or sua sponte by the judge. Third, § 144 applies only to district judges, while § 455 covers "[a]ny justice, judge, or magistrate judge of the United States."[10]

A third disqualification statute, 28 U.S.C. § 47 (discussed in section IV), provides that "[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him." The statute applies to judges sitting on courts of appeals who were recently appointed from the district court or who are district judges sitting by designation, and directs their disqualification from appeals of cases they decided as trial judges. Given its limited applicability, this statute has been utilized infrequently, and for the most part uneventfully.

A fourth statute, 28 U.S.C. § 2106 (discussed in section V), is not a disqualification statute as such but has been used to serve a comparable purpose. It authorizes the Supreme Court and circuit courts to "remand the cause and . . . require such further proceedings to be had as may be just under the circumstances." Section 2106 effectively enables an appellate court to disqualify a district judge by remanding a matter to a different judge for further proceedings if the appellate court doubts the original judge's impartiality.

10. *See* Pearson v. Prison Health Serv., 850 F.3d 526, 544 n.10 (3d Cir. 2017) ("The District Court is thus ultimately responsible for the decision, including for the Magistrate's report and recommendation if it is adopted in its entirety, but magistrate judges play an important role in the operation of the federal courts and must take care to word their published recommendations accordingly. Indeed, it is equally applicable to District Judges and Magistrates that '[w]henever a judge's impartiality "might reasonably be questioned" in a proceeding, 28 U.S.C. § 455(a) commands the judge to disqualify himself *sua sponte* in that proceeding.'").

# I

# Judicial Disqualification
## History and Policy

## A. History

Disqualification standards in the United States have been a work in progress, gaining in complexity and strength over time. In 1792, Congress enacted legislation that was the precursor to 28 U.S.C. § 455. This legislation codified the common law by calling for disqualification of a district judge who was "concerned in interest" but added that a judge could also be disqualified if the judge "has been of counsel for either party."[11] The statute was expanded in 1821 to require disqualification when relatives of the judge appeared as parties.[12]

In 1891, Congress enacted legislation, later codified as 28 U.S.C. § 47, forbidding a judge from hearing the appeal of a case that the judge tried.[13] In 1911, the precursor to § 455 was further amended to require disqualification when the judge was a material witness in the case.[14] That same year, Congress also enacted legislation—the predecessor to 28 U.S.C. § 144—entitling a party to secure the disqualification of a judge by submitting an affidavit that the judge has "a personal bias or prejudice" against the affiant or for the opposing party.[15] A decade later, in *Berger v. United States*,[16] the Supreme Court interpreted this statute to prohibit a judge from ruling on the truth of matters asserted in such an affidavit and to require automatic disqualification if the affidavit was facially sufficient.

11. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 279.
12. Act of Mar. 3, 1821, ch. 51, 3 Stat. 643.
13. Act of Mar. 3, 1891, ch. 23, § 21, 36 Stat. 1090.
14. Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1090.
15. *Id.* § 21.
16. 255 U.S. 22 (1921).

In 1927, the Supreme Court added a constitutional dimension to the law of disqualification. In *Tumey v. Ohio*,[17] the Court invalidated, on due process grounds, an Ohio statute that authorized a judge to preside over cases in which the judge would receive court costs assessed against convicted (but not acquitted) defendants.

By the mid-twentieth century, common-law aversion to judicial bias as grounds for disqualification continued to exert considerable influence. Section 455 remained silent as to bias. Section 144—although ostensibly enabling a party to disqualify a district judge simply by submitting an affidavit alleging personal bias—had been construed exactingly by the courts of appeals. As Professor John Frank explained at the time, "narrow construction of the phrase 'bias and prejudice'" had allowed frequent evasion of the statute.[18] Courts would find affidavits "not 'legally sufficient'" because the "specific acts mentioned" did not "indicate 'bias and prejudice,'" thereby "emasculat[ing] the *Berger* decision by transferring the point of conflict."[19] Frank warned that "[u]nless and until the Supreme Court gives new force and effect to the *Berger* decision, the disqualification practice of the federal district courts will remain sharply limited."[20]

In 1948, § 455 was further amended to disqualify judges who were related to a party's lawyer (not just related to a party, as had been the case since 1821). As amended, the statute then provided:

> 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 a party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.[21]

In 1964, the Fifth Circuit articulated a so-called duty to sit.[22] "It is a judge's duty to refuse to sit when he is disqualified, but it is equally his duty to sit when there is no valid reason for recusation."[23] In context, this created a duty to preside notwithstanding obvious appearance problems—problems that did not warrant disqualification under existing law. By 1972, Justice William Rehnquist reported, in *Laird v. Tatum*,[24] that the duty to sit had been accepted by all circuit courts.

17. 273 U.S. 510 (1927).

18. John Frank, Disqualification of Judges, 56 Yale L.J. 605, 629 (1927).

19. *Id.*

20. *Id.* at 630. *See also* United States v. Malinsky, 153 F. Supp. 321, 324–27 (S.D.N.Y. 1957) (relying on Frank's discussion in support of trend justifying court's rejection of § 144 claim).

21. 28 U.S.C. § 455, ch. 646, § 1, 62 Stat. 908 (1948).

22. United States v. Edwards, 334 F.2d 360 (5th Cir. 1964).

23. *Id.* at 362 n.2.

24. 409 U.S. 824, 837 (1972).

In 1972, the American Bar Association published the Model Code of Judicial Conduct to replace the Canons of Judicial Ethics it had promulgated fifty years earlier. The Model Code sought to encapsulate the ethics of disqualification into a unified rule.[25] Under the new rule, a judge was subject to disqualification "in a proceeding in which his impartiality might reasonably be questioned, including but not limited to" cases in which the judge had an actual bias concerning a party, had served as a lawyer in the matter (or was still with his former firm when the matter was being handled by another lawyer in that firm), had an interest in the case, or was related to the parties or their lawyers.

In 1973, the Judicial Conference of the United States adopted the Code of Conduct for United States Judges, based on the 1972 Model Code. The Code of Conduct applies to appellate and district judges, judges on the Courts of International Trade and Federal Claims, and bankruptcy and magistrate judges. The Judicial Conference Committee on Codes of Conduct is authorized to render advisory opinions about the code when requested by a judge to whom the code applies.

In 1974, Congress adopted, with some variations, the Model Code's disqualification rule in an amendment to § 455, which—by virtue of its requirement that judges disqualify themselves whenever their impartiality might reasonably be questioned—was generally seen as qualifying, if not ending, the "duty to sit."[26]

## B. Policy

The history of judicial disqualification, discussed in the preceding section, reveals at least three policies at work, all of which are oriented toward preserving and promoting an impartial judiciary. First is fair process. To guarantee litigants their day in court before an impartial judge, we need a mechanism to disqualify judges who may be biased against a party or otherwise closed-minded. This is, in effect, the due process justification for disqualification—a means to protect the rights of litigants to a fair hearing before an impartial judge.[27]

25. Model Code of Judicial Conduct, Canon 3C (Am. Bar Ass'n 1972).

26. *See* Charles Gardner Geyh, James J. Alfini, Steven Lubet & Jeffrey M. Shaman, Judicial Conduct and Ethics § 4.03 (5th ed. 2013).

27. Tumey v. Ohio, 273 U.S. 510, 535 (1927) (Due Process Clause guarantees parties "right to have an impartial judge"); *In re* Murchison, 349 U.S. 133, 136 (1955) ("[a] fair trial in a fair tribunal is a basic requirement of due process"). *See also* Model Code of Judicial Conduct, Terminology (Am. Bar Ass'n 2007) (defining "impartial" as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge").

Second is court legitimacy. To reassure the general public that its courts can be trusted to administer justice impartially, we must exclude judges whose conduct calls their impartiality into question. This focus on public confidence is what led lawmakers to amend § 455 in 1974 to disqualify judges whose impartiality "might reasonably be questioned."[28]

Third is civic virtue. Disqualification rules are embedded in the Code of Conduct for United States Judges as a means to promote ethical and virtuous judging by exhorting judges to live up to the ideals of the judicial role and step aside when their impartiality is in doubt.[29]

Taken in isolation, these three justifications for disqualification rules—fair process, court legitimacy, and civic virtue—would seem to favor a robust disqualification regime. But there are three countervailing concerns to be weighed in the balance. First, an unduly rigorous system of disqualification could be counterproductive. If the goal is to promote public and litigant confidence in the impartiality of the judiciary, a system in which judges are forever being challenged and removed could engender the perception that the judiciary is awash with bias. So there is something to be said for disqualification rules establishing a meaningful threshold that must be met before the time-honored presumption of impartiality is rebutted. Chief Justice Roberts made this point in his dissent in *Caperton v. A.T. Massey Coal Co.*[30] He argued that reading the Due Process Clause to require disqualification for probable bias "will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case."[31] The *Caperton* majority was mindful of the Chief Justice's concern but concluded that "[a]pplication of the constitutional standard implicated in this case will . . . be confined to rare instances."[32]

Second, an unduly rigorous disqualification regime can put a strain on the judicial workforce that jeopardizes the expeditious administration of justice. To the extent that justice delayed is justice denied, the need for meaningful

28. "If we are concerned, as most of us are with the need to shore up public confidence in our public institutions, we need to remove any scintilla of doubt that the public might have that that judge would be prejudiced in his decision. And that is why the criteria that we establish in S. 1886 is rather strict." *Judicial Disqualification: Hearing Before the Subcomm. on Improvements in Judicial Machinery* of the S. Comm. on the Judiciary on S. 1064, 93d Cong. 14 (1971 & 1973) (statement of Sen. Birch Bayh, cosponsor).

29. Model Code of Judicial Conduct, Preamble, para. 3 (Am. Bar Ass'n 2011).

30. 556 U.S. 868 (2009).

31. *Id.* at 891 (Roberts, C.J., dissenting).

32. *Id.* at 890 (Kennedy, J., opinion of the court).

disqualification standards must be weighed against the concern that "over-disqualification" depletes the supply of judges available to adjudicate cases.[33]

Third, unduly rigorous disqualification standards enable litigants and their lawyers to game the system. If disqualification is made too easy to obtain, litigants can exploit disqualification strategically, to remove judges who are unlikely to be receptive to a party's arguments on the merits, for reasons having little to do with the judges' "impartiality," as properly understood.[34]

These policy considerations are of limited relevance to the interpretation of unambiguous rules requiring judges to disqualify themselves for clearly defined conflicts of interest, such as when the judge owns stock in a corporate party or the judge's daughter enters an appearance before the court as counsel of record. But they can play a role when the court is called on to decide whether a judge's impartiality "might reasonably be questioned." This is particularly true in grey-area cases that present a novel set of facts, where these policy implications can help strike a balance that promotes the purposes served by a rigorous disqualification regime without being so rigorous as to raise countervailing concerns.

33. Canon 3A(2) of the Code of Conduct for United States Judges (*see* appendix A) provides that "A judge should hear and decide matters assigned, unless disqualified." Commentary accompanying a similar rule in the ABA Model Code of Judicial Conduct explains that "judges must be available to decide matters that come before the courts," and that "unwarranted disqualification" is at odds with "the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues." Model Code of Judicial Conduct r. 2.7, cmt. (Am. Bar Ass'n 2014).

34. Justice Breyer made this point in an opinion he wrote on behalf of the court when he was a circuit judge, emphasizing that the disqualification standard must be crafted "to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking." *In re* Allied-Signal Inc., 891 F.2d 967, 970 (1st Cir. 1989).

# II

# Disqualification Under 28 U.S.C. § 455

## A. Overview

### 1. The text of § 455

The primary source of disqualification law in the federal judicial system is 28 U.S.C. § 455. It provides, in its entirety, as follows:

> **§ 455. Disqualification of justice, judge, or magistrate judge**
>
> (a) Any justice, judge, or magistrate judge 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 a 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, or magistrate judge 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.
>
> (f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

Subsections (a) and (b) occupy the core of § 455 and should be read together. The two subsections divide the universe of disqualification into two categories: the general catchall of § 455(a), which requires disqualification from any proceeding in which a judge's "impartiality might reasonably be questioned"; and a list of more specific grounds for disqualification in § 455(b).

The rest of § 455 is directed at implementing subsections (a) and (b):

- Subsection (c) admonishes judges to keep abreast of their financial interests to ensure that they know when to disqualify themselves under § 455(b)(4).
- Subsection (d) defines the terms used in subsections (a) and (b).
- Subsection (e) provides parties with a limited opportunity to waive disqualification otherwise required by the catchall subsection (a), typically where the judge is poised to disqualify himself or herself sua sponte. It does not, however, permit the parties to waive disqualification required by the more specific provisions of subsection (b).
- Subsection (f) provides a limited opportunity for judges to avoid the need to disqualify themselves for financial interest under subsection (b)(4) through divestiture.

## 2. Interpretive ground rules

### a. Interpreting § 455(a) in relation to § 455(b)

As embodied in § 455, subsections (a) and (b) are conceptually separate. Subsection (a) compels disqualification for the appearance of partiality, while subsection (b) "also" compels disqualification for bias, financial interest, and other specific grounds. In contrast, the ABA Model Code of Judicial Conduct—after which § 455 was originally modeled—and the current Code of Conduct for United States Judges unify the two halves conceptually by characterizing the specific grounds for disqualification in subsection (b) as a nonexclusive subset of circumstances in which a judge's impartiality might reasonably be questioned in subsection (a).[35] In other words, § 455 says that judges must disqualify themselves under subsection (a) when their impartiality might reasonably be questioned *and* when one of the specific scenarios enumerated in subsection (b) applies. The ABA Model Code, in contrast, declares that judges must disqualify themselves when their impartiality might reasonably be questioned, *which includes but is not limited to* the conflict-of-interest scenarios enumerated in subsection (b).

For the most part, this may be a distinction without a difference—disqualification is required if the specific or general provisions are triggered, regardless of whether the specific provisions are characterized as a subset of or separate from the general. On the other hand, by conceptualizing them separately, § 455 can require disqualification under specific circumstances enumerated in subsection (b) that might not reasonably be characterized as calling a judge's impartiality into question under subsection (a). For example, subsection (b)(4) requires judges to disqualify themselves for "financial interest" (defined in subsection (d) as "however small")—which necessarily includes an interest so small that it could not reasonably call the judge's impartiality into question.[36]

Any circumstance in which a judge's impartiality might reasonably be questioned under § 455(a) requires disqualification, even if the circumstance is not enumerated in § 455(b).[37] At the same time, when § 455(b) identifies a particular situation requiring disqualification, it will tend to control any § 455(a) analysis with respect to that specific situation. For example, § 455(b)(5) requires disqualification when one of the parties is within the third degree of relationship to the judge. Consequently, a fourth-degree relationship to a party does not *by itself* create an appearance of partiality requiring disqualification under § 455(a). As

35. Model Code of Judicial Conduct r. 2.11(a) (Am. Bar Ass'n 2011); Canon 3C, Code of Conduct for United States Judges (2019).

36. Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 860 n.8 (1988).

37. *Id.*

the Supreme Court explained, "[s]ection 455(b)(5), which addresses the matter of relationship specifically, ends the disability at the *third* degree of relationship, and that should obviously govern for purposes of § 455(a) as well."[38] That said, disqualification under § 455(a) might still be appropriate if, for example, the judge's personal relationship with the fourth-degree relative was so close as to call the judge's impartiality into question. In that situation, disqualification would be required not because the party is a remote blood relative of the judge but because of the close personal relationship between the two. As a practical matter, however, when a litigant seeks disqualification under both §§ 455(a) and (b), and the court is satisfied that disqualification is required under § 455(a), it will frequently avoid the complexities of interpreting the sections in relation to each other by concluding that it need not address the § 455(b) claim.[39]

### b. Balancing the duty to decide with the duty to disqualify

Prior to 1974, the courts of appeals applied a judicial "gloss" to § 455 that created a "duty to sit,"[40] whereby judges resolved close questions against disqualification—including cases in which a judge's impartiality was in doubt, as long as an enumerated conflict of interest requiring disqualification did not apply. The 1974 amendments to § 455, however, shifted the balance by requiring disqualification whenever a judge's impartiality "might" reasonably be questioned, and the legislative history made clear that in revising the statute, Congress sought to end the "duty to sit."[41] The First, Fifth, Sixth, Tenth, and Eleventh Circuits have since said that close questions should be decided in favor of disqualification,[42] while the Seventh Circuit has remarked that "[a] judge *may* decide close calls in favor of recusal."[43] Justice Scalia, in declining a request for his own disqualification, cited the proposition that judges should err on the side of disqualification with apparent approval as applied to the lower courts, but opined that the absence of

38. Liteky v. United States, 510 U.S. 540, 553 (1994).

39. *See, e.g.*, Chase Manhattan Bank v. Affiliated FM Ins. Co., 343 F.3d 120, 128 (2d Cir. 2003) (ruling that judge should have recused under § 455(a), rendering § 455(b) analysis unnecessary); In re School Asbestos Litig., 977 F.2d 764, 781 (3d Cir. 1992) (allegations relating to §§ 455(a) and (b)(1), but decided on basis of § 455(a) alone); United States v. Cooley, 1 F.3d 985, 995-96 (10th Cir. 1993) (involving § 144 and § 455(b)(1) but decided on basis of § 455(a)); Parker v. Connors Steel Co., 855 F.2d 1510, 1527 (11th Cir. 1988) (ordering recusal under § 455(a) and declining to rule on § 455(b)(5)(iii)).

40. *See* section I.A.

41. H.R. Rep. No. 93-1453, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355.

42. *See In re* United States, 158 F.3d 26, 30 (1st Cir. 1998); Republic of Panama v. American Tobacco Co., 217 F.3d 343, 347 (5th Cir. 2000) (citing *In re* Chevron, 121 F.3d 163, 165 (5th Cir. 1997)); United States v. Dandy, 998 F.2d 1344, 1349 (6th Cir. 1993); Nichols v. Alley, 71 F.3d 347, 352 (10th Cir. 1995); United States v. Kelly, 888 F.2d 732, 744 (11th Cir. 1989).

43. N.Y.C. Hous. Dev. Corp. v. Hart, 796 F.2d 976, 980 (7th Cir. 1986) (emphasis added).

a mechanism to replace a disqualified justice on the Supreme Court renders it inapplicable there.[44]

Even though the "duty to sit" ended with the adoption of § 455, Canon 3A(2) of the Code of Conduct for United States Judges nonetheless declares that "a judge should hear and decide matters assigned, unless disqualified." The point is simply to underscore that judges have a duty to decide the cases that come before them and that disqualification should not be used as an excuse to shirk that duty by dodging difficult or unpleasant cases. As a result, most circuits have said "there is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is."[45]

### c. The rule of necessity

Rooted in common law dating back to the fifteenth century, the rule of necessity states that "where all are disqualified, none are disqualified."[46] In *United States v. Will*,[47] the Supreme Court ruled that the adoption of § 455 was not intended to abridge the rule of necessity.[48]

*Will* involved a class action brought by thirteen federal district judges challenging an act of Congress that stopped or reduced previously authorized cost-of-living increases for certain federal employees, including judges. The district court granted summary judgment for the plaintiffs (judges). On appeal, the Supreme Court addressed whether the Court itself was disqualified from hearing the case since all of its members had a direct financial interest in the outcome. Invoking the rule of necessity, the Court held that disqualification could not be required because then no federal judge would be able to entertain this federal constitutional challenge.

Courts have used the rule of necessity to reject disqualification in a variety of situations.[49] In *In re Wireless Telephone Radio Frequency Emissions Products Liability*

44. Cheney v. U.S. Dist. Ct. for the Dist. of Columbia, 541 U.S. 913, 915–16 (2004) (mem.) (Scalia, J.).

45. Hinman v. Rogers, 831 F.2d 937, 939 (10th Cir. 1987). *Accord* Nakell v. Attorney Gen. of N.C., 15 F.3d 319, 325 (4th Cir. 1994); *In re* Drexel Burnham Lambert Inc., 861 F.2d 1307, 1312 (2d Cir. 1988); Easley v. University of Mich. Bd. of Regents, 853 F.2d 1351, 1356 (6th Cir. 1988); Suson v. Zenith Radio Corp., 763 F.2d 304, 308–09 n.2 (7th Cir. 1985); Brody v. President & Fellows of Harvard Coll., 664 F.2d 10, 12 (1st Cir. 1981).

46. Evans v. Gore, 253 U.S. 245 (1920).

47. 449 U.S. 200 (1980).

48. *Id.* at 217.

49. *See, e.g.*, Williams v. United States, 240 F.3d 1019, 1025–26 (Fed. Cir. 2001); Tapia-Ortiz v. Winter, 185 F.3d 8, 10 (2d Cir. 1999); Bartley v. United States, 123 F.3d 466, 467 n.1 (7th Cir. 1997), *cert. denied*, 522 U.S. 1062 (1998); Jefferson Cty. v. Acker, 92 F.3d 1561, 1583 (11th Cir. 1996) (en banc), *vacated and remanded on other grounds*, 520 U.S. 1261 (1997), *aff'd*, 137 F.3d 1314 (11th Cir. 1998) (en banc), *rev'd on other grounds*, 527 U.S. 423 (1999); Duplantier v. United States, 606 F.2d 654, 662 (5th Cir. 1979).

*Litigation*,[50] for example, four of seven members of the Judicial Panel on Multidistrict Litigation (JPML) assigned to hear the matter held stock interests in one or more of the parties. The JPML determined that the rule of necessity precluded disqualification under § 455(a) because there was no statutory provision for substituting panel members, and disqualification would result in fewer than the four judges required by statute to hear the case.

In *Ignacio v. Judges of the United States Court of Appeals for the Ninth Circuit*,[51] the pro se plaintiff sought to disqualify the entire circuit from hearing his case, on the grounds that all of the Ninth Circuit judges had conspired to dismiss his previous suits. In denying the motion, the court explained that "a judge is not disqualified to try a case because of a personal interest in the matter at issue if 'the case cannot be heard otherwise.'"[52] The Ninth Circuit held that the rule of necessity applies when a litigant "indiscriminately sues all of the judges" in a circuit.[53] Quoting the axiom that "where all are disqualified, none are disqualified,"[54] the court found that disqualification was "not necessary" because all of the Ninth Circuit judges would have been eliminated, making it impossible to hear the case.[55]

### d. Special concerns in bench trials

The question has arisen as to whether the standard for disqualification differs in a bench trial, where the judge's role is even more pivotal than in a jury trial. In *Alexander v. Primerica Holdings, Inc.*,[56] the Third Circuit said, "We cannot overlook the fact that this is a non-jury case . . . . When the judge is the actual trier of fact, the need to preserve the appearance of impartiality is especially pronounced."[57]

50. 170 F. Supp. 2d 1356 (J.P.M.L. 2001).

51. 453 F.3d 1160 (9th Cir. 2006).

52. *Id.* at 1163 (quoting United States v. Will, 449 U.S. 200, 213 (1980)).

53. *Id.* at 1164.

54. *Id.* at 1165 (quoting Pilla v. ABA, 542 F.2d 56, 59 (8th Cir. 1976). *See also* Haase v. Countrywide Home Loans, Inc., 838 F.3d 665, 666 (5th Cir. 2016) (rule of necessity authorized court to hear case in which plaintiff brought suit against entire Fifth Circuit); Glick v. Edwards, 803 F.3d 505, 509 (9th Cir. 2015) (where plaintiff sued all district court's judges, none were required to recuse, citing rule of necessity); Zaleski v. Burns, 606 F.3d 51, 53 n.1 (2d Cir. 2010) (rule of necessity enabled court to address claim against entire federal judiciary alleging conspiracy to deprive plaintiff of his constitutional rights).

55. *Ignacio*, 453 F.3d at 1165.

56. 10 F.3d 155 (3d Cir. 1993).

57. *Id.* at 163, 166.

*Price Bros. v. Philadelphia Gear Corp.*[58] involved an alleged ex parte communication. The Sixth Circuit held that "*where a suit is to be tried without a jury,* sending a law clerk to gather evidence is so destructive of the appearance of impartiality required of a presiding judge" that a remand was necessary to determine the truth of the allegation.[59] The D.C. Circuit has stated that "recusal might well be prudent when a perjury bench trial involves testimony from a proceeding over which the same judge presided," although § 455(a) "does not require it."[60]

Even though disqualification issues may be of special concern in bench trials, it does not follow that a different disqualification standard is justified in jury trials. As the Third Circuit has stated:

> [S]ection 455 properly makes no distinction between jury and nonjury trials. The district judge in a jury trial must still make numerous pretrial rulings, including crucial summary judgment rulings, and will doubtless be called on to make numerous rulings on the qualification of witnesses and on evidentiary matters, not to mention post-trial motions.[61]

### e. Standing

Parties who file disqualification motions claim, in effect, that they will be aggrieved if their cases are decided by judges who are partial or appear to be so. In the usual case, a movant alleges that the judge has a real or perceived bias or interest against the movant or in favor of the movant's opponent. For example, a plaintiff may seek to disqualify a judge on the grounds that the defendant is the judge's close friend. In that scenario, however, may the judge's friend likewise move for disqualification? Although it might seem that the friend lacks standing, insofar as the friend stands to be helped rather than injured by the allegedly disqualifying bias, the friend could harbor an understandable concern that the judge might err in favor of his friend's opponent to appear fair.

Does a party have standing to challenge a refusal to disqualify when the judge's alleged partiality would be in that party's favor? In *Pashaian v. Eccelston Properties, Ltd.*,[62] the judge's sister-in-law was married to a partner in the law firm of a defendant's attorney. Even though any potential bias would seem to favor the defendants, multiple defendants moved to disqualify the judge, who granted the motion, but not before ordering a preliminary injunction in favor of the plaintiff.

58. 629 F.2d 444 (6th Cir. 1980).

59. *Id.* at 446 (emphasis added) (finding harmless error on remand, 649 F.2d 416 (6th Cir. 1981)).

60. United States v. Barrett, 111 F.3d 947, 951 (D.C. Cir. 1997). *See also* United States v. Parker, 742 F.2d 127, 128–29 (4th Cir. 1984) (disqualification not required in same circumstance).

61. *In re* School Asbestos Litig., 977 F.2d 764, 782 (3d Cir. 1992).

62. 88 F.3d 77 (2d Cir. 1996).

The movants challenged the judge's failure to disqualify earlier, and the Second Circuit raised the standing issue sua sponte:

> [A party] has standing to challenge the judge's refusal to recuse even if the alleged bias would be in the moving party's favor. Such a party might legitimately be concerned that the judge will "bend over backwards" to avoid any appearance of partiality, thereby inadvertently favoring the opposing party. The possibility of this compensatory bias by an interested judge is sufficiently immediate to constitute the "personal injury" necessary to confer standing under Article III.[63]

A different standing issue has arisen with respect to nonparty witnesses who seek a judge's disqualification. In *United States v. Sciarra*,[64] the Third Circuit concluded that nonparty witnesses lacked standing to seek the disqualification of a judge in the context of a posttrial investigation. In that case, the United States government filed a civil complaint against a local union and twelve individuals, including the two petitioners who were members of the union's executive board. After holding a bench trial, the district judge found the executive board culpable of aiding and abetting corruption. After the trial court's judgment was affirmed on appeal, the government moved to depose the petitioners about the union's operations during the intervening period.[65] The petitioners, who had been removed from their executive board positions as part of the trial court's final judgment, filed a cross-motion to disqualify the presiding judge. The judge declined to disqualify himself. In reviewing that decision, the Third Circuit construed § 455(a)'s "proceeding" requirement to mean any stage of litigation in which a judge's decision affects the "substantive rights of litigants to an actual case or controversy."[66] Because there was no pending action in which the rights of the litigants were at issue, the petitioners had no standing, as nonparty witnesses, to invoke § 455 to disqualify the judge. The Third Circuit reserved judgment on the question whether, in the context of a case or controversy, a nonparty witness can move for the disqualification of a judge.[67]

63. *Id.* at 83. *See also* United States v. Kelly, 888 F.2d 732 (11th Cir. 1989). When the district judge is placed in the "awkward position" of ruling one way and appearing to indulge his or her perceived bias, or ruling the other way and appearing to bend over backward to avoid perceived bias, disqualification is necessary. *Id*. at 745.

64. 851 F.2d 621 (3d Cir. 1988).

65. *Id.* at 624.

66. *Id.* at 635.

67. *Id.* at 636.

# B. Grounds for disqualification

## 1. General standard: when impartiality might reasonably be questioned—§ 455(a)

### a. Framework for analysis

Section 455(a) requires disqualification for the *appearance* of partiality (i.e., when a judge's "impartiality might reasonably be questioned"). Unlike § 455(b)(1)—which requires disqualification for *actual* partiality (i.e., when a judge "has a personal bias or prejudice toward a party")—whether the judge is, in fact, impartial is not dispositive of disqualification under subsection (a). The justification for making perceived partiality a ground for disqualification is at least twofold. First, regardless of whether judges are partial in fact, public perceptions of partiality can undermine confidence in the courts. Second, disqualifying judges for outward manifestations of what could reasonably be construed as bias obviates the need to make subjective judgment calls about what is actually going on inside a judge's heart and mind.

Section 455(a) makes clear that judges should apply an objective standard in determining whether to disqualify. Judges contemplating disqualification under § 455(a), then, should not ask whether they believe they are capable of impartially presiding over the case. Rather, the question is whether a judge's impartiality might be questioned from the perspective of a reasonable person. Every circuit has adopted some version of the "reasonable person" standard to answer this question.[68] In the context of denying a motion for his disqualification from *Cheney v. United States District Court for the District of Columbia*,[69] Justice Scalia noted that this reasonable person is aware "*of all the surrounding facts and circumstances*."[70] The Second Circuit has characterized the reasonable person as an "objective, disinterested observer" who is privy to full knowledge of the

68. *See, e.g.*, *In re* United States, 666 F.2d 690, 695 (1st Cir. 1981); SEC v. Razmilovic, 738 F.3d 14, 29 (2d Cir. 2013); Blanche Rd. Corp. v. Bensalem Twp., 57 F.3d 253, 266 (3d Cir. 1995); United States v. DeTemple, 162 F.3d 279, 286 (4th Cir. 1998), *cert. denied*, 526 U.S. 1137 (1999); Vieux Carre Prop. Owners v. Brown, 948 F.2d 1436, 1448 (5th Cir. 1991); United States v. Nelson, 922 F.2d 311, 319 (6th Cir. 1990); *In re* Hatcher, 150 F.3d 631, 637 (7th Cir. 1998); Little Rock Sch. Dist. v. Arkansas, 902 F.2d 1289, 1290 (8th Cir. 1990); United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986); Hinman v. Rogers, 831 F.2d 937, 939 (10th Cir. 1987); United States v. Scrushy, 721 F.3d 1288, 1303 (11th Cir. 2013); *In re* Barry, 946 F.2d 913, 914 (D.C. Cir. 1991); Baldwin Hardware Corp. v. FrankSu Enter. Corp., 78 F.3d 550, 557 (Fed. Cir. 1996).

69. 541 U.S. 913 (2004) (mem.) (Scalia, J.).

70. *Id.* at 924 (quoting Microsoft Corp. v. United States, 530 U.S. 1301, 1302 (2000)).

surrounding circumstances.[71] The Fourth Circuit has clarified that the hypothetical reasonable observer is not a judge because judges, keenly aware of the obligation to decide matters impartially, "may regard asserted conflicts to be more innocuous than an outsider would."[72] The Seventh Circuit has likewise noted that an outside observer is "less inclined to credit judges' impartiality and mental discipline than the judiciary."[73] And relying on the Supreme Court's observation in *Liljeberg v. Health Services Acquisition Corp.*,[74] the Fifth Circuit commented that "[p]eople who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges."[75]

At the same time, this hypothetical "reasonable" observer "is not a person unduly suspicious or concerned about a trivial risk that a judge may be biased."[76] The reasonable observer must be "thoughtful" and "well-informed."[77] The First Circuit has emphasized that a reasonable person does not draw conclusions on the basis of groundless suspicion:

> [W]hen considering disqualification, the district court is *not* to use the standard of "Caesar's wife," the standard of mere suspicion. That is because the disqualification decision must reflect *not only* the need to secure public confidence through proceedings that appear impartial, *but also* the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.[78]

Numerous cases have rejected disqualification under circumstances in which calling a judge's impartiality into question would require suspicion or speculation beyond what a reasonable person would indulge. The Second Circuit upheld a refusal to disqualify where the defendant alleged that the judge, a personal acquaintance, had grown unfriendly to him because of the defendant's public

71. United States v. Bayless, 201 F.3d 116, 126 (2d Cir. 2000). *See also Scrushy*, 721 F.3d at 1303 (disqualification under § 455(a) is determined with reference to whether "an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality").

72. *DeTemple*, 162 F.3d at 287. *See also* Mathis v. Huff & Puff Trucking, Inc., 787 F.3d 1297, 1310 (10th Cir. 2015) ("The reasonable observer is not the judge or even someone familiar with the judicial system, but rather an average member of the public.")

73. *In re* Mason, 916 F.2d 384, 386 (7th Cir. 1990). *See also* O'Regan v. Arbitration Forums, Inc., 246 F.3d 975, 988 (7th Cir. 2001).

74. 486 U.S. 847 (1988).

75. *In re* Faulkner, 856 F.2d 716, 721 (5th Cir. 1998) (quoting *Liljeberg*, 486 U.S. at 864–65). *See also* United States v. Jordan, 49 F.3d 152, 156 (5th Cir. 1995).

76. *DeTemple*, 162 F.3d at 287.

77. *Mason*, 916 F.2d at 386. *See also Jordan*, 49 F.3d at 156; *O'Regan*, 246 F.3d at 988.

78. *In re* Allied-Signal Inc., 891 F.2d 967, 970 (1st Cir. 1989) (Breyer, J.) (citation omitted).

opposition to the Gulf War. The court reasoned that "a disinterested observer could not reasonably question [the judge's] impartiality based upon his alleged failure to return the plaintiff's greetings."[79]

Uninformed speculation and criticism—even if widely reported in the media—do not trigger disqualification under § 455(a). In *United States v. Bayless*,[80] a district judge was criticized in the media for granting a motion to suppress in a drug case, culminating in members of Congress calling for the judge's impeachment. The judge subsequently reversed his earlier ruling, and the defendant argued that the judge should have disqualified himself. Although it was widely speculated that the judge had reversed his earlier ruling in response to the threats and criticism, the Second Circuit concluded that disqualification was unnecessary. The need for disqualification "is to be determined 'not by considering what a straw poll of the only partly informed man-in-the-street would show[,] but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge.'"[81]

Explaining his decision not to disqualify himself in *Cheney*, Justice Scalia rejected the assertion that newspaper editorials calling his impartiality into question were dispositive. The reasonable observer must be "*informed of all the surrounding facts and circumstances*,"[82] and, in Scalia's view, the editorials in question were not only factually inaccurate, but lacked recognition and understanding of relevant precedent.[83]

Section 455 also requires disqualification if a reasonable person might believe that the judge was aware of circumstances creating an appearance of partiality, even if the judge was in fact unaware. In *Liljeberg v. Health Services Acquisition Corp.*,[84] the trial judge was a member of the board of trustees of a university that had a financial interest in litigation before the judge. But the judge stated that he was unaware of the financial interest when he conducted a bench trial and ruled in the case. The court of appeals, nevertheless, vacated the judgment under Fed. R. Civ. P. 60(b) because the judge failed to disqualify himself pursuant to § 455(a). The Supreme Court agreed. Noting that the purpose of § 455(a) is to promote public confidence in the integrity of the judicial process, the Court observed that such confidence "does not depend upon whether or not the judge actually

79. Diamondstone v. Macaluso, 148 F.3d 113, 121 (2d Cir. 1998).

80. 201 F.3d 116 (2d Cir. 2000).

81. *Id.* at 127 (citing *In re* Drexel Burnham Lambert Inc., 861 F.2d 1307, 1313 (2d Cir. 1988)).

82. *Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913, 924 (2004) (mem.) (Scalia, J.) (quoting Microsoft Corp. v. United States, 530 U.S. 1301, 1302 (2000)).

83. *Id.*

84. 486 U.S. 847 (1988).

knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew."[85]

The Supreme Court addressed a related issue in *São Paulo State of Federative Republic of Brazil v. American Tobacco Co*.[86] The respondents sought the disqualification of the district judge because his name had been associated with an earlier, similar suit prior to his appointment to the bench. In the earlier case, the judge was erroneously named in an amicus curiae brief as the president of the association that submitted the brief, although he had retired from that position six months before filing. The respondents argued that the inclusion of the judge's name created an appearance of partiality on the part of the judge in the later case, even though the judge was unaware that his name was on the earlier brief, he played no part in preparing the brief, and he was only "vaguely aware" of the case.[87] The judge declined to disqualify himself. The court of appeals reversed. The Supreme Court reversed, concluding that the court of appeals had misapplied the "reasonable person" standard and overlooked the requirement that the reasonable person be aware of all relevant facts when determining the need for disqualification. In the Court's view, the fully informed, reasonable person would not believe that the erroneous use of the judge's name could call into question the judge's impartiality.

Courts of appeals have likewise required disqualification when a reasonable observer might think that judges were aware of events or information that could impair their impartiality—even if they were not so aware. The Seventh Circuit, for example, remanded a habeas case directing the judge to whom the case had been reassigned to provide the petitioner the opportunity to challenge the dismissal of four claims by the previously assigned district judge.[88] That judge had ruled on the habeas petition without realizing that he, as a state court judge years earlier, had been on the panel whose decision was now challenged.

85. *Id.* at 860.

86. 535 U.S. 229 (2002).

87. *Id.* at 233 (emphasis omitted).

88. Russell v. Lane, 890 F.2d 947 (7th Cir. 1989). *See also* E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1295 n.7 (9th Cir. 1992) (stating district judge's lack of actual knowledge of his former firm's involvement in the litigation is irrelevant).

### b. Recurring scenarios

#### i. Judge's prior relationship with parties, witnesses, or lawyers

*Prior relationship with a party.* The First Circuit has observed that "[f]ormer affiliations with a party may persuade a judge not to sit; but they are rarely a basis for compelled [disqualification]."[89] Judges often cannot avoid some acquaintance with the underlying parties or events that give rise to litigation, particularly in smaller communities. Acquaintance, by itself, will not require disqualification. The Second Circuit upheld a refusal to disqualify where the judge had a social relationship with a shareholder in a company victimized by the defendants. The judge's relationship with the shareholder "ended seven or eight years prior to sentencing[,] . . . he had no specific knowledge of the contested facts[,] and . . . the . . . allegations [regarding the judge's friend's restaurant] were not outcome-determinative in these proceedings."[90] The Second Circuit also upheld a refusal to disqualify where the defendant had a remote (but adversarial) business relationship with the judge's husband. "[I]t requires too much speculation to convert [the husband's] alleged past frustrated dealings with [the defendant] into any interest, financial or otherwise, in the outcome of [the defendant's] unrelated criminal trial."[91]

The Eleventh Circuit rejected the argument that a judge's penchant for strip clubs required him to disqualify himself from a case in which a strip club was a party. In so ruling, the court emphasized that the judge did not frequent the club in question.[92] In a related vein, the D.C. Circuit ruled that disqualification was unnecessary where the judge and a party shared an interest in glass art and were co-donors (with others) of a glass sculpture to the Metropolitan Museum of Art.[93]

Some personal relationships, however, are so friendly or antagonistic as to require disqualification. The Sixth Circuit reversed a failure to disqualify in a sex discrimination suit where, in pretrial proceedings, the judge stated that he personally knew one of the people accused of discrimination and that "he is an honorable man and I know he would never intentionally discriminate against anybody."[94] "Once the district court expressed his ardent sentiments . . . the objective appearance of impartiality vanished."[95] Similarly, the Second Circuit

89. *In re* Martinez-Catala, 129 F.3d 213, 221 (1st Cir. 1997).
90. United States v. Lovaglia, 954 F.2d 811, 817 (2d Cir. 1992).
91. United States v. Morrison, 153 F.3d 34, 47–49 (2d Cir. 1998).
92. Curves, LLC v. Spalding Cty., 685 F.3d 1284, 1287 (11th Cir. 2012).
93. Armenian Assembly of Am., Inc. v. Cafesjian, 758 F.3d 265 (D.C. Cir. 2014).
94. Roberts v. Bailar, 625 F.2d 125, 127 (6th Cir. 1980).
95. *Id.* at 129.

found disqualification necessary when the judge admitted to a prior relationship with the defendant that influenced his decision making.[96]

In *In re Faulkner*,[97] the Fifth Circuit concluded that although there was no actual bias, the judge's close, familial relationship with his cousin, who was integral to a number of transactions giving rise to the indictment, was sufficient to establish an appearance of bias. Both the judge and his cousin "describe[d] their relationship as more like that of 'brother and sister'; she is the godmother to one of his children."[98]

In another Fifth Circuit case, the court reversed a failure to disqualify where there was a publicized history of "bad blood" between the defendant and a close personal friend of the judge.[99] While noting that friendship between the judge and a person with an interest in the case need not be disqualifying, here the judge's friend and the defendant "were embroiled in a series of vindictive legal actions resulting in a great deal of publicity," some of which involved the judge's spouse.[100]

A recurring issue has arisen with respect to litigants who stand accused of threatening, attacking, or killing federal judges. The cases are in general accord that if the presiding judge is among those targeted by the alleged assailant, disqualification is appropriate under § 455(a). Thus, where the alleged assailant targeted a courthouse (rather than an individual judge) the Seventh Circuit determined that all judges presiding in the circuit where the courthouse was situated at the time of the attack should disqualify themselves.[101] Likewise, where the alleged assailant targeted judges within the circuit generally, the Eleventh Circuit decided that all judges presiding in the circuit when the attack occurred would disqualify themselves.[102]

On the other hand, when the assigned judge is not among those targeted, disqualification may be unnecessary. A defendant was accused of threatening three California district judges who handled his pro se cases. The Ninth Circuit declined to disqualify the district judge assigned to hear the case because he was not

96. United States v. Toohey, 448 F.3d 542 (2d Cir. 2006).

97. 856 F.2d 716 (5th Cir. 1998).

98. *Id.* at 718.

99. United States v. Jordan, 49 F.3d 152 (5th Cir. 1995).

100. *Id.* at 157.

101. *In re* Nettles, 394 F.3d 1001 (7th Cir. 2005). *See also* Nichols v. Alley, 71 F.3d 347 (10th Cir. 1995) (mandating recusal where federal judge's chambers were damaged by Oklahoma City bombing of federal building a block away).

102. United States v. Moody, 977 F.2d 1420 (11th Cir. 1992).

among the defendant's intended victims.[103] Similarly, in a habeas petition filed twenty years after the attack at issue, the Eleventh Circuit held that disqualification was necessary only for those judges who were on the bench and in the circuit at the time of the attack.[104] These cases are distinct from the cases (discussed in Section II.B.1.b.iv) in which a party threatens a judge in a strategic move to force disqualification.

Courts distinguish personal or otherwise direct relationships between judges and parties—which sometimes give rise to a need for disqualification—from shared affiliations or characteristics among judges and parties, which, by themselves, are insufficient to warrant disqualification. Shared religious affiliation, for example, is insufficient to justify disqualification. In *Bryce v. Episcopal Church in the Diocese of Colorado*,[105] the Tenth Circuit rejected the assertion that disqualification was necessary simply because the judge was a member of the same religion as the defendants. The court found that the plaintiff's argument that the judge's subscription to the same belief system as the defendant was tenuous and mere "associational bias," rendering it insufficient to necessitate disqualification.[106]

Likewise, shared political affiliation is not enough, by itself, to require disqualification. In *Higganbotham v. Oklahoma*,[107] the Tenth Circuit rejected the plaintiff's argument that disqualification was necessary because the judge and a litigant shared a partisan affiliation in a politically charged case. The court explained, "an inescapable part of our system of government [is] that judges are drawn primarily from lawyers who have participated in public and political affairs."[108]

Similarly, a judge's sexual orientation is not enough to disqualify a judge from hearing cases in which a party is advocating in support of rights that could inure to the benefit of people who share the judge's orientation. The Ninth Circuit held that a district judge was not disqualified from ruling on the constitutionality of a state ban on same-sex marriage simply because he was in a long-term, same-sex relationship (the Supreme Court, however, subsequently vacated the decision on the grounds that the plaintiff lacked standing).[109]

103. Clemens v. U.S. District Court for the Central District of California, 428 F.3d 1175, 1179–80 (9th Cir. 2005). *See also* United States v. Spiker, 649 F. App'x 770 (11th Cir. 2016) (district judge and magistrate judge were not required to disqualify on grounds that they belonged to the same court as the magistrate judge whom the defendant attempted to have murdered).

104. *In re* Moody, 755 F.3d 891 (11th Cir. 2014).

105. 289 F.3d 648 (10th Cir. 2002).

106. *Id.* at 660.

107. 328 F.3d 638 (10th Cir. 2003).

108. *Id.* at 645.

109. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom.* Hollingsworth v. Perry, 570 U.S. 693 (2013).

Courts have reached the same conclusions when confronted with requests to disqualify on the basis of the judge's race or gender. In *MacDraw, Inc. v. CIT Group Equipment Financing, Inc.*,[110] a defendant moved for an Asian judge to disqualify himself because the defendant had been publicly critical of a prominent Asian man. The Second Circuit opined that "it is intolerable for a litigant, without any factual basis, to suggest that a judge cannot be impartial because of his or her race and political background."[111]

In a district court case where the judge's impartiality was challenged because of her gender, the judge denied the motion for disqualification.

> The assertion, without more, that a judge who . . . happens to be of the same sex as a plaintiff in a suit alleging sex discrimination on the part of a law firm, is, therefore, so biased that he or she could not hear the case, comes nowhere near the standards required for [recusation]. Indeed, if background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case.[112]

There is authority for declining to disqualify when the judge's friend is a public official who is sued in an official (as opposed to a personal) capacity. In *Cheney v. United States District Court for the District of Columbia*,[113] Justice Scalia declined to disqualify himself from hearing a case in which Vice President Dick Cheney was a named party after Justice Scalia went on a hunting trip with the vice president while the case was pending before the Supreme Court. Justice Scalia emphasized that the suit in question was filed against the vice president in his official, as distinguished from his personal, capacity, and explained the importance of that distinction:

> [W]hile friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue, no matter how important the official action was to the ambitions or the reputation of the Government officer.[114]

On the other hand, there may be circumstances in which the ties between the judge and the public official are so close, and the consequences of a ruling adverse to the official are so dire, that disqualification is appropriate regardless of the capacity (if any) in which the official is sued. In *United States v. Bobo*,[115] an Alabama district judge disqualified himself from hearing a case of interest

110. 157 F.3d 956 (2d Cir. 1998).

111. *Id.* at 963.

112. Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 4 (S.D.N.Y. 1975).

113. 541 U.S. 913 (2004) (mem.) (Scalia, J.).

114. *Id.* at 916.

115. 323 F. Supp. 2d 1238 (N.D. Ala. 2004).

to the governor because the judge had previously attended private functions endorsing the governor's candidacy. Although the governor was not a party in the case, the outcome of the case could have affected the governor's reelection. To avoid an appearance of bias, the district court concluded that disqualification was appropriate.

*Prior relationship with a witness.* As with parties, a judge's mere acquaintance or familiarity with a witness does not require disqualification. In *Fletcher v. Conoco Pipe Line Co.*,[116] the Eighth Circuit found disqualification unnecessary even though the judge maintained a thirty-six-year friendship with a fact witness for the plaintiff and remained a client of the witness's law firm in an unrelated, ongoing matter. The court found this relationship insufficient to overcome a presumption of impartiality. In *In re Beyond Innovation Technology Co.*,[117] the Federal Circuit ruled, in the context of a mandamus action, that the movant "had not met its burden of showing that the judge clearly abused his discretion in not disqualifying"[118] when a close personal friend of the judge testified as a witness. The court emphasized that "we are not reviewing the matter de novo. We do not review to determine whether we would recuse in such circumstances. Instead, we are only to review whether the judge abused his discretion in declining to disqualify himself."[119]

On the other hand, in some cases disqualification may be necessary. In *United States v. Kelly*,[120] the Eleventh Circuit held that a trial judge improperly failed to disqualify himself when, among other things, a close personal friend was a key defense witness. The judge had expressed concern on the record that he might "bend over backwards to prove he lacked favoritism" toward the witness, and that a guilty verdict might "jeopardize his wife's friendship" with the witness's wife.[121] These "profound doubts about the propriety of continuing . . . on the case . . . should have been resolved in favor of disqualification."[122]

*Prior relationship with an attorney.* While a judge's acquaintance with one of the attorneys does not ordinarily require disqualification, there are cases where the extent of intimacy, or other circumstances, renders disqualification necessary. In *United States v. Murphy*,[123] the Seventh Circuit concluded that a judge should have disqualified himself where he and the prosecuting attorney were close

116. 323 F.3d 661 (8th Cir. 2003).
117. 166 F. App'x 490 (Fed. Cir. 2006).
118. *Id.* at 492.
119. *Id.*
120. 888 F.2d 732 (11th Cir. 1989).
121. *Id.* at 738.
122. *Id.* at 745.
123. 768 F.2d 1518 (7th Cir. 1985).

friends and planned to vacation together immediately after the trial. The court noted that "friendships among judges and lawyers are common" and "a judge need not disqualify himself just because a friend—even a close friend—appears as a lawyer."[124] Yet here the extent of intimacy was "unusual," and an objective observer might reasonably doubt the judge's impartiality where the judge "was such a close friend of the prosecutor that the families of both were just about to take a joint vacation."[125]

By the same token, a judge's antipathy toward a lawyer is not enough, by itself, to require disqualification, unless it casts doubt on the judge's impartiality toward the lawyer's client. As the Tenth Circuit opined in *United States v. Ritter*,[126] "bias in favor of or against an attorney can certainly result in bias toward the party. Thus, if a judge is biased in favor of an attorney, his impartiality might reasonably be questioned in relationship to the party."[127] Even then, however, circumstances can change. In *Diversified Numismatics, Inc. v. City of Orlando*,[128] the district judge had previously disqualified himself from prior cases "because of his feeling that he might be biased against counsel."[129] When the judge declined to disqualify himself from a later case in which the attorney entered an appearance, the Eleventh Circuit affirmed the ruling: "Tempers do cool, and anger does dissipate. Prior recusals, without more, do not objectively demonstrate an appearance of partiality."[130]

The Eleventh Circuit held that a trial judge should have disqualified himself where his law clerk's father—who himself had been the judge's law clerk—was a partner in the law firm representing one of the parties.[131] The court nevertheless found the failure to disqualify harmless error in this case.[132]

Similarly, the First Circuit held that refusal to disqualify was "probably" improper where, during pendency of the action, the judge was represented in an unrelated matter by a partner in a firm that was involved in the case before the

124. *Id.* at 1537.

125. *Id.* at 1538. Nevertheless, the Seventh Circuit chose not to reverse because the defendant's disqualification motion was inexcusably untimely. *Id.* at 1541.

126. 540 F.2d 459 (10th Cir. 1976).

127. *Id.* at 463.

128. 949 F.2d 382 (11th Cir. 1991).

129. *Id.* at 384.

130. *Id.*

131. Parker v. Connors Steel Co., 855 F.2d 1510 (11th Cir. 1988). *See also* First Interstate Bank of Ariz. v. Murphy, Weir & Butler, 210 F.3d 983, 988 (9th Cir. 2000) (holding that when firm representing party hires law clerk of presiding judge, judge must make sure law clerk ceases further involvement in case).

132. *Parker*, 855 F.2d at 1527.

judge.[133] Because of the procedural posture of the case, the court did not resolve the question on the merits, but remarked:

> Most observers would agree that a judge should not hear a case argued by an attorney who, at the same time, is representing the judge in a personal matter. Although the appearance of partiality is attenuated when the lawyer appearing before the judge is a member of the same law firm as the judge's personal counsel, but not the same individual, many of the same cautionary factors are still in play. This principle would seem to have particular force where, as here, the law firm is small and the judge's lawyer is a name partner.[134]

Problems concerning a judge's relationship with counsel become acute when personal and financial relationships are entangled. As a state judge, G. Thomas Porteous, Jr., often solicited friends and former colleagues in the Louisiana Bar for money to pay personal gambling and other debts, and received monies from two of those same lawyers in exchange for court-appointed "curatorships."[135] After becoming a federal judge, Porteous declined to disqualify himself from a case in which a party was represented by one of those same two lawyers from whom he had received thousands of dollars over the years. While that case was under advisement, Porteous solicited that lawyer for additional money. Although there is no indication that Judge Porteous was soliciting a bribe, his refusal to disqualify himself from hearing the case under these circumstances gave rise to the first of four articles of impeachment voted against him by a unanimous House of Representatives. The Senate convicted him on the same article—Article I: engaging in a pattern of conduct incompatible with the trust and confidence placed in him as a federal judge.

Likewise, problems arise when judges explore postjudicial employment with lawyers or law firms that enter an appearance before the judge. In *In re Continental Airlines Corp.*,[136] a law firm representing one of the parties appearing before the judge was considering the judge for employment but did not communicate its interest to the judge until the day after the judge awarded the firm's lawyers $700,000 in legal fees. The Fifth Circuit, quoting from *Liljeberg*, acknowledged that § 455(a) "does not call upon judges to perform the impossible;"[137] hence, the judge was not "required to stand recused before discovering that he was being

133. *In re* Cargill, Inc., 66 F.3d 1256, 1260 (1st Cir. 1995).

134. *Id.* at 1260 n.4 (citations omitted).

135. *See* John Conyers, Impeachment of G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana, H.R. Rep. No. 111-427 (2010); and John Conyers, Impeaching G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana, for High Crimes and Misdemeanors, H.R. Res. 1031, 111th Cong. 2d Sess. (2010).

136. 901 F.2d 1259 (5th Cir. 1990).

137. *Id.* at 1262 (quoting Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 861 (1988)).

considered for employment."[138] Once the judge received an offer of employment and became aware of the firm's interest, however, he was "required to take the steps necessary to maintain public confidence in the judiciary."[139] In this case that meant "either . . . reject[ing] the offer outright, or, if he seriously desired to consider accepting the offer, st[anding] recused and vacat[ing] the rulings made shortly before the offer was made."[140]

In *Pepsico, Inc. v. McMillan*,[141] a federal district judge who was contemplating resigning from the bench and returning to private practice spoke to a recruiter who agreed to contact law firms on the judge's behalf. Although the recruiter did not use the judge's name, it was generally known in the legal community that this was the only judge who was contemplating resignation. Two of the firms that were contacted represented opposing parties in an action pending before the judge, but the judge denied a motion to disqualify. On appeal, the Seventh Circuit ruled that the judge had acted improperly in denying the motion. According to the court, although there was no indication of actual bias or favoritism toward either of the law firms, there was, to an objective observer, an appearance of partiality that was disqualifying.[142] The court explained that disqualification is necessary whenever a judge is in negotiations—even preliminary and tentative negotiations—for employment with a lawyer or law firm appearing before the judge.[143] The Judicial Conference subsequently issued an advisory opinion admonishing judges to refrain from negotiations if the firm's cases before the court are "so frequent and so numerous that the judge's recusal in those cases (which would be required) would adversely affect the litigants or would have an impact on the court's ability to handle its dockets."[144]

Disqualification questions sometimes arise when a party is represented by a lawyer from the judge's former firm. Disqualification is automatic under

138. *Continental Airlines*, 901 F.2d at 1262.

139. *Id.*

140. *Id.* at 1262–63. The Fifth Circuit held, however, that the violation of § 455(a) constituted harmless error. *But see In re* Continental Airlines, 981 F.2d 1450, 1461–64 (5th Cir. 1993) (ruling, on different order in same litigation, that failure to disqualify was not harmless error; explaining that prior order was subject to *de novo* review, which enabled appellate court to protect parties from injustice resulting from failure to disqualify, whereas here, order was subject to "abuse of discretion" standard, which did not afford parties adequate safeguards).

141. 764 F.2d 458 (7th Cir. 1985).

142. *Id.* at 461.

143. *Id. Cf.* Anderson v. United States, 754 A.2d 920 (D.C. Ct. App. 2000) (disqualification unnecessary when news article mentioned that judge was potential candidate for federal prosecutor's position; no showing that judge had sought position).

144. Judicial Conference Committee on Codes of Conduct, Advisory Opinion No. 84 (June 2009).

§ 455(b)(2) only if the judge was affiliated with the firm at the time the firm was handling the matter now before the court. But relationships between judges and lawyers at judges' former firms can remain close long after matters pending during the judge's tenure at the firm have been resolved. For that reason, some judges choose to disqualify themselves from hearing matters argued by lawyers at their former firms for a period of years.[145] With the exception of isolated, unusually close friendships discussed above, however, relationships between judges and lawyers at their former firms naturally dissipate over time. In *Patterson v. Mobil Oil Corp.*,[146] the plaintiffs moved for disqualification because the judge had previously been employed by the law firm that represented the defendants. The Fifth Circuit concluded that disqualification was unnecessary because the judge had terminated his relationship with the firm thirty years earlier.

When relatives rather than friends appear as counsel, the issue is ordinarily resolved by § 455(b)(5). Sometimes § 455(a) is used to fill gaps. In *In re Hatcher*,[147] the Seventh Circuit reversed a refusal to disqualify where the judge's son, a third-year law student, had assisted the government in the prosecution of a defendant in a case arising from the same circumstances as that of the present defendant. Although the cases were formally separate proceedings, "they are both component parts of one large prosecution of the continuing criminal enterprise. . . . Outside observers have no way of knowing how much information the judge's son acquired about that broader prosecution while working on the . . . case."[148] The court emphasized that a judge whose son is an assistant U.S. attorney need not disqualify himself from all cases in which the United States is a party, or even those cases where the son prosecuted a case bearing some relationship to the case before the judge. "This is instead the rare case where the earlier proceedings were so close to the case now before the judge that disqualification under § 455(a) was the only permissible option."[149]

145. *See* Financial Settlement and Disqualification on Resignation from Law Firm, Advisory Op. No. 24 (Judicial Conference Committee on Codes of Conduct June 2009) (recommending that judges consider a recusal period of at least two years, recognizing that there will be circumstances where a longer period is more appropriate).

146. 335 F.3d 476 (5th Cir. 2003).

147. 150 F.3d 631 (7th Cir. 1998).

148. *Id.* at 638.

149. *Id.*

Former clerks appearing as counsel before judges for whom they worked presents a recurring issue. The First Circuit has noted that this issue is often addressed by the imposition of moratoriums:

> It is common knowledge in the profession that former law clerks practice regularly before judges for whom they once clerked. Courts often have prophylactic rules that forbid a former law clerk from appearing in that court for a year or more after the clerkship.[150]

When the judge's current law clerk has a possible conflict of interest, the Eleventh Circuit notes that "it is the clerk, not the judge who must be disqualified."[151] In a case involving medical malpractice, the plaintiff had moved to disqualify the judge because the judge's law clerk used to work for the law firm representing some of the defendants. The Eleventh Circuit held that disqualification was not required under § 455(a) since the judge had screened the law clerk from the case and assigned the matter to another law clerk.[152] The court reasoned that since "precedent approves the isolation of a law clerk who has accepted future employment with counsel appearing before the court[,] it follows that isolating a law clerk should also be acceptable when the clerk's former employer appears before the court."[153] If a disqualified clerk is screened from substantive responsibilities but performs ministerial tasks in relation to the case, the Eighth Circuit and the U.S. District Court for the District of Columbia have ruled that the judge's disqualification is unnecessary.[154]

### ii. Judge's conduct in judicial proceedings

*"Extrajudicial source" doctrine and its limits.* The authority for the extrajudicial source doctrine started with *United States v. Grinnell Corp.*,[155] which predated the 1974 amendments to § 455. The Supreme Court said that "[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source . . . other

150. In re Martinez-Catala, 129 F.3d 213, 221 (1st Cir. 1997).

151. Byrne v. Nezhat, 261 F.3d 1075, 1101–02 (11th Cir. 2001) (quoting Hunt v. American Bank & Trust Co., 783 F.2d 1011, 1016 (11th Cir. 1986)).

152. *Id.* at 1100.

153. *Id.* at 1102 (internal citation omitted). *See also* Mathis v. Huff & Puff Trucking, Inc., 787 F.3d 1297, 1312–13 (10th Cir. 2015) (§ 455(a) satisfied by prompt screening of law clerk whose husband was hired by defendant's insurance company to watch the trial); Trammel v. Simmons First Bank of Searcy, 345 F.3d 611, 612-13 (8th Cir. 2003) (§ 455(a) satisfied by screening clerk who attended bible study with important witness).

154. United States v. Martinez, 446 F.3d 878, 883 (8th Cir. 2006); Doe v. Cabrera, 134 F. Supp. 3d 439, 451-52 (D.D.C. 2015).

155. 384 U.S. 563 (1966).

than what the judge learned from his participation in the case."[156] The Court ruled that disqualification was unnecessary because "[a]ny adverse attitudes that [the judge] evinced toward the defendants were based on his study of the depositions and briefs which the parties had requested him to make."[157] This so-called "extrajudicial source" doctrine is born of the common-sense view that ordinarily the circumstances suggesting or creating the appearance of partiality cannot reasonably be derived from information revealed in the normal course of litigation because it is natural for judges to form attitudes about litigants and issues before the court as the facts unfold, and no reasonable person would question the impartiality of judges who do. As the Supreme Court explained later, in *Liteky v. United States*:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task.[158]

The *Liteky* Court added, however, that "[i]t is wrong in theory, though it may not be too far off the mark as a practical matter,"[159] to say that disqualification for bias requires an extrajudicial source. Rather, an extrajudicial source "is the only *common* basis [for disqualification], but not the exclusive one."[160] The Court referred to two different scenarios when disqualification follows from remarks made during judicial proceedings: when the remarks reveal an extrajudicial bias, and when the remarks reveal an excessive bias arising from information acquired during judicial proceedings. Comments judges make during trial—even remarks that are hostile toward "counsel, the parties, or their cases[—]ordinarily do not support a bias or partiality challenge."[161] Such judicial remarks, however, can "reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible."[162] The Court emphasized that bias that arises from what the judge learns in the courtroom must be truly excessive to warrant disqualification: "A favorable or unfavorable predisposition can also deserve to be characterized

156. *Id.* at 583.
157. *Id.*
158. 510 U.S. 540, 550–51 (1994).
159. *Id.* at 551.
160. *Id.*
161. *Id.* at 555.
162. *Id.*

as 'bias' or 'prejudice,'" the Court reasoned, "because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment."[163]

*Comments on parties or issues in the pending case.* The general rule is that remarks a judge makes in the course of ongoing judicial proceedings—remarks that are in the nature of reactions to what the judge has observed—do not warrant disqualification.[164] This rule is consistent with *Liteky* and the extrajudicial source doctrine.

In *In re Huntington Commons Associates*,[165] the district court had stated that "any predisposition this court has in this matter is a result of things that have taken place in this very courtroom."[166] The Seventh Circuit ruled that the district court's acknowledgment of a "predisposition" was not "remotely sufficient evidence of the required 'deep-seated and unequivocal antagonism that would render fair judgment impossible.'"[167]

Similarly, in *In re Marshall*,[168] a bankruptcy court ruled that the media's characterization of the court's remarks from the bench as hostile to the creditor's claims was insufficient to require disqualification. The court noted that in litigation, courts are likely to form opinions about parties and that an adverse ruling in a prior, related case is insufficient to require disqualification. While the court made some negative comments about the creditor, the court concluded, consistent with *Liteky*, that the comments were not so antagonistic as to show that the judge was unable to judge the matter fairly.[169]

In *In re Mann*,[170] disqualification was again unwarranted where, during a status hearing with the petitioner, the judge "expressed skepticism about the likelihood that a Rule 60(b) motion, filed fourteen years after entry of an order, would

163. *Id.* at 551.

164. *See, e.g.*, *In re* City of Milwaukee, 788 F.3d 717, 721–22 (7th Cir. 2015) (comments critical of police in stop-and-frisk case not enough to warrant disqualification); *In re* Steward, 828 F.3d 672, 682 (8th Cir. 2016) (party not entitled to recusal merely because a judge is "exceedingly ill disposed" toward them, where judge's "knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings'"); United States v. McChesney, 871 F.3d 801, 808 (9th Cir. 2017) ("[J]ocular comments are no basis for recusal.").

165. 21 F.3d 157 (7th Cir. 1994).

166. *Id.* at 158.

167. *Id.* at 159 (quoting *Liteky*, 510 U.S. at 556).

168. 291 B.R. 855 (Bankr. C.D. Cal. 2003).

169. *Id.* at 860.

170. 229 F.3d 657 (7th Cir. 2000).

be granted."[171] The Seventh Circuit held, "That comment, standing alone, is not enough to prove an improper motive."[172] The judge had also told the petitioner "he harbored no animosity towards her and would therefore consider the merits of her claim."[173]

*In re Chevron U.S.A.*[174] was a more difficult case, in which the district judge made race-related remarks in the courtroom, including a statement rejecting a study as illegitimate because it was conducted by Caucasians. The Fifth Circuit characterized the remarks as "unfortunate, grossly inappropriate, and deserving of close and careful scrutiny."[175] While the court found that the district judge's comments created "a reasonable perception of bias or prejudice," it also found that they did not "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible,"[176] which, in its view, was required by the Supreme Court's decision in *Liteky* before in-court statements would require disqualification. Observing that the litigation was near completion, the court declined to issue a writ of mandamus. In so ruling, the Fifth Circuit did not appear to distinguish between in-court statements in which a judge arguably acquired an excessive bias from information received during judicial proceedings (to which the quoted passage from *Liteky* pertained) and in-court statements that revealed extrajudicial bias, arguably at issue here.

It is not uncommon for judges, at sentencing, to express outrage at defendants' conduct or at defendants themselves, or a desire to see defendants severely punished. Ordinarily, none of this is grounds for disqualification.[177] Although decided before *Liteky*, *United States v. Barry*[178] illustrates the relevant principle. At sentencing, the trial judge claimed that jurors who voted to acquit the defendant

171. *Id.* at 658.

172. *Id.* at 659.

173. *Id.* at 658.

174. 121 F.3d 163 (5th Cir. 1997).

175. *Id.* at 166.

176. *Id.* at 165 (quoting *Liteky*, 510 U.S. at 555).

177. *See, e.g.*, United States v. Minard, 856 F.3d 555, 556–57 (8th Cir. 2017) (disqualification not required when judge commented on victim impact statement: "It happened to me, too, when my kids were little, so I know exactly what you're talking about"); United States v. Pulido, 566 F.3d 52, 62–63 (1st Cir. 2009) (judge's statement, made prior to defendant's sentencing and in different but related case, that defendant was a thoroughly corrupt police officer did not require judge to recuse himself because opinion was based on facts introduced in proceedings); United States v. Pearson, 203 F.3d 1243, 1277–78 (10th Cir. 2000) (disqualification not required where district judge made remarks about defendant's character during sentencing); United States v. Kimball, 73 F.3d 269, 273 (10th Cir. 1995) (disqualification not necessary despite judge's "unfortunate comment" that he wanted defendant to "die in prison").

178. 938 F.2d 1327 (D.C. Cir. 1991).

on several charges "will have to answer to themselves and to their fellow citizens."[179] The D.C. Circuit acknowledged that "this statement may indicate that the court thought appellant was guilty of more counts than he was convicted of" but "there is no indication that the court reached this conclusion based on anything other than its participation in the case."[180]

The Tenth Circuit upheld a refusal to disqualify, even though the trial judge opined pretrial that "the obvious thing that's going to happen . . . is that [the defendant is] going to get convicted."[181] The court believed the judge merely expressed a view of what was likely to happen from what he had observed in the case: "Nothing in the remark indicates that the judge was unable or unwilling to carry out his responsibilities impartially."[182]

In a Ninth Circuit case, the district judge did not abuse his discretion in denying a motion to disqualify based on his criticism of the government's initial failure to charge the defendant with carrying a weapon during the commission of a robbery. At a status conference, the judge had commented that the government's omission of the gun count was "absurd" and "asinine," and told counsel to "[s]hare that with your head of [the] criminal [division]."[183] The Ninth Circuit found that the judge's comments did not rise to the level required for disqualification under § 455(a), stating that "[a] judge's views on legal issues may not serve as the basis for motions to disqualify."[184]

As the Supreme Court's opinion in *Liteky* notes, there are times when the comments a judge makes in court are so excessive as to trigger the need for disqualification.[185] In *Unites States v. Whitman*,[186] the Sixth Circuit remanded the sentencing of a criminal defendant to a different trial judge after the original judge engaged in a "lengthy harangue" of the defense attorney that "had the unfortunate effect of creating the impression that the impartial administration of the law was not his primary concern."[187] However, there was no evidence that the judge was actually biased in this case.

179. *Id.* at 1341.

180. *Id.*

181. United States v. Young, 45 F.3d 1405, 1414 (10th Cir. 1995).

182. *Id.* at 1416. *See also* United States v. Martin, 278 F.3d 988, 1005 (9th Cir. 2002) (holding no abuse of discretion in denying motion to disqualify where, during sentencing hearing, district judge became frustrated with defendant and counsel, and made "testy" remarks about defendant's credibility).

183. United States v. Wilkerson, 208 F.3d 794, 797 (9th Cir. 2000).

184. *Id.* (quoting United States v. Conforte, 624 F.2d 869, 882 (9th Cir. 1980)).

185. Liteky v. United States, 510 U.S. 540, 555 (1994).

186. 209 F.3d 619 (6th Cir. 2000).

187. *Id.* at 626–27.

In *United States v. Antar*,[188] the trial judge commented during a sentencing hearing on the amount of restitution he might award: "*My object in this case from day one has always been to get back to the public that which was taken from it as a result of the fraudulent activities of this defendant and others.*"[189] The Third Circuit held that the judge's remark reflected a mindset that required disqualification. The district judge "told the parties that his goal in the criminal case, from the beginning, was something other than what it should have been and, indeed, was improper."[190]

> It is difficult to imagine a starker example of when opinions formed during the course of judicial proceedings display a high degree of antagonism against a criminal defendant. After all, the best way to effectuate the district judge's goal would have been to ensure that the government got as free a road as possible towards a conviction, which then would give the judge the requisite leverage to order a large amount of restitution.[191]

The court noted the trial judge's reputation for fairness and acknowledged the perils of focusing on one sentence out of volumes of transcripts. Yet "in determining whether a judge had the duty to disqualify him or herself, our focus must be on the reaction of the reasonable observer. If there is an appearance of partiality, that ends the matter."[192]

In *United States v. Franco-Guillen*,[193] the district judge withdrew the defendant's guilty plea and set the matter over for trial after the defendant objected to certain information in the presentence report. In the course of the hearing, the judge said, "I will not put up with this from these Hispanics or anybody else, any other defendants";[194] and again,

> I'm not putting up with this. I've got another case involving a Hispanic defendant who came in here and told me that he understood what was going on and that everything was fine and now I've got a 2255 from him saying he can't speak English. And he is lying because he told me he could.[195]

The Tenth Circuit reversed the conviction and remanded the case for reassignment to a different judge, with the explanation, "The judge's statements on the record would cause a reasonable person to harbor doubts about his impartiality,

188. 53 F.3d 568 (3d Cir. 1995).

189. *Id.* at 573.

190. *Id.* at 576.

191. *Id.*

192. *Id.*

193. 196 F. App'x 716 (10th Cir. 2006) (unpublished decision).

194. *Id.* at 717.

195. *Id.* at 718.

without regard to whether the judge actually harbored bias against Franco-Guillen on account of his Hispanic heritage."[196]

Finally, in *United States v. Bergrin*,[197] the Third Circuit ordered a district judge's disqualification under § 455(a) after the judge repeatedly expressed "discomfort" with the indictment, which combined an array of witness tampering counts under the umbrella of a RICO charge and which the Third Circuit noted "is exactly what" RICO allows.[198] The Third Circuit concluded that "in light of the District Court's statements—both before and after the earlier appeal in this case—about a perceived unfairness in trying the various witness-tampering counts together, we believe that the Court's 'impartiality might reasonably be questioned[.]'"[199]

*Comments on parties or issues in prior judicial proceedings.* The general rule that bias or prejudice must be derived from an extrajudicial source and that comments based on a judge's observations in pending proceedings will not ordinarily form the basis for disqualification applies equally to comments a judge makes in earlier proceedings. In *Liteky v. United States*,[200] the Supreme Court made two relevant observations. First, it stated that in *United States v. Grinnell Corp.*,[201] it "clearly meant by 'extrajudicial source' a source outside the judicial proceeding at hand—which would include as extrajudicial sources earlier judicial proceedings conducted by the same judge."[202] This observation, however, must be understood in the larger context of the opinion as a whole, in which the Court rejected rigid adherence to an extrajudicial source doctrine (which it characterized not as a "doctrine" but as a "factor"[203]).

The Court's second, and ultimately more important, observation—regardless of whether prior proceedings are characterized as an "extrajudicial source"—was that for purposes of disqualification analysis, a judge's comments in pending and past proceedings are on equal footing:

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.[204]

196. *Id.* at 719.
197. 682 F.3d 261 (3d Cir. 2012).
198. *Id*. at 284.
199. *Id.* (quoting United States v. Wecht, 484 F.3d 194, 226 (3d Cir. 2007)).
200. 510 U.S. 540 (1994).
201. 384 U.S. 563 (1966).
202. *Liteky*, 510 U.S. at 545.
203. *Id.* at 555.
204. *Id.*

In *Liteky*, the defendant moved to disqualify the judge on the ground that, during an earlier criminal trial, the judge displayed "impatience, disregard for the defense and animosity"[205] toward the defendant. He cited various comments by the judge, including admonitions of defense witnesses and counsel as well as certain trial rulings. The Court rejected the contention that disqualification was in order: "All occurred in the course of judicial proceedings, *and* neither (1) relied upon knowledge acquired outside such proceedings nor (2) displayed deep-seated and unequivocal antagonism that would render fair judgment impossible."[206]

In *Frey v. EPA*,[207] the Seventh Circuit observed that "information a judge has gleaned from prior judicial proceedings is not considered extrajudicial and simply does not require recusal."[208] Similarly, in *United States v. Pulido*,[209] the First Circuit concluded that a judge's statement—made prior to the defendant's sentencing and in a different but related case—that the defendant was a "thoroughly corrupt police officer" did not require the judge to recuse himself, since that opinion was based on facts introduced in the proceedings.[210] In *Town of Norfolk v. United States Army Corps of Engineers*,[211] a district judge had overseen compliance with a city plan to clean up the Boston Harbor. In a subsequent case about locating a landfill pursuant to the Clean Water Act, a party moved for the judge's disqualification, and the judge refused. The First Circuit upheld the refusal, noting that "a judge is sometimes required to act against the backdrop of official positions he took in other related cases. A judge cannot be replaced every time a case presents an issue with which the judge's prior official decisions and positions may have a connection."[212]

*Ex parte communications.* Trial courts should be wary of ex parte contacts, which can result in reversals and disqualification. Ex parte contacts contributed to the D.C. Circuit's decision to remand a case to a different trial judge in *United States v. Microsoft Corp.* (*Microsoft I*).[213] The court was "concerned by the district judge's

205. *Id.* at 542.

206. *Id.* at 556.

207. 751 F.3d 461 (7th Cir. 2014).

208. *Id.* at 472.

209. 566 F.3d 52 (1st Cir. 2009).

210. *Id.* at 62–63.

211. 968 F.2d 1438 (1st Cir. 1992).

212. *Id.* at 1462.

213. 56 F.3d 1448 (D.C. Cir. 1995) (contacts included argumentative letters and a redacted exhibit). *See also* United States v. Microsoft Corp., 253 F.3d 34, 113 (D.C. Cir. 2001) (holding judge's secret interviews with reporters during course of trial violated Code of Conduct, Canon 3A(4), which prohibits "ex parte communications on the merits, or procedures affecting the merits, of a pending . . . proceeding").

acceptance of *ex parte* submissions" and indicated that "the appropriate course would have been simply to refuse to accept any *ex parte* communications."[214]

In a Sixth Circuit case, the appellant alleged that the trial judge had sent his law clerk to gather evidence and that therefore the judge should have disqualified himself. The court observed that while "not every *ex parte* communication to the trial court requires reversal,"[215] the allegation here was sufficiently serious as to require a remand to determine its truth.

Where the trial judge met ex parte with a panel of experts and prohibited counsel from discovering the contents of the meeting, the Seventh Circuit reversed a refusal to disqualify.[216] In a similar situation, however, the Sixth Circuit upheld a refusal to disqualify because the judge had "explained to Plaintiffs' counsel the ministerial nature of these *ex parte* discussions before they took place" and "personally extended to Plaintiffs' counsel an invitation to attend *all* of these meetings."[217] Counsel chose not to attend and "failed to register any objection to the meetings at that time."[218]

*Conduct in relation to guilty pleas.* In *Halliday v. United States*,[219] the First Circuit implied that disqualification is sometimes appropriate when a judge faces a motion under 28 U.S.C. § 2255 to vacate a conviction with respect to which they imposed the sentence. In a postconviction motion, the defendant argued that a different judge should have conducted the Federal Rule of Criminal Procedure 11 plea agreement hearing. Since the § 2255 challenge would have forced the same judge to evaluate his own actions, the First Circuit found it preferable (but not required) for a different judge to conduct the § 2255 evidentiary hearing. The First Circuit has clarified that *Halliday* is limited to cases in which the § 2255 motion accuses the sentencing judge of violating Rule 11.[220]

Where a judge's conduct during plea negotiations violated Rule 11, and a defendant subsequently pled not guilty and was convicted, the Fifth Circuit held that the defendant was not entitled to a new trial but was entitled to resentencing

214. *Microsoft I*, 56 F.3d at 1464.

215. Price Bros. v. Philadelphia Gear Corp., 629 F.2d 444, 446 (6th Cir. 1980).

216. Edgar v. K.L., 93 F.3d 256 (7th Cir. 1996). *See also In re* Kensington Int'l, Ltd., 368 F.3d 289 (3d Cir. 2004). The judge had assembled an asbestos advisory panel. The panel members represented clients—in unrelated asbestos bankruptcy proceedings—who would likely have claims against the companies involved in the consolidated litigation. The Third Circuit ordered disqualification in light of the judge's ex parte communication with the panel.

217. Reed v. Rhodes, 179 F.3d 453, 468 (6th Cir. 1999).

218. *Id.*

219. 380 F.2d 270 (1st Cir. 1967).

220. *See, e.g.*, Panzardi-Alvarez v. United States, 879 F.2d 975, 985 (1st Cir. 1989).

before a new judge.[221] The Eighth Circuit concurred that when cases are remanded after a court of appeals finds a Rule 11 violation, judges need not disqualify themselves from the subsequent trial, though disqualification might be in order for sentencing if a defendant is convicted.[222]

Similarly, the Third Circuit required resentencing before a new judge when the trial judge had communicated his preference to defense counsel that the defendant plead guilty and indicated that the defendant would receive a lighter sentence if he did.[223] After the defendant went to trial and was convicted, the Third Circuit vacated the sentence because a reasonable person might conclude that "the judge's attitude as to sentence was based at least to some degree on the fact that the case had to be tried, an exercise which the judge seemed anxious to avoid."[224]

*Conduct reflecting that the judge took personal offense.* In assorted cases, disqualification has been deemed necessary where trial judges took unusual actions, or made comments, that indicated they took personal offense. In *In re Johnson*,[225] a bankruptcy trustee had been held in contempt because the trial judge thought the trustee had misrepresented the judge's conduct to another judge in order to obtain a favorable court order. At the contempt proceedings, the judge declared that he was "prejudiced in this matter," had "all but made up his mind," was "not in the least inclined to be neutral," and would serve as "complaining witness, prosecutor, judge, jury, and executioner."[226] The Fifth Circuit held that the judge clearly "considered [the party's] actions to be a personal affront to his authority" such that a reasonable person would doubt his impartiality.[227]

Trial judges occasionally appear insulted when their rulings are challenged by litigants. The Third Circuit reversed a refusal to disqualify when the judge had responded to the petitioners' mandamus motion for disqualification by writing a lengthy letter. The judge, "in responding to the mandamus petition . . . has exhibited a personal interest in the litigation."[228] Similarly, the Fifth Circuit reversed a conviction when the judge remarked in court that the defendant had "broken faith" with him by raising a certain issue on appeal following his earlier trial.[229]

221. United States v. Adams, 634 F.2d 830, 835–43 (5th Cir. 1981).
222. *In re* Larson, 43 F.2d 410, 416 (8th Cir. 1994).
223. United States v. Furst, 886 F.2d 558 (3d Cir. 1989).
224. *Id.* at 583.
225. 921 F.2d 585 (5th Cir. 1991).
226. *Id.* at 587.
227. *Id.*
228. Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 165 (3d Cir. 1993).
229. United States v. Holland, 655 F.2d 44 (5th Cir. 1981).

On the other hand, the Seventh Circuit found disqualification unnecessary where the judge called the motion for his disqualification by a lawyer–litigant "offensive," claimed it "impugned" his integrity, and directed the party to testify under oath about the judge's alleged bias because, the judge claimed, the motion reflected unethical behavior.[230] The judge was reacting, "albeit strongly," to a motion brought on the eve of trial, and the Seventh Circuit believed that his comments did not "reflect a bias or prejudice gained from outside the courtroom."[231]

### iii. Judge's extrajudicial conduct

As explained in Section ii, "Extrajudicial Source" Doctrine and Its Limits, a judge is subject to disqualification for apparent partiality evidenced by extrajudicial conduct. The focus here, however, is on extrajudicial conduct that impugns impartiality or perceived impartiality. "Impartiality" subsumes a lack of bias toward a party, and perhaps open-mindedness toward the issues before the court, but it does not require the absence of preexisting views on the legal questions that the judge must decide.[232] The fact that a judge comes to a case with preexisting views on the legal questions presented, based on prior, extrajudicial learning, is no grounds for disqualification. As the Court observed in *Liteky v. United States*,[233] "*some* opinions acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will *not* suffice" to warrant disqualification.[234]

What will require disqualification is conduct manifesting bias or prejudgment. Such conduct can arise in a variety of settings.

*Extrajudicial comments on pending or impending cases.* The general rule against disqualification for in-court comments on pending cases, discussed in Section II.B.1.b.ii, does not apply to out-of-court comments on pending cases, for two related reasons. First, judges are expected to comment in open court on pending cases—it is an unavoidable part of the job. There is no comparable need for judges to opine to the media. Second, when judges take the unnecessary step of commenting on the merits of pending cases outside of court, they appear personally invested in their rulings and the outcome of the case, which is incompatible with their role as indifferent and impartial adjudicators. For that reason, the Code of Conduct for United States Judges provides that "[a] judge should not make public comment on the merits of a matter pending or impending

230. Hook v. McDade, 89 F.3d 350, 355 (7th Cir. 1996).

231. *Id.* at 356.

232. Republican Party of Minn. v. White, 536 U.S. 765 (2002).

233. 510 U.S. 540 (1994).

234. *Id.* at 554.

in any court," subject to the exception that this prohibition "does not extend to public statements made in the course of the judge's official duties."[235]

In *United States v. Cooley*,[236] the Tenth Circuit reversed a refusal to disqualify when the defendants were abortion protesters and the trial judge had appeared on national television and stated that "these people are breaking the law."[237] The court observed that the judge's TV appearance conveyed two messages. The first "consisted of the words actually spoken."[238] The second "was the judge's expressive conduct in deliberately making the choice to appear in such a forum at a sensitive time to deliver strong views on matters which were likely to be ongoing before him."[239] In the court's view, when taken together,

> these messages unmistakably conveyed an uncommon interest and degree of personal involvement in the subject matter. It was an unusual thing for a judge to do, and it unavoidably created the appearance that the judge had become an active participant in bringing law and order to bear on the protesters, rather than remaining as a detached adjudicator.[240]

*In re Boston's Children First*[241] was a case that challenged an elementary school's student-assignment process on grounds of racial discrimination. Seeking to correct misinterpretations in press accounts unfavorably comparing her action in the pending matter with her action in a previous case, the district judge told a newspaper reporter in a phone interview—the content of which was later published— that the pending case was "more complex."[242] The plaintiffs moved for disqualification, and the judge denied the motion. The First Circuit held that disqualification was necessary and granted the petitioners' writ of mandamus pursuant to § 455(a). Although it found the media contact "less inflammatory than that in *Cooley*," the court saw "the same factors at work" for three reasons.[243] First, because the school-assignment program was a matter of significant local concern, the public attention and rarity of such public statements by a judge made it "more likely that a reasonable person [would] interpret such statements as evidence of bias."[244] Second, like *Cooley*, the "'appearance of partiality' at issue here . . . stems from the real possibility that a judge's statements may be

235. Code of Conduct for United States Judges, Canon 3A(6).

236. 1 F.3d 985 (10th Cir. 1993).

237. *Id.* at 990.

238. *Id.* at 995.

239. *Id*.

240. *Id*.

241. 244 F.3d 164 (1st Cir. 2001).

242. *Id.* at 166.

243. *Id.* at 169.

244. *Id.* at 170.

misinterpreted because of the ambiguity of those statements."[245] Finally, a judge's defense of her own orders before the resolution of appeal could also create the appearance of partiality.[246] The court noted that its holding was "based on the particular events" of a "highly idiosyncratic case."[247]

Similarly, the Fourth Circuit reversed a refusal to disqualify in a case in which, while a jury trial was pending against an automobile company, the judge gave a speech at an auto torts seminar that expressed hostility toward defendants and defense counsel in such cases.[248]

In *United States v. Microsoft Corp.*,[249] the district judge had given "secret interviews to select reporters" throughout the course of the trial, requiring "that the fact and content of the interviews remain secret until he issued the Final Judgment."[250] The interviews began to appear in press accounts immediately after the final judgment was entered. Some interviews were conducted after the final judgment was entered. Because the full extent of the judge's actions did not become apparent until the case was on appeal, the D.C. Circuit decided to adjudicate Microsoft's disqualification request even though the published interviews had not been admitted into evidence and no evidentiary hearing had been held on them. The D.C. Circuit held that the judge "breached his ethical duty under Canon 3A(6) each time he spoke to a reporter about the merits of the case."[251] The judge's comments did not fall into one of "three narrowly drawn exceptions" under the canon because the judge did not discuss "purely procedural matters" but actually "disclosed his views on the factual and legal matters at the heart of the case."[252] The fact that the judge "may have intended to 'educate' the public about the case or to rebut 'public misperceptions'" was not an excuse for his actions, and his "insistence on secrecy . . . made matters worse" because it prevented the

245. *Id.*

246. *Id.* "Canon 3A(6) does not bar comment in final, completed cases, so long as judges refrain from revealing the deliberative processes and do not place in question their impartiality in similar future cases." Compendium of Selected Opinions § 3.9-1(d) (2009).

247. *Boston's Children First*, 244 F.3d at 171. After receiving a petition for rehearing en banc from the district judge, the appeals panel sought the opinions of the three nonpanelist active judges. The nonpanelists agreed that the judge's comment was "particularly unwise," but disagreed that it required mandatory disqualification. *Id.* The panel acknowledged that this difference of view among the active judges indicated "the continuing need for a case-by-case determination of such issues." *Id.*

248. Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 41 (4th Cir. 1995).

249. 253 F.3d 34 (D.C. Cir. 2001).

250. *Id.* at 108.

251. *Id.* at 112. Canon 3A(6), explained in Section II.B.1.b.iii, Extrajudicial Comments on Pending or Impending Cases, applies to cases pending before any court—state or federal, trial or appellate.

252. *Microsoft*, 253 F.3d at 112.

parties from raising objections or seeking disqualification before the judge issued a final judgment.[253]

The D.C. Circuit noted that other courts of appeals had found violations of § 455(a) "for judicial commentary on pending cases that seems mild in comparison to what we are confronting in this case."[254] "[W]e have not gone so far as to hold that every violation of Canon 3A(6) . . . inevitably destroys the appearance of impartiality and thus violates § 455(a)."[255] "In this case, however, . . . the line has been crossed," and the judge's comments "would lead a reasonable, informed observer to question the District Judge's impartiality."[256] Because Microsoft "neither alleged nor demonstrated that [the judge's conduct] rose to the level of actual bias or prejudice," the court found "no reason to presume that everything the District Judge did [was] suspect."[257] The court concluded that there was no reason to set aside the findings of fact and conclusions of law and that the appropriate remedy was disqualification of the judge "retroactive only to the date he entered the order breaking up Microsoft."[258]

In *Ligon v. City of New York*,[259] a racial profiling case that challenged the New York City Police Department's "stop and frisk" policy, the district judge agreed to several media interviews and made a number of public statements while the case was pending, "purporting to respond publicly to criticism of the District Court."[260] The Second Circuit reassigned the case to a different judge, concluding that the district judge's statements gave rise to an appearance of impropriety.[261] The court was criticized for its decision and issued a second opinion explaining the reassignment. The circuit panel referenced one article that quoted the judge as saying of city officials, "I know I'm not their favorite judge[,]" and other articles reporting that the judge "describes herself as a jurist who is skeptical of law enforcement, in contrast to certain of her colleagues, whom she characterizes as inclined to favor the government."[262] The court explained that "interviews in which

253. *Id.*

254. *Id.* at 114 (citing *In re* Boston's Children First, 244 F.3d 164 (1st Cir. 2001) *and* United States v. Cooley, 1 F.3d 985 (10th Cir. 1993)).

255. *Id.* at 114.

256. *Id.* at 115.

257. *Id.* at 116.

258. *Id.*

259. 736 F.3d 118 (2d Cir. 2013) (per curiam), *vacated in part,* 743 F.3d 362 (2d Cir. 2014).

260. Id. at 131.

261. *Id.* at 129–30.

262. *Id.* at 127.

the presiding judge draws such distinctions between herself and her colleagues might lead a reasonable observer to question the judge's impartiality."[263]

In contrast, disqualification has been deemed unnecessary if the judge's extrajudicial comments are sufficiently balanced to belie claims that they manifest bias. In *United States v. Pitera*,[264] the judge gave a videotaped lecture to a government drug enforcement task force seven months before a narcotics case was tried but after the case had already been assigned to her. In the lecture, the judge urged the assembled agents and prosecutors to take certain steps to increase prospects for conviction in narcotics cases. The Second Circuit nevertheless upheld the refusal to disqualify because the judge's lecture "included several emphatic criticisms of prosecutors that would lead a reasonable person not to question, but to have confidence in the [j]udge's impartiality."[265] In addition, the judge participated in various programs for criminal defense lawyers, and she "commendably lectures to a variety of trial practice seminars."[266]

Similarly, in *United States v. Barry*,[267] an extrajudicial comment on a pending case did not give rise to a perception of partiality sufficient to warrant disqualification. After sentencing the defendant, the judge addressed a forum at Harvard Law School in which he spoke of the overwhelming evidence of the defendant's guilt. When the sentence was vacated on unrelated grounds and the case remanded for resentencing, the defendant moved for disqualification, claiming the judge's remarks at Harvard created an appearance of partiality. The D.C. Circuit ruled, however, that because the judge's remarks were "based on his own observations during the performance of his judicial duties," disqualification was not required.[268]

*Attendance at party-sponsored educational seminars on issues in litigation.* For years, educational institutions and other organizations have hosted expense-paid educational seminars for judges on a range of issues that come before the courts. When seminar sponsors later appear as parties before those judges in cases raising issues covered in the seminars, it brings up questions of ethics and disqualification. As to the ethics of participating in expense-paid seminars, the

263. *Id.*

264. 5 F.3d 624 (2d Cir. 1993).

265. *Id.* at 626.

266. *Id.* at 627.

267. 961 F.2d 260 (D.C. Cir. 1992).

268. *Id.* at 263. *See also In re* Wilborn, 401 B.R. 848 (Bankr. S.D. Tex. 2009) (judge's speech at CLE seminar, which explained the basis of his prior decisions and those of other judges concerning the disclosure obligations of mortgage lenders, did not provide a basis for his disqualification).

Judicial Conference Committee on Codes of Conduct has opined at length and in considerable detail.[269] As to the need to disqualify, the answer is: it depends.

The Third Circuit reversed a refusal to disqualify where the trial judge in a mass tort asbestos case attended a scientific conference on the dangers of asbestos.[270] The conference was funded in part by $50,000 from the plaintiffs' settlement fund. The request to use these funds for this purpose was approved by the judge.[271] The Third Circuit, in reversing, offered the following explanation:

> We are convinced that a reasonable person might question [the judge's] ability to remain impartial. To put it succinctly, he attended a predominantly pro-plaintiff conference on a key merits issue; the conference was indirectly sponsored by the plaintiffs . . . and his expenses were largely defrayed by the conference sponsors. . . . Moreover, he was, in his own words, exposed to a Hollywood-style "pre-screening" of the plaintiffs' case.[272]

The court declined to address whether any of these facts alone compelled disqualification because "together they create an appearance of partiality that mandates disqualification."[273]

The Second Circuit, in contrast, upheld a refusal to disqualify in a case involving a trial judge's attendance at an expense-paid environmental seminar funded indirectly by Texaco.[274] After the judge attended the seminar, a lawsuit against Texaco that he had previously dismissed was remanded to him. The Second Circuit agreed with the district judge that his presence at the seminar did not warrant disqualification under § 455(a) because Texaco provided only a minor part of the funding to one of two nonprofit organizations that conducted the seminar and because the organizations had no connection to the case. Also, there was no showing that any aspect of the seminar touched on issues material to any claims or defense in the litigation.[275]

#### iv. Parties' conduct toward judge

Parties and their lawyers sometimes behave in ways that predictably engender a judge's animus, but such behavior does not trigger the need for disqualification.

269. *See* Participation in a Seminar of General Character, Advisory Op. No. 3 (Judicial Conference Committee on Codes of Conduct June 2009); Attendance at Independent Educational Seminars, Advisory Op. No. 67 (Judicial Conference Committee on Codes of Conduct June 2009).

270. *In re* School Asbestos Litig., 977 F.2d 764 (3d Cir. 1992).

271. *Id.* at 779.

272. *Id.* at 781–82.

273. *Id.* at 782.

274. *In re* Aguinda, 241 F.3d 194 (2d Cir. 2001).

275. *Id.* at 202.

To hold otherwise would be to create an opportunity for parties to exhibit hostile behavior strategically, as a means to force disqualification. Upholding a refusal to disqualify where the litigant had verbally attacked the judge in public, the First Circuit said, "[a] party cannot force disqualification by attacking the judge and then claiming that these attacks must have caused the judge to be biased against [her]."[276] Indeed, when a party argued that the judge's ongoing hostility toward him required disqualification, the Third Circuit held that the party's own public hostility toward the judge (including writing a letter to a Supreme Court justice urging punishment of the judge) counseled *against* disqualification, "lest we encourage tactics designed to force recusal."[277] For the same reason, the filing of a collateral lawsuit or other adversarial legal action against the judge will generally not require disqualification.[278]

In upholding a refusal to disqualify when the plaintiff had sent a letter to the Senate Judiciary Committee opposing the judge's nomination to the bench, the Ninth Circuit rejected the argument that disqualification was necessary: "Such a letter is probative of [the plaintiff's] dislike for [the judge], not the other way around."[279]

The courts have taken a similar approach to threats against the judge. In *United States v. Mosby*,[280] the respondent moved for disqualification on the grounds that he had previously threatened the judge, that the judge was made aware of these threats through a motion filed with the court, and that the judge was thus incapable of approaching the case impartially. The Eighth Circuit found that the judge was previously unaware of these threats and that therefore

276. FDIC v. Sweeney, 136 F.3d 216, 219 (1st Cir. 1998) (quoting 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3542 at 577–78 (2d ed. 1984)).

277. United States v. Bertoli, 40 F.3d 1384, 1414 (3d Cir. 1994). *See also* Akins v. Knight, 863 F.3d 1084, 1087 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 992 (2018) ("[A] rule that would require recusal any time a litigant has been critical of a judge would create perverse incentives and enable judge shopping."); United States v. Bayless, 201 F.3d 116, 129 (2d Cir. 2000) (judge did not commit clear error in denying disqualification because of media and political attacks on him; to read § 455 to allow such disqualification "would create a moral hazard by encouraging litigants or other interested parties to maneuver to obtain a judge's disqualification").

278. *See, e.g.*, *In re* Bush, 232 F. App'x 852, 854 (11th Cir. 2007) (recusal not required on grounds that debtor had filed civil claim against district judge, who had entered adverse ruling against debtor in prior case); Azubuko v. Royal, 443 F.3d 302, 304 (3d Cir. 2006) (recusal not required when judge was one of the numerous federal judges against whom plaintiff had filed suit). *See also* Jones v. Pittsburgh Nat'l Corp., 899 F.2d 1350, 1355–56 (3d Cir. 1990); United States v. Studley, 783 F.2d 934, 940 (9th Cir. 1986); United States v. Grismore, 564 F.2d 929, 933 (10th Cir. 1977); United States v. Whitesel, 543 F.2d 1176, 1181 (6th Cir. 1976).

279. DeNardo v. Municipality of Anchorage, 974 F.2d 1200, 1201 (9th Cir. 1992).

280. 177 F.3d 1067 (8th Cir. 1999).

disqualification was unnecessary. In another Eighth Circuit case,[281] a district judge did not disqualify himself after a letter threatening his life was sent to a local newspaper. Because the judge believed the threat was an attempt to have the case removed to a different court with a more favorable judge and the defendant was incapable of carrying out the threat, the Eighth Circuit concluded that the judge properly denied the motion for disqualification. And in a case where the judge told the press that he was not intimidated by a party's threats, the Second Circuit concluded that disqualification was unnecessary, observing that the judge's statement evinced his capacity to separate his personal interests from the facts of the case.[282]

It bears emphasis, however, that this line of cases seeks to thwart the efforts of parties or their counsel to engage in strategic behavior aimed at forcing disqualification. Cases in which a party is independently discovered to have threatened the judge's life stand on different footing.[283] In *United States v. Greenspan*,[284] the Tenth Circuit reversed a refusal to disqualify in the face of a threat to the trial judge. The court concluded that the judge should have disqualified himself because he "learned of the alleged threat from the FBI, and there is nothing in the record to suggest the threat was a ruse by the defendant in an effort to obtain a different judge."[285] Moreover, the trial court had expedited sentencing in order to "'get [the defendant] into the federal penitentiary system immediately, where he [could] be monitored more closely.'"[286] Under the circumstances, the court's impartiality could reasonably be questioned. But the Tenth Circuit clarified, in dicta, that threats against a judge will rarely be a ground for disqualification:

> [I]f a death threat is communicated directly to the judge by a defendant, it may normally be presumed that one of the defendant's motivations is to obtain a recusal, particularly if he thereafter affirmatively seeks a recusal. . . . [I]f a judge concludes that recusal is at least one of the defendant's objectives (whether or not the threat is taken seriously), then section 455 will not mandate recusal because that statute is not intended to be used as a forum shopping statute. . . . Similarly, if a defendant were to make

281. United States v. Dehghani, 550 F.3d 716 (8th Cir. 2008).

282. LoCascio v. United States, 473 F.3d 493, 496 (2d Cir. 2007). *See also* United States v. Beale, 574 F.3d 512, 520 (8th Cir. 2009) (recusal not required when threats were clearly an attempt to manipulate the judicial system); United States v. Yousef, 327 F.3d 56, 170 (2d Cir. 2003) (disqualification unnecessary when defendants repeatedly raised their aborted attempt to kill an unnamed judge in an effort to harass and force disqualification).

283. *See* Charles Gardner Geyh, James J. Alfini, Steven Lubet & Jeffrey M. Shaman, Judicial Conduct and Ethics (5th ed. 2013).

284. 26 F.3d 1001 (10th Cir. 1994).

285. *Id.* at 1006.

286. *Id.* at 1005 (Appellant's Appendix 358–59).

> multiple threats to successive judges or even to multiple judges on the same court, there might be some reason to suspect that the threats were intended as a recusal device.[287]

Cases in which parties are being prosecuted for having threatened, attempted to murder, or murdered, the judge or the judge's colleagues, ordinarily require disqualification and are discussed in Section II.B.1.b.i.

Judges have likewise been loath to disqualify themselves from cases in which a party or that party's lawyer has been complimentary of the judge. In *Sullivan v. Conway*,[288] the defendant (a lawyer) wrote a letter to his client praising the judge. Sullivan, a lawyer representing himself as plaintiff, inadvertently received a copy of the letter, submitted it to the court, then moved for disqualification on the ground that the praise could influence the judge. "[T]he praise would not have come to [the judge's] attention . . . had not the lawyer wishing to disqualify him brought it to his attention."[289] Rejecting the argument that the judge should have disqualified himself, the Seventh Circuit observed that "it is improper for a lawyer or litigant (Sullivan being both in this case) to *create* the ground on which he seeks the recusal of the judge assigned to his case. That is arrant judge-shopping."[290]

## 2. Specific grounds: § 455(b)

### a. Personal bias, prejudice, or knowledge: § 455(b)(1)

Disqualification under § 455(b)(1) requires disqualification when the judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."[291]

#### i. Bias and prejudice

As a practical matter, parties rarely seek disqualification under § 455(b)(1) alone for two reasons. First, relief for actual bias may be easier to obtain under § 144 than § 455(b)(1).[292] Section 144 requires disqualification whenever a timely and

287. *Id.* at 1006. *See also* United States v. Cordova, 806 F.3d 1085, 1094 (D.C. Cir. 2015) (disqualification not required when judge concluded there was no active threat against him; defendant had taken no affirmative steps toward carrying out threat).

288. 157 F.3d 1092 (7th Cir. 1998).

289. *Id.* at 1096.

290. *Id. Accord* United States v. Owens, 902 F.2d 1154, 1156 (4th Cir. 1990). *See also In re* Mann, 229 F.3d 657, 658 (7th Cir. 2000).

291. The corollary to § 455(b)(1) in the Code of Conduct for United States Judges is Canon 3C(1)(a). *See* Appendix A.

292. This is not to imply that obtaining relief under § 144 is easy. Section 144 is discussed in section III.

facially sufficient affidavit alleging bias is filed, whereas § 455(b)(1) requires disqualification "only if actual bias or prejudice is 'proved by compelling evidence.'"[293] If courts analyze a claim under § 144 and it fails, there will not be sufficient evidence to meet the higher burden of proof under § 455(b)(1); if the claim is valid, disqualification is required under § 144, and an analysis of § 455(b)(1) becomes unnecessary. As a consequence, litigants often argue for disqualification under both statutes when alleging actual bias. Courts often conflate the analysis of bias under the two statutes, deciding to "view judicial interpretations of 'personal bias or prejudice' under § 144 as equally applicable to § 455(b)(1)."[294]

Second, most litigants who file motions for disqualification for actual bias or partiality under § 455(b)(1) also argue that the judge's impartiality might reasonably be questioned under § 455(a). Because demonstrating an appearance of partiality under § 455(a) is easier (and implicitly less critical of the subject judge) than demonstrating actual bias or prejudice, courts again often decide the issue on § 455(a) grounds without ever reaching § 455(b)(1).

The issue of disqualification for bias, while not a common occurrence, still arises occasionally. Disqualification under § 455(b)(1) requires that a litigant present evidence of a "negative bias or prejudice [which] must be grounded in some personal animus or malice that the judge harbors against him."[295] The standard for determining if such bias exists is "whether a reasonable person would be convinced the judge was biased."[296] The Fifth Circuit noted that the standard for finding actual bias is objective and that "it is with reference to the 'well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical and suspicious person' that the objective standard is currently established."[297]

293. Hook v. McDade, 89 F.3d 350, 355 (7th Cir. 1996) (quoting United States v. Balistrieri, 779 F.2d 1191, 1202 (7th Cir. 1985)). The court concluded that the judge's statement that a motion for disqualification was "offensive" and "'impugn[ed]' his integrity" was not sufficiently compelling evidence of an extrajudicial source of actual bias against the defendant. *Id.* at 355–56.

294. *Balistrieri*, 779 F.2d at 1202.

295. *Id.* at 1201.

296. *Hook*, 89 F.3d at 355. *See also* Ethicon Endo-Surgery, Inc. v. Covidien LP, 812 F.3d 1023 (Fed. Cir. 2016); Belue v. Leventhal, 640 F.3d 567 (4th Cir. 2011); Collins v. Illinois, 554 F.3d 693 (7th Cir. 2009); United States v. Amedeo, 487 F.3d 823 (11th Cir. 2007); United States v. Jamieson, 427 F.3d 394 (6th Cir. 2005); *In re* Community Bank of N. Va., 418 F.3d 277 (3d Cir. 2005); Cordoza v. Pacific States Steel Corp., 320 F.3d 989 (9th Cir. 2003); Ocasio v. Fashion Inst. of Tech., 9 F. App'x 66 (2d Cir. 2001); *In re* American Ready Mix, Inc., 14 F.3d 1497 (10th Cir. 1994); *In re* Barry, 946 F.2d 913 (D.C. Cir. 1991); Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322 (8th Cir. 1985); United States v. Kelley, 712 F.2d 884 (1st Cir. 1983).

297. Andrade v. Chojnacki, 338 F.3d 448, 462 (5th Cir. 2003) (quoting United States v. Jordan, 49 F.3d 152, 156 (5th Cir. 1995)).

In *Mann v. Thalacker*,[298] the Eighth Circuit was unwilling to imply actual bias or prejudice from the judge's own personal history. After his conviction for sexual abuse of a child, the defendant argued, in the context of his habeas petition, that the state trial judge's own history of sexual abuse at the hands of his father should have caused him to disqualify himself on the grounds of personal bias. Although § 455(b)(1) does not apply to the actions of a state trial judge, the court used it as a standard in this case. The court held that reference to the judge's personal history was insufficient to establish actual bias, although it stated that the defendant's argument would have been stronger "if the abuse the judge suffered as a child bore a closer resemblance to the conduct with which [the defendant] was charged."[299]

### ii. Extrajudicial source of bias

Most circuits have adopted the requirement, based on the Supreme Court's use of the extrajudicial source doctrine for § 455(a),[300] that "[b]ias against a litigant must . . . arise from an extrajudicial source" for disqualification under § 455(b)(1).[301] Adverse contempt orders and other judicial rulings in the same case, for example, are thus not, by themselves, sufficient for establishing bias for disqualification under § 455(b)(1).[302] Explaining the application of the extrajudicial source doctrine to § 455(b)(1), one district court noted: "In every lawsuit, judges make rulings adverse to one or the other party. That these rulings may be unwelcome is simply too commonplace a circumstance to support an allegation of bias."[303]

The Fifth Circuit held, in *Andrade v. Chojnacki*,[304] that opinions formed in the course of the current proceedings, as well as those based on prior judicial proceedings, are "nearly exempt from causing recusal" and can only do so if they "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible."[305] The judge's off-the-record insults and expressions of distaste for several of the parties were not enough to meet this high standard because

298. 246 F.3d 1092 (8th Cir. 2001).

299. *Id.* at 1097.

300. Liteky v. United States, 510 U.S. 540, 554–55 (1994). *See* Section II.B.1.b.ii for a discussion of *Liteky* and the extrajudicial source doctrine as it applies to § 455(a).

301. *Hook*, 89 F.3d at 355. *See also* United States v. Griffin, 84 F.3d 820, 831 (7th Cir. 1996).

302. *See, e.g.*, Brokaw v. Mercer Cty., 235 F.3d 1000, 1025 (7th Cir. 2000).

303. Marion v. Radtke, No. 07-cv-243-bbc, 2009 U.S. Dist. LEXIS 41031, at *14–15 (W.D. Wis. May 14, 2009) (holding defendant's motion to disqualify, which was based wholly on motions the judge made that were not in defendant's favor, lacked sufficient evidence of actual bias for disqualification under § 455(b)(1)).

304. 338 F.3d 448 (5th Cir. 2003).

305. *Id.* at 462 (citing *Liteky*, 510 U.S. at 555–56).

"expressions of impatience, dissatisfaction, and even anger" will not establish the bias or prejudice required by § 455(b)(1).[306]

In *Grove Fresh Distributors, Inc. v. John Labatt, Ltd.*,[307] the Seventh Circuit rejected the disqualification arguments of an attorney whom the trial judge had found in contempt several times. The attorney had repeatedly violated court orders, including a confidentiality agreement, and he had misrepresented himself as a party's counsel after that party had dismissed him. The Seventh Circuit found his argument for disqualification without merit because the attorney made "no attempt to establish any bias stemming from a personal relationship or prior litigation," instead relying exclusively on "rulings during the litigation, which absent extraordinary circumstances, are not grounds for recusal."[308] No such extraordinary circumstances were enumerated, and the court made clear that "efforts at courtroom administration and enforcing compliance with a court order do not amount to an inability to render fair judgments."[309]

Although establishing disqualifying bias on the basis of a judge's statements made during judicial proceedings is difficult, it is not impossible. As the foregoing discussion suggests (and the Supreme Court has opined), disqualification is required in those rare circumstances in which a judge's comments "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible."[310] Thus, for example, in *Gardiner v. A.H. Robins Co.*,[311] the Eighth Circuit concluded that a judge's comments during proceedings rose to the level of pervasive bias when, without a trial, the judge suggested that he believed the allegations against the defendant.[312]

306. *Id. See also* United States v. White, 582 F.3d 787, 807 (7th Cir. 2009) (recusal not required when judge referred to defendant, convicted as leader of drug-trafficking street gang, as a kingpin; expressed doubts about defendant's capacity to produce the briefs he submitted without help; and called defendant's briefs "rude").

307. 299 F.3d 635 (7th Cir. 2002).

308. *Id.* at 640.

309. *Id. See also* United States v. Lanza-Vázquez, 799 F.3d 134, 143 (1st Cir. 2015) (judge's pattern of interceding to assist with prosecution's questions "skirted near the line," but was ultimately a proper exercise of trial management, because judge generally intervened only to expedite trial after defense counsel's repetitive and technical objections unnecessarily slowed pace of trial); Burley v. Gagacki, 834 F.3d 606, 617 (6th Cir. 2016) (recusal not required for instructing plaintiffs' counsel to use the question-and-answer format during cross-examination, reminding a witness to testify truthfully, refusing to allow a witness without personal knowledge of a document to testify about the document, and questioning merits of plaintiffs' case-in-chief).

310. *Liteky*, 510 U.S. at 555–56.

311. 747 F.2d 1180 (8th Cir. 1984).

312. *Id.* at 1192. *See also* Parliament Ins. Co. v. Hanson, 676 F.2d 1069, 1075 (5th Cir. 1982) (applying exception to extrajudicial source doctrine and finding judge's comments in judicial context showed no ill will, and thus no bias or prejudice).

### iii. Bias against nonparties

Actual bias for or against an attorney, witness, or other participant is not ordinarily enough to warrant disqualification under § 455(b)(1), unless it is so extreme as to engender bias for or against a party. In *Dembowski v. New Jersey Transit Rail Operations, Inc.*,[313] a part-time magistrate judge was allowed to continue his representation of a party involved in a suit in the same district in which the magistrate judge served his judicial function. The party seeking disqualification of the magistrate judge from his role as advocate alleged that the judge and jury would be inclined to favor the arguments of the magistrate judge because of his status as a member of the judiciary. In reaching its decision denying the motion to disqualify, the district court held that, in the context of § 455(b)(1), "potential 'bias for or against an attorney, who is not a party, is not enough to require disqualification unless it can also be shown that such a controversy would demonstrate bias for or against the party itself.'"[314] The court further held that "a judge's acquaintance with a party, an attorney, or a witness without some factual allegation of bias or prejudice, is not sufficient to warrant recusal."[315]

The Second Circuit held that a judge's comment on the possibility of disbarment proceedings against a party's attorney does not establish the personal bias required by § 455(b)(1). In *LoCascio v. United States*,[316] the trial judge, in a hearing not attended by the attorney threatened with disbarment, mentioned the possibility of disbarment proceedings should the attorney testify as planned. The Second Circuit found that, when read in context, the judge's comment could not "reasonably be construed as exhibiting personal animosity towards [the attorney or the defendant]," nor could it be seen as "displaying hostility towards [the defendant's] claim."[317] The court went on to hold that personal bias was not established because the judge's comment did not derive from an extrajudicial source or reveal the requisite favoritism or antagonism, making disqualification unnecessary.

313. 221 F. Supp. 2d 504 (D.N.J. 2002).

314. *Id.* at 511 (quoting United States v. Edwards, 39 F. Supp. 2d 692, 699 (M.D. La. 1999)).

315. *Id.* (quoting Bailey v. Broder, No. 94, 1997 WL 73717, at *3 (S.D.N.Y. Feb. 20, 1997)).

316. 473 F.3d 493 (2d Cir. 2007).

317. *Id.* at 496–97. *See also* Bolden v. City of Topeka, 441 F.3d 1129, 1146 (10th Cir. 2006) (disqualification under § 455(b)(1) unnecessary, despite judge repeatedly calling attorney incompetent, making sarcastic comments about attorney's incompetence, urging client to proceed *pro se*, and encouraging party to file a malpractice claim against counsel).

### iv. Knowledge of disputed evidentiary facts

Section 455(b)(1) requires disqualification when judges have prior knowledge of disputed facts. The Fifth Circuit reversed a refusal to disqualify when a relative of the judge was a major participant in transactions relating to the defendant's indictment and "had communicated to the judge . . . material facts and her opinions and attitudes regarding those facts."[318]

In *United States v. Alabama*,[319] the Eleventh Circuit held that the trial judge should have disqualified himself from a lawsuit against Alabama and its state universities when the judge had been a state legislator involved in legislative battles germane to the litigation. The judge was "forced to make factual findings about events in which he was an active participant."[320]

*Alabama* can be reconciled with *Easley v. University of Michigan Board of Regents*,[321] in which the Sixth Circuit rejected the contention that knowledge gained by the judge while serving on a law school's "committee of visitors" required him to disqualify himself from a discrimination suit against the law school. In *Easley*, the judge's position did not give him knowledge of the events at issue in the litigation.

In *United States v. Microsoft Corp.* (*Microsoft I*),[322] the D.C. Circuit remanded a case to a different trial judge when, among other things, the original judge appeared to be influenced in his handling of a case by his private reading of a book related to the case. While the court did not explicitly cite § 455(b)(1), the facts and holding of the case suggest the relevance of this subsection. The court noted that "[t]he book's allegations are, of course, not evidence on which a judge is entitled to rely."[323]

The Ninth Circuit held that the trial judge's decision to revoke the bail bonds of bank robbery defendants after the U.S. attorney informed the judge about threats to the witnesses' safety could not constitute a disqualifying fact with regard to the subsequent trial.[324] The fact that the judge was made aware of the information in private rather than in open court was irrelevant, considering the defense counsel's refusal of an offer to review the information in camera.

318. *In re* Faulkner, 856 F.2d 716, 721 (5th Cir. 1988).
319. 828 F.2d 1532 (11th Cir. 1987).
320. *Id.* at 1545.
321. 906 F.2d 1143 (6th Cir. 1990).
322. 56 F.3d 1448 (D.C. Cir. 1995).
323. *Id.* at 1463.
324. United States v. Jackson, 430 F.2d 1113, 1115 (9th Cir. 1970).

In *Edgar v. K.L.*,[325] the Seventh Circuit extended § 455(b)(1) to information acquired in off-the-record briefings and held that § 455(b)(1) required disqualification when a judge who was briefed privately by a panel of experts declined to inform the parties about the briefing's contents. The court acknowledged that § 455 is primarily concerned with knowledge gained "outside a courthouse"; however, knowledge acquired in a judicial capacity typically "enters the record and may be controverted or tested by the tools of the adversary process . . . in the record—and in this case the judge has forbidden any attempt at reconstruction. . . . This is 'personal' knowledge."[326] In *Rupert v. Ford Motor Co.*,[327] in contrast, the Eighth Circuit ruled that disqualification was unnecessary under § 455(b)(1) when the judge became privy to facts underlying the plaintiff's loss of consortium claim at a status conference, because "[a]ll information exchanged during the conference was inadmissible at subsequent proceedings."[328]

When the judge simply possesses information generally available to the public, disqualification is unnecessary. In *In re Hatcher*,[329] the judge's son had assisted in the prosecution of a defendant in a case related to the case before the judge, and the judge had sat in on the trial to observe his son's performance. The Seventh Circuit noted that the district judge

> was present only as a spectator in the courtroom. He therefore learned nothing . . . that any member of the public could not also have learned by attending the trial or reading a good newspaper account of its progress. This limited exposure is simply not the kind of *personal* knowledge of disputed evidentiary facts with which § 455(b)(1) is concerned.[330]

The Seventh Circuit nonetheless concluded that disqualification was required under § 455(a) because the cases were so closely related.

### b. Prior association with matter as private practitioner or witness: § 455(b)(2)

Subsection 455(b)(2) requires disqualification under the following circumstance:

> [w]here in private practice [the judge] served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served

325. 93 F.3d 256 (7th Cir. 1996).
326. *Id.* at 259.
327. 640 F. App'x 205 (3d Cir. 2016).
328. *Id.* at 209.
329. 150 F.3d 631 (7th Cir. 1998).
330. *Id.* at 635.

> during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it[.][331]

In *In re Rogers*,[332] the Fourth Circuit defined the "matter in controversy" quite broadly. The defendants were charged with using unlawful means to secure passage of a bill in the state legislature. A former law partner of the trial judge had represented a company in its own efforts to get the bill passed. The defendants planned to argue that their conduct was no more culpable than that of the company represented by the judge's former partner, whom they planned to call as a witness. Holding that disqualification was required under § 455(b)(2), the Fourth Circuit observed that "the actual case before the court consists of more than the charges brought by the government. It also includes the defense asserted by the accused. Here, this defense, in part at least, will consist of matters in which the judge's former partner served as lawyer."[333]

In *United States v. DeTemple*,[334] the Fourth Circuit distinguished *Rogers* and held disqualification unnecessary when the judge had represented a creditor of the defendant several years before the current charges of bankruptcy fraud. The creditor "played no role in either the defense or the prosecution of the case. . . . The connection between the judge's prior professional associations and the case before him is far more tenuous here than in *Rogers*."[335]

In *Little Rock School District v. Armstrong*,[336] the district judge (Wilson)—when he was a private practitioner decades earlier—had defended a judge (Woods) in a mandamus proceeding that sought Woods's disqualification from a case that came before Wilson twenty years later in the context of a motion for release from court supervision. The Eighth Circuit concluded that Judge Wilson's prior representation of Judge Woods was irrelevant to the merits of the underlying dispute and thus that "there is not a sufficient relationship between the recusal proceedings with respect to Judge Woods and the issues now before us on the merits to make them the same 'matter in controversy.'"[337]

331. The corollary to § 455(b)(2) in the Code of Conduct for United States Judges is Canon 3C(1)(b). *See* Appendix A.

332. 537 F.2d 1196 (4th Cir. 1976).

333. *Id*. at 1198.

334. 162 F.3d 279 (4th Cir. 1998).

335. *Id*. at 284.

336. 359 F.3d 957 (8th Cir. 2004).

337. *Id*. at 961.

### c. Prior association with matter as governmental employee: § 455(b)(3)

Subsection 455(b)(3) requires disqualification when the judge 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."

The Eighth Circuit has held that "[i]f an indictment or investigation leading directly to the indictment began after a former prosecutor took office as a judge, he or she is not considered to have been 'of counsel' and is not required by § 455 to disqualify himself or herself."[338]

In *United States v. Arnpriester*,[339] the Ninth Circuit held that a judge who was formerly a U.S. attorney when the case at hand was under investigation should have disqualified himself from ruling on the appellant's motion for a new trial. The court noted that its analysis "imputes to the United States Attorney the knowledge and acts of his assistants."[340]

In *United States v. Silver*,[341] the Ninth Circuit held that a trial judge who had served as U.S. attorney for the preliminary investigation of the defendant's prior offense need not disqualify himself under § 455(b)(3). The judge had served as U.S. attorney during the first two years of a five-year mail fraud investigation of the defendant, conducted more than ten years before the indictment that led to the current case. In reaching its decision, the Ninth Circuit said, "There is no factual connection or relationship between the current case and the 1982 mail fraud case."[342] It further noted that the previous case was referenced only "for purposes of sentencing" and that the judge "was not asked to make any determinations or to render an opinion on the mail fraud conviction."[343] Distinguishing *Arnpriester*, the court explained that here the trial judge had not initiated the current case and only happened to have been U.S. attorney at the beginning of an investigation of a factually unrelated case involving the same defendant.[344]

In *Murray v. Scott*,[345] the Eleventh Circuit held that a district judge who had served as counsel of record in prior litigation for one of the current parties should

338. United States v. DeLuna, 763 F.2d 897, 908 (8th Cir. 1985).

339. 37 F.3d 466 (9th Cir. 1994).

340. *Id.* at 467. The court held that both § 455(a) and (b) required disqualification in this case.

341. 245 F.3d 1075 (9th Cir. 2001).

342. *Id.* at 1079.

343. *Id.* at 1080.

344. *Id.* at 1079–80.

345. 253 F.3d 1308 (11th Cir. 2001).

have disqualified himself under §§ 455(b)(1) and (b)(3). In 1970, while serving as a U.S. district attorney, the judge appeared as counsel of record for the defendant, a sporting association, the status of which was the subject of the current litigation. He had filed a brief that the party now seeking disqualification claimed would likely be used as evidence in the current proceeding. The Eleventh Circuit found that the judge "may have knowledge of facts in dispute in the present case" and that disqualification was thus required because "the record is strong enough to presume personal knowledge."[346]

The Seventh Circuit held that disqualification was not required when the judge presiding over a tax evasion case had previously served as an assistant U.S. attorney (AUSA) at the same time when, and in the same district where, the defendant had been indicted.[347] The court stated: "As applied to judges who were formerly AUSAs, § 455(b)(3) requires some level of actual participation in a case to trigger disqualification."[348] Absent evidence of actual participation, the judge did not commit plain error in not disqualifying himself.[349]

In *Clemmons v. Wolfe*,[350] decided in 2004, the district judge denied a habeas petition filed by a petitioner over whose trial that same judge, before his appointment to the federal bench, had presided in state court. The Third Circuit concluded that the district judge erred in declining to disqualify himself, on the grounds that his impartiality might reasonably be questioned under § 455(a). The court went further, however, taking the unusual step of exercising its broad supervisory authority over federal proceedings to require that all federal district judges disqualify themselves from habeas corpus proceedings that raise issues concerning trials or convictions over which the judges presided in their former capacities as state judges. *Clemmons* was decided under § 455(a), not § 455(b)(3). The corollary to § 455(b)(3) in the Code of Conduct for United States Judges—Canon 3C(1)(e)—was amended in 2009 to make its applicability to former judicial service explicit.[351]

346. *Id*. at 1313.

347. United States v. Ruzzano, 247 F.3d 688 (7th Cir. 2001), *overruled in part by* Fowler v. Butts, 829 F.3d 788, 793 (7th Cir. 2016) ("Several of this circuit's decisions hold that failure to file a [§ 455(a)] motion in the district court waives the right to present the contention on appeal.").

348. *Ruzzano*, 247 F.3d at 695 (citing cases).

349. *Id*. at 696. Because the defendant didn't request disqualification at trial and raised the issue for the first time on appeal, the Seventh Circuit could only review for plain error. *Id*. at 695.

350. 377 F.3d 322 (3d Cir. 2004).

351. For the text of Canon 3C(1)(e), *see* Appendix A.

### d. Financial interest in matter: § 455(b)(4) and § 455(f)

#### i. Disqualification for financial interest

Subsection 455(b)(4) requires disqualification when a judge

> 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[.][352]

Section 455(d)(4) defines "financial interest" for the purposes of § 455(b) and provides specific exemptions, such as investment in a mutual fund or ownership of government securities. Apart from such exemptions, even the smallest financial interest (e.g., ownership of a single share of stock) requires disqualification. Under § 455(c), it is a judge's duty to keep abreast of all of his or her financial interests.[353]

Courts of appeals have interpreted "financial interest" to refer to a direct interest, not a "remote or contingent" interest.[354] In a case involving the constitutionality of a "privilege" tax as applied to federal judges working within Jefferson County, Alabama, the Eleventh Circuit raised the issue of disqualification sua sponte when "nine of the *en banc* panel's twelve judges [had] sat in Jefferson County at least one day—and some a few days more."[355] Because the city had never tried to collect the privilege tax from a federal judge who did not have chambers in the county, and none of the Eleventh Circuit judges had chambers in Jefferson County, the court held that any possible interest the judges may have was too remote and contingent to constitute a financial interest.[356]

Similarly, in an antitrust case alleging price-fixing by oil companies, all of the trial judges in the district were residents of New Mexico, whose future utility bills could have been affected by the outcome of the litigation. The Tenth Circuit held that this was too remote and contingent to qualify as a "financial interest" under

352. The corollary to § 455(b)(4) in the Code of Conduct for United States Judges is Canon 3C(1)(c). *See* Appendix A.

353. Fed. R. Civ. P. 7.1, Fed. R. Crim. P. 12.4, and Fed. R. App. P. 26.1 require a nongovernmental corporate party to a proceeding to file a statement identifying any parent corporation or publicly held corporation that owns 10% or more of its stock. This disclosure is meant to aid judges in decisions about disqualification under Canon 3C(1)(c) and § 455(b)(4). Under Fed. R. Crim. P. 12.4, the government must also file a statement identifying an organizational victim of a crime and providing the same information on a corporate victim that a nongovernmental corporate party must file.

354. *See, e.g.*, *In re* Virginia Elec. & Power Co., 539 F.2d 357, 366–67 (4th Cir. 1976).

355. Jefferson Cty. v. Acker, 92 F.3d 1561, 1581 (11th Cir. 1996) (citing appendix).

356. *Id*. at 1582. The court also held that disqualification would be contrary to the rule of necessity. *Id*. at 1583–84.

§ 455(b)(4).[357] In each case, the courts considered the potential benefit to the judges of an "other interest" under the statute, which meant, under § 455(b)(4), that disqualification was required only if this "other interest" would be "substantially affected by the outcome of the proceeding."

Contributions by a judge's spouse have not been considered a financial interest. In a Second Circuit case involving an attack on an abortion clinic, the defendant moved for disqualification on the grounds that the judge's wife had made financial contributions to the victim clinic and so had created a financial interest under § 455(b)(4).[358] The court noted that "[r]ecusal is not required . . . when the alleged interest or bias on the part of the judge or his spouse is 'not direct, but is remote, contingent, or speculative.'"[359] In affirming the trial judge's denial of the disqualification motion, the court explained that the clinic in question, although named as the victim, was not a party to the litigation, and that "contributions made by [the judge's] wife to [the clinic] did not constitute a financial interest in the organization."[360]

In *Draper v. Reynolds*,[361] a civil rights suit filed under 42 U.S.C. § 1983, the plaintiff sought to disqualify the trial judge on the grounds that the judge owned property in the same county in which the defendant was deputy sheriff. The Eleventh Circuit rejected the plaintiff's argument that the judge, who previously filed a zoning application in the county, would likely side with his own financial interests and hence the county in violation of § 455(b)(4). It held that a property interest in a given county is grounds for disqualification only if "[that county and its commissioners] are parties to the case *and* . . . [the judge's] zoning application is currently pending before [that county and its commissioners]."[362]

The Fifth Circuit held that when the judge or someone in his family is a member of a class seeking monetary relief, § 455(b)(4) imposes a "per se rule" requiring disqualification.[363] The Fourth Circuit, in contrast, held that a trial judge who, as a rate-paying customer of a utility company involved in the case before him, could have received a $100 refund as a putative member of the class of plaintiffs,

357. *In re* New Mexico Natural Gas Antitrust Litig., 620 F.2d 794, 796 (10th Cir. 1980).

358. United States v. Arena, 180 F.3d 380 (2d Cir. 1999).

359. *Id*. at 398 (quoting United States v. Morrison, 153 F.3d 34, 48 (2d Cir. 1998)). *See also* Sensley v. Albritton, 385 F.3d 591, 600 (5th Cir. 2004) (holding that trial judge was not disqualified even though his wife's position at district attorney's office might conceivably be affected indirectly by outcome of case, because such an interest was "remote, contingent or speculative").

360. *Arena*, 180 F.3d at 398.

361. 369 F.3d 1270 (11th Cir. 2004).

362. *Id*. at 1280.

363. Tramonte v. Chrysler Corp., 136 F.3d 1025, 1029–30 (5th Cir. 1998).

should not have disqualified himself under § 455(b)(4).[364] The court classified the potential refund as an expectancy interest, and as such it was not a "financial interest" but rather "some other interest" under the language of § 455(b)(5). It further explained that the words "however small" apply only to financial interests under subsection (b)(4) and that in addressing other interests a judge "must necessarily consider the remoteness of the interest and its extent or degree."[365] The Fourth Circuit held that the possible refund was "de minimis" and therefore not grounds for disqualification.[366]

In a class action arising from the damage caused by Hurricane Katrina, a New Orleans district judge refused to disqualify himself on the grounds that possible inconvenience experienced by the judge and his family gave him a potential financial interest in the outcome of the proceedings under § 455(b)(4).[367] In its disqualification analysis, the district court referred to the Fifth Circuit's statement that "[a] remote, contingent, or speculative interest is not a disqualifying financial interest under the statute."[368] Because the judge and his family had suffered no financial loss or property damage as a result of Katrina, any interest or potential class membership based on possible inconvenience was, at best, "ephemeral, inchoate, and bordering on the metaphysical," and so could not justify disqualification.[369]

In *United States v. Rogers*,[370] a mail fraud case, the trial judge was "one of millions of stockholders" in a defrauded bank.[371] Holding that disqualification was not required under § 455(b)(4), the Ninth Circuit explained that the bank, which was the victim of the crime, is not a party to the proceeding under § 455(b)(4).[372] Moreover, "stock ownership in the corporate victim of a crime cannot be deemed a financial interest in the subject matter in controversy" under § 455(b)(4).[373]

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

365. *Id*. at 368.

366. *Id*. *But see* Gordon v. Reliant Energy, Inc., 141 F. Supp. 2d 1041, 1043–44 (S.D. Cal. 2001) (holding that disqualification was required of a judge who, as wholesale customer of defendant/electric company, had "legal claims identical to those raised by plaintiffs," which qualified both as financial and other claims under language of § 455(b)(4)).

367. Berthelot v. Boh Bros. Constr. Co., 431 F. Supp. 2d 639 (E.D. La. 2006).

368. *Id*. at 648 (citing *In re* Placid Oil Co., 802 F.2d 783, 786–87 (5th Cir. 1986)).

369. *Id*. at 649–50.

370. 119 F.3d 1377 (9th Cir. 1997).

371. *Id*. at 1384.

372. *Id*. *See also* United States v. Aragon, No. 99-50341, 2000 U.S. App. LEXIS 15423, at *5 (9th Cir. June 29, 2000).

373. *Rogers*, 119 F.3d at 1384. Disqualification was not required under § 455(a) either, the court ruled.

### ii. Divestiture as a cure for "financial interest" disqualification

The conflicts enumerated in § 455(b) require automatic disqualification—even if judges believe they are capable of impartial judgment; even if they believe that a reasonable person would not question their impartiality; and even if the parties are willing to waive any objections. Section 455(f), however, provides an opportunity for the judge to "cure" certain § 455(b) conflicts.

> Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for disqualification.[374]

A number of courts of appeals have upheld and applauded the use of subsection (f) to prevent disqualification.[375] In *Kidder, Peabody & Co. v. Maxus Energy Corp.*,[376] the judge sold stock as soon as he learned that the corporation in which he owned stock held a large percentage of the stock of one of the parties. The Second Circuit noted that the judge's curative action pursuant to § 455(f) prevented the waste of "three years of the litigants' time and resources and substantial judicial efforts."[377]

In *United States v. Lauersen*,[378] an insurance fraud case, the trial judge disclosed his ownership of a small number of shares in one of the victimized insurance companies eligible to receive monetary restitution as a result of the judge's ruling in the case. Because the recovery of restitution would affect the price of the

374. 28 U.S.C. § 455(f).

375. *See, e.g.*, *In re* Initial Pub. Offering Sec. Litig., 174 F. Supp. 2d 70, 80–81 (S.D.N.Y. 2001) (criticizing Tramonte v. Chrysler Corp., 136 F.3d 1025 (5th Cir. 1998)) (denying defendants' motion for disqualification and holding that, under § 455, "a judge . . . assigned a case in which she has a financial or other curable conflict . . . may continue to preside if she promptly eliminates it"); Key Pharm., Inc. v. Mylan Labs., Inc., 24 F. Supp. 2d 480, 484 (W.D. Pa. 1998) (judge divested stock in parent corporation and declined to disqualify himself, noting that disqualification would be mandatory except for the provisions of § 455(f)). *But see* Gordon v. Reliant Energy, Inc., 141 F. Supp. 2d 1041, 1046 (S.D. Cal. 2001) (relying on *Tramonte*) (both cases holding disqualifying interests incurable even if discovered and removed at beginning of case).

376. 925 F.2d 556 (2d Cir. 1991).

377. *Id*. at 561.

378. 348 F.3d 329 (2d Cir. 2003).

shares in question, the company agreed to waive its right to monetary recovery so the judge could continue on the case with no financial conflict. The Second Circuit held that what otherwise would have provided a basis for disqualification under § 455(b)(4) was not a financial interest in this case because the company's decision to "forgo its restitution claim" served to "eliminate such a basis" under § 455(f).[379]

In *In re Certain Underwriter*,[380] the district judge discovered—after being assigned to hear a class-action antitrust suit—that she owned shares in two of the defendant corporations, making her a putative class member. The judge immediately informed the parties of the conflict, divested herself of the shares, and opted out of the class. She denied the subsequent § 455(b)(4) disqualification motion. The Second Circuit affirmed, stating that § 455(f) was created to allow the continued participation of a "district judge with a minor interest in a class action lawsuit discovered after assignment, who quickly divested herself of the conflicting interest."[381]

In a class-action copyright case, two of the reviewing Second Circuit judges declined to disqualify themselves despite their membership in the relevant class for five months during their work on the case.[382] The class included anyone with copyrighted material posted on the electronic databases LexisNexis and Westlaw, among others. Having promptly divested themselves of any legal or financial claim as soon as they realized that they were members in the class, the judges relied on § 455(f) to justify their decision not to disqualify themselves. As they explained, "a reasonable person would *not* have known that we were class members" before the date on which they discovered—and promptly divested themselves of—the interest.[383] Also relevant to their refusal to disqualify was the fact that "many—if not most—other judges are similarly situated," including all but one of the other members of the Second Circuit, as well as (presumably) all the members of the Supreme Court.[384]

Some courts, however, have construed the "divestiture cure" strictly. The Sixth Circuit held that disqualification was required in a case in which the trial judge's daughter was employed by the law firm representing a party before the judge, even though the daughter resigned from the law firm.[385] It observed that

379. *Id*. at 338.

380. 294 F.3d 297 (2d Cir. 2002).

381. *Id*. at 304.

382. *In re* Literary Works in Elec. Databases Copyright Litig., 509 F.3d 136 (2d Cir. 2007).

383. *Id*. at 142.

384. *Id*. at 142–43.

385. *In re* Aetna Cas. & Sur. Co., 919 F.2d 1136 (6th Cir. 1990).

§ 455(f) refers to the judge himself or herself, his or her spouse, or a minor child residing with the judge. This "suggests that Congress intended to exclude the types of cure not permitted by this provision, for Congress had the opportunity to enact a broader amendment than it devised with section 455(f)."[386]

The Second Circuit held that a district judge who had unknowingly possessed a substantial financial stake in one of the plaintiffs (a bank) during a bench trial could not cure this conflict by divesting himself of the interest on remand.[387] Although the court based its decision on an "appearance of partiality" problem under § 455(a), its analysis is relevant to the divestment cure of a § 455(b)(4) conflict. The court held that "where an earlier 'appearance' of a potentially disqualifying interest mandated recusal under Section 455(a), a divestiture years later cannot cure a judge's presiding over significant proceedings in a case—here rendering a decision after a bench trial—in the intervening years."[388]

### e. Other interests of judge and judge's family: § 455(b)(5)

Section 455(b)(5) requires a judge's disqualification when

> 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.[389]

#### i. When judge or relatives are parties or associated with parties

Under § 455(b)(5)(i), judges shall disqualify themselves when they or a close family member is a party to the proceeding. Based on this subsection, the Tenth Circuit held that a trial judge should have disqualified himself from hearing habeas claims challenging state court cases in which his uncle had participated

386. *Id.* at 1147 (Kennedy, J., concurring).

387. Chase Manhattan Bank v. Affiliated FM Ins. Co., 343 F.3d 120 (2d Cir. 2003).

388. *Id.* at 131.

389. The corollary to § 455(b)(5) in the Code of Conduct for United States Judges is Canon 3C(1)(d). *See* Appendix A.

as a criminal appeals judge.[390] The judge's uncle, who had since died, was nonetheless a named defendant in the claims, thus requiring disqualification pursuant to § 455(b).[391]

The District Court of Puerto Rico held that § 455(b)(5) did not reach the father of the judge's son-in-law, who was on the board of directors of one of the named parties.[392] The Checklist for Financial and Other Conflicts contained within the Code of Conduct for United States Judges identified "the following blood relatives as falling within the third degree relationship: parent, child, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece, and nephew."[393] Regarding this as an exclusive list of possible third-degree relationships, the court concluded that a judge could not disqualify himself under § 455(b)(5) without establishing the existence of such a relationship.[394]

#### ii. When judge or relative acts as lawyer

The Seventh Circuit held that a judge's attendance at a related trial, to watch his son act as assistant counsel, did not require disqualification under § 455(b)(1).[395] The defendant also sought disqualification under § 455(b)(5)(ii). Although the son, who was a third-year law student, "acted as a lawyer," the court held that disqualification was not required under subsection (b)(5)(ii) because the proceeding was not the same as that involving the defendant. It involved a defendant charged with conduct arising from the same conduct as the defendant in the case at bar, but the two men were not codefendants. "No matter how closely related the two cases were factually or legally . . . the fact remains that they were separate 'proceedings.'"[396]

In similar circumstances, the Sixth Circuit required disqualification. In *In re Aetna Casualty & Surety Co.*,[397] seven claims against an insurance company were consolidated for trial, and the trial judge initially disqualified himself because his daughter's law firm represented four of the claimants. The judge later separated the cases and planned to try the three claims in which his daughter's firm was not

390. Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994).

391. *Id.* at 1571.

392. Oriental Fin. Group, Inc. v. Federal Ins. Co., 467 F. Supp. 2d 176 (D.P.R. 2006).

393. *Id.* at 179.

394. *Id.*

395. *In re* Hatcher, 150 F.3d 631 (7th Cir. 1998).

396. *Id.* at 637. The court found that disqualification was required under § 455(a), which illustrates that the appearance of impropriety may require disqualification even absent grounds for disqualification specifically enumerated in § 455(b).

397. 919 F.2d 1136 (6th Cir. 1990) (en banc).

involved. On mandamus petition, the court reversed because the cases remained intimately connected: "A decision on the merits of any important issue in any of the seven cases . . . could . . . constitute the law of the case in all of them, or involve collateral estoppel, or might be highly persuasive as a precedent."[398] The court did not specify whether it based its decision on § 455(a) or § 455(b)(5)(ii), but a concurring opinion, joined by seven judges, emphasized that there was an actual conflict of interest pursuant to § 455(b)(5), as well as an appearance of partiality.[399]

A proposed substitution or addition of counsel by one of the parties may create a conflict of interest requiring disqualification of the judge under § 455(b). The Eleventh Circuit held that, in such a case, the court may deny the request for new counsel, even apart from evidence or suspicion that it is made to spark disqualification, if it would cause undue delay.[400] However, a showing of "overriding need" for the new counsel "would trump both time delay and the loss of prior judicial activity."[401] Where the defendants retained the judge's brother-in-law six years after the complaint was filed, the Fifth Circuit remanded for a determination of whether the primary motive in his hiring had been to disqualify the judge.[402] The court held that "a lawyer may not enter a case for the primary purpose of forcing the presiding judge's recusal."[403] Otherwise, it observed, "a litigant could in effect veto the allotment and obtain a new judge by the simple expedient of finding one of the judge's relatives who is willing to act as counsel."[404]

### iii. When judge or relatives have an interest that could be substantially affected

A recurring problem implicating subsection 455(b)(5)(iii) arises when relatives of the judge are employed by a law firm that represents a party in litigation before the judge. In 1993, seven members of the Supreme Court, each with relatives employed by law firms, issued a letter responding to this concern.[405] The justices noted that in a case in which a relative appears before the judge as counsel, § 455(b)(5)(ii) requires disqualification. Since Congress could have, but did not, broaden this subsection to require disqualification whenever a relative is affiliated with a law firm that appears before a judge, the justices opined that

398. *Id*. at 1143.

399. *Id*. at 1147.

400. Robinson v. Boeing Co., 79 F.3d 1053 (11th Cir. 1996).

401. *Id*. at 1056.

402. McCuin v. Texas Power & Light Co., 714 F.2d 1255 (5th Cir. 1983).

403. *Id*. at 1265.

404. *Id*. at 1264.

405. Supreme Court of the United States, Statement of Recusal Policy (Nov. 1, 1993).

Congress must not have regarded so broad a disqualification as necessary.[406] That conclusion, in turn, refuted categorical assertions under § 455(a) that a judge's impartiality might reasonably be questioned whenever a firm that employs one of the judge's relatives appears before him or her. And in the minds of the justices, it likewise refuted categorical claims that any lawyer–relative at the firm possessed an interest in the case under § 455(b)(5)(iii) sufficient to require disqualification. The signatories to the letter nonetheless indicated that they would disqualify themselves from any case in which a relative held a partnership interest in a firm appearing before the Court, unless the Court received assurances from the firm that the relative would not share in profits derived from the case. Salaried employees, in contrast, did not share in the profits of the firm and so had no significant interest in the outcome of cases heard by the Court.

The courts of appeals appear to concur that disqualification is unnecessary when a relative is simply a salaried employee of the firm that appears before the court. For example, the Eighth Circuit found disqualification unnecessary in a case in which a law firm representing a party before the judge had hired the judge's daughter, who worked for the firm as a law clerk and later accepted a permanent job offer as associate starting in the fall.[407] The court said, "an employment relationship between a party and a judge's son or daughter does not *per se* necessitate a judge's disqualification."[408] The issue is fact-dependent, and the facts in this case didn't show an actual conflict under § 455(b)(iii).[409] The daughter was not, and would not—as a future employee of the law firm—be involved in the present litigation. She "was to be a salaried employee . . . not a partner whose income is directly related to the profit margin of the firm and could be substantially affected by the outcome of this case."[410] Finally, the firm was only one of many firms representing the parties, and its share of any damages almost certainly would not affect the salary or benefits of a first-year associate. Similarly, in *Southwestern Bell Telephone Co. v. FCC*,[411] a court of appeals judge found that his son's employment as a nonmanagement entry-level computer programmer for an intervenor in the case on appeal did not require the judge's disqualification from the panel hearing the appeal.

406. *Id*. at 53.

407. *In re* Kansas Pub. Emps. Ret. Sys., 85 F.3d 1353 (8th Cir. 1996).

408. *Id*. at 1364.

409. *Id*. The court also held that there was no appearance of a conflict of interest in violation of § 455(a). *Id*. at 1365.

410. *Id*. at 1364.

411. 153 F.3d 520 (8th Cir. 1998).

The circuits are divided, however, on whether a relative of the judge who is a partner at a firm in litigation before the judge has an interest in the outcome that is sufficient to trigger the need for disqualification. In *Potashnick v. Port City Construction Co.*,[412] the Fifth Circuit adopted a per se rule requiring disqualification when a relative of the judge is a partner in a law firm representing a party in the case. The judge will always know that the partner has "'an interest that could be substantially affected by the outcome of' a proceeding involving the partner's law firm."[413]

The Second Circuit, however, explicitly rejected this per se approach in *Pashaian v. Eccelston Properties, Ltd.*[414] It found disqualification unnecessary when a partner in the law firm representing the defendant was married to the sister of the judge's wife. "It would simply be unrealistic to assume . . . that partners in today's law firms invariably 'have an interest that could be substantially affected by the outcome of' any case in which any other partner is involved."[415] The trial court had noted that the law firm in question had sixty partners and gross revenue in excess of $100 million. Moreover, the case was not likely to affect the firm's reputation. The judge had concluded that his sister-in-law's interest would not be "substantially affected" by the outcome of the case, and the court of appeals agreed.

In a Fifth Circuit false advertising case,[416] the district judge was not disqualified even though her father-in-law was a retired partner in the firm representing the defendants. The judge's alleged interest in the proceeding under § 455(b)(5)(iii) was connected to the fact that since her father-in-law's death, the firm had been paying her husband death benefits that were adjustable based on the salaries of partners within the firm. The Fifth Circuit held that this interest was too remote to constitute a disqualifying financial interest because "the Consumer Price Index always served as a ceiling on the adjustment to which [the judge's father-in-law] was entitled," making any interest the judge had in the outcome of the case so small as to be insignificant.[417]

In *Sensley v. Albritton*,[418] the trial judge's wife was employed as an assistant district attorney in the office representing the defendants, though she herself was in no way involved in the case. The plaintiffs moved to disqualify. Relying on § 455(b)(5)(iii), they alleged that the outcome of the case might have an indirect

412. 609 F.2d 1101 (5th Cir. 1980).

413. *Id.* at 1113 (quoting § 455(b)(5)(iii)).

414. 88 F.3d 77 (2d Cir. 1996).

415. *Id.* at 83 (quoting § 455(b)(5)(iii)).

416. IQ Prods. Co. v. Pennzoil Prods. Co., 305 F.3d 368 (5th Cir. 2002).

417. *Id.* at 378.

418. 385 F.3d 591 (5th Cir. 2004).

effect on the judge's wife's ongoing employment in the office, in the event that the district attorney lost political popularity by losing the case. The Fifth Circuit found the plaintiffs' allegations unconvincing because "they are only able to make this argument by layering several speculative premises on top of one another to reach a speculative conclusion."[419]

In a case about the constitutionality of state taxation practices,[420] the Tenth Circuit concluded that § 455(b)(5) did not require disqualification even though the father-in-law of the trial judge's son was state governor. It found that the governor was not within the third degree of relationship required by § 455(b)(5). In addition, the court rejected the idea that the governor had an interest in the outcome of the suit because it was not "alleged that [the governor] has a personal or financial interest in the outcome of this litigation," and "[a]ny political interest that [the governor] may have in the outcome of this case is filtered through the State."[421]

#### iv. When judge or relative is likely to be material witness

In *United States v. Robinson*,[422] the Eighth Circuit ruled that the trial judge's failure to disqualify himself under § 455(b)(5)(iv) when his nephew was one of thirty-four witnesses testifying on the same subject was harmless error. The court declined to reach the issue of whether the nephew was a material witness, holding that even if he was, the judge's failure to disqualify was harmless. The court explained that, "[a]s in other areas of the law, there is surely room for harmless error committed by busy judges who inadvertently overlook disqualifying circumstances."[423]

## C. Disqualification procedure

By its terms, § 455 simply states that "[a] judge shall disqualify himself" under the circumstances specified. It obligates disqualification regardless of whether a motion to disqualify has been filed. Accordingly, the disqualification process may be triggered by a judge on his or her own initiative or by a party on motion.

419. *Id*. at 600.

420. Higganbotham v. Oklahoma, 328 F.3d 638 (10th Cir. 2003).

421. *Id*. at 645.

422. 439 F.3d 777 (8th Cir. 2006).

423. *Id.* at 779 (quoting Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 862 (1988)).

## 1. Investigating disqualification claims

*United States v. Morrison*[424] addressed the question of whether a trial judge, asked to disqualify herself based on conflict of interest, may investigate the matter. When the defendant sought disqualification based on an alleged adverse business relationship between himself, the judge's husband, and a friend of the judge, the judge asked her husband and friend to review the materials submitted in the defendant's motion. Both the judge's husband and friend stated that the allegations were false and denied any relationship with the defendant. Accordingly, the judge declined to disqualify herself. The Second Circuit noted that "it was not irregular for [the judge] to ascertain her husband's and friend's possible involvement with the defendant simply by asking them, in a reasonable effort to confirm that [the defendant's] incredible claims were indeed not factual."[425]

Conversely, when the trial judge does not adequately investigate and disclose potential grounds for disqualification, the judge's ignorance of those grounds does not eliminate the potential conflict. In *Chase Manhattan Bank v. Affiliated FM Insurance Co.*,[426] Chemical Bank merged with The Chase Manhattan Bank just before the case was assigned to the district judge. The newly merged entity used the Chase name, while counsel and the court used the Chemical Bank name to refer to the plaintiff. As a consequence, the district judge was unaware that his stock in Chase actually meant he had a financial interest in the plaintiff.[427] Three years later and on remand, the judge became aware of the interest and immediately divested himself of his stock. Although it could not be established that the judge was in fact aware of his financial interest, the Second Circuit concluded that "a reasonable person knowing the pertinent facts" would conclude the judge was aware, which created the appearance of partiality under § 455(a).[428] The appropriate remedy was the vacatur of the district court's judgment awarding damages to Chemical Bank.[429]

In a variation on this theme, the Sixth Circuit clarified that a litigant has no obligation to investigate possible bases for disqualification.[430] After learning of a conflict of interest, the trial judge transferred the case to another judge. The second judge—faced with deciding whether a prior dispositive ruling by the

424. 153 F.3d 34 (2d Cir. 1998).

425. *Id*. at 48 n.4.

426. 343 F.3d 120 (2d Cir. 2003).

427. *Id*. at 123.

428. *Id*. at 130.

429. *Id*. at 132–33.

430. American Textile Mfrs. Inst., Inc. v. The Limited, Inc., 190 F.3d 729 (6th Cir. 1999).

first judge should be allowed to stand—noted that the disqualification motion had been filed after the judge's adverse ruling. Refusing to "reward [the movant] or encourage this trend,"[431] the judge observed that "litigants have a duty to investigate and inform the court of any perceived biases before the court and the parties invest time and expense in a case."[432] Rejecting this analysis, the Sixth Circuit said:

> We believe instead that litigants (and, of course, their attorneys) should assume the impartiality of the presiding judge, rather than pore through the judge's private affairs and financial matters. Further, judges have an ethical duty to "disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification." *Porter v. Singletary*, 49 F.3d 1483, 1489 (11th Cir. 1995). . . . [The judge] possibly did not consider the matter sufficiently relevant to merit disclosure, but his nondisclosure did not vest in [the party] a duty to investigate him.[433]

## 2. Waiver of disqualification: § 455(e)

Under 28 U.S.C. § 455(e), waiver of a ground for disqualification based on § 455(a) "may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification"; waiver of disqualification under § 455(b) is not permissible.[434]

Some courts of appeals have recognized waivers pursuant to § 455(e).[435] In *Perkins v. Spivey*,[436] the trial judge fully disclosed the potential conflict arising from his law clerk accepting an employment offer from a firm that occasionally represented one of the parties to the lawsuit. Counsel for both parties elected to proceed, expressing no concern about the law clerk's continued participation.[437] The Eighth Circuit found that when counsel expressly assented to the clerk's participation and failed to seek the judge's disqualification in a timely manner after disclosure, the parties effectively waived the grounds for the judge's disqualification.[438]

431. *Id*. at 742.

432. *Id*.

433. *Id*. *See also In re* Initial Pub. Offering Sec. Litig., 174 F. Supp. 2d 61, 66–67 (S.D.N.Y. 2001) (holding that when facts are undisputed, expert opinion on a disqualification motion is not acceptable). *See also* United States v. Eyerman, 660 F. Supp. 775, 781 (S.D.N.Y. 1987) (same).

434. The corollary to § 455(e) in the Code of Conduct for United States Judges is Canon 3D. *See* Appendix A.

435. *See, e.g.*, United States v. Rogers, 119 F.3d 1377, 1382 (9th Cir. 1997); *In re* Cargill, Inc., 66 F.3d 1256, 1261 (1st Cir. 1995); United States v. Nobel, 696 F.2d 231, 236–37 (3d Cir. 1982).

436. 911 F.2d 22 (8th Cir. 1990).

437. *Id*. at 33.

438. *Id*.

The Eleventh Circuit noted, however, that "[w]hile it is . . . permissible for a judge to accept a waiver of recusal, we believe this option should be limited to marginal cases and should be exercised with the utmost restraint."[439] The court found that the defendant did not validly waive his disqualification claim, even though he was apprised of the potential disqualifying circumstance and did not seek disqualification. The Eleventh Circuit held that:

> as a general rule, "'a federal judge should reach his own determination [on recusal], *without calling upon counsel* to express their views. . . . The too frequent practice of advising counsel of a possible conflict, and asking counsel to indicate their approval of a judge's remaining in a particular case is fraught with potential coercive elements which make this practice undesirable.'"[440]

Failure to comply with the procedural requirements for disclosure under § 455(e) for waiver of disqualification can result in reversal.[441] In *Barksdale v. Emerick*,[442] the district court rejected a "belated" disqualification motion, explaining that it had initially "disclosed . . . that one of its law clerks was related to a Defendant party . . . at the . . . status conference and counsel . . . voiced no objections."[443] Quoting § 455(e), the Sixth Circuit reversed, noting that "[t]here is no disclosure 'on the record' and therefore no properly obtained 'waiver.'"[444] The court went on to say that § 455(e)'s disclosure and waiver requirements "must be strictly construed."[445]

### 3. Timeliness of disqualification motion

Unlike § 144, § 455 has no explicit requirement for a "timely" affidavit. Most circuits, however, require that a motion for disqualification be brought "at the earliest moment after knowledge of the facts demonstrating the basis for such

439. United States v. Kelly, 888 F.2d 732, 745 (11th Cir. 1989).

440. *Id*. at 745–46 (quoting *In re* National Union Fire Ins. Co., 839 F.2d 1226, 1231 (7th Cir. 1988) (quoting Resolution L, Judicial Conference of the United States, Oct. 1971)).

441. *See, e.g.*, Hall v. Small Bus. Admin., 695 F.2d 175, 180 (5th Cir. 1983) (holding § 455(e) waiver not valid when magistrate judge "failed fully to disclose the basis on which a reasonable person might 'harbor doubts about the magistrate's impartiality'" (quoting Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1111 (5th Cir. 1980)); and vacating lower court's judgment).

442. 853 F.2d 1359 (6th Cir. 1988).

443. *Id*. at 1361.

444. *Id*. (Contie, J., dissenting).

445. *Id*. *Accord* United States v. Murphy, 768 F.2d 1518, 1538–39 (7th Cir. 1985) (disclosure must be on record).

disqualification."[446] And all the circuits that have considered the issue agree that a party may not withhold "a recusal application as a fall-back position in the event of adverse rulings on pending matters."[447] These circuits have held that the timeliness requirement applies to § 455(b) as well, even though disqualification under that section cannot be waived.[448] "[A] party having information that raises a possible ground for disqualification cannot wait until after an unfavorable judgment before bringing the information to the court's attention."[449] The Fifth Circuit has said that "[t]he most egregious delay—the closest thing to per se untimeliness—occurs when a party already knows the facts purportedly showing an appearance of impropriety but waits until after an adverse decision has been made by the judge before raising the issue."[450]

The Ninth Circuit requires "reasonable promptness after the ground for such a motion is ascertained."[451] The Second Circuit uses a four-factor analysis for determining the timeliness of a motion: (1) whether the movant has participated in a substantial manner in trial or pretrial proceedings; (2) whether granting the motion would waste judicial resources; (3) whether the motion was made after entry of judgment; and (4) whether the movant can show good cause for delay.[452]

446. Travelers Ins. Co. v. Liljeberg Enters., Inc., 38 F.3d 1404, 1410 (5th Cir. 1994). *See also* Apple v. Jewish Hosp. & Med. Ctr., 829 F.2d 326, 333 (2d Cir. 1987). *Accord* United States v. Barrett, 111 F.3d 947, 951–52 (D.C. Cir. 1997) (citing cases); Pontarelli v. Stone, 978 F.2d 773, 775 (1st Cir. 1992); United States v. Barnes, 909 F.2d 1059, 1071 (7th Cir. 1990); *In re* National Union Fire Ins. Co., 839 F.2d 1226, 1232 (7th Cir. 1988).

447. *In re* IBM Corp., 45 F.3d 641, 643 (2d Cir. 1995). *See also* Polaroid Corp. v. Eastman Kodak Co., 867 F.2d 1415, 1418–21 (Fed. Cir. 1989). *But see* United States v. Tucker, 78 F.3d 1313, 1324 (8th Cir. 1996) *and* United States v. Microsoft Corp., 253 F.3d 34, 109 (D.C. Cir. 2001).

448. *See* Summers v. Singletary, 119 F.3d 917, 921 (11th Cir. 1997) ("The policy considerations supporting a timeliness requirement are the same in each section: to conserve judicial resources and prevent a litigant from waiting until an adverse decision has been handed down before moving to disqualify the judge."); *In re* Kansas Pub. Emps. Ret. Sys., 85 F.3d 1353, 1363 (8th Cir. 1996) ("While it is true that a § 455(b)(1) objection cannot be waived, it is still subject to the timeliness requirement of our cases.").

449. Nordbrock v. United States, 2 F. App'x 779, 779 (9th Cir. 2001) (unpublished opinion) (citing United States v. Rogers, 119 F.3d 1377, 1380 (9th Cir. 1997)).

450. United States v. Vadner, 160 F.3d 263, 264 (5th Cir. 1998). *Accord* Rabushka v. Crane Co., 122 F.3d 559, 566 (8th Cir. 1997), *cert. denied*, 523 U.S. 1040 (1998); United States v. Rogers, 119 F.3d 1377, 1382 (9th Cir. 1997); United States v. Barrett, 111 F.3d 947, 952 (D.C. Cir. 1997); United States v. Stenzel, 49 F.3d 658, 661 (10th Cir. 1995); United States v. Owens, 902 F.2d 1154, 1156 (4th Cir. 1990).

451. Preston v. United States, 923 F.2d 731, 733 (9th Cir. 1991).

452. Apple v. Jewish Hosp. & Med. Ctr., 829 F.2d 326, 334 (2d Cir. 1987). *See also* United States v. Amico, 486 F.3d 764 (2d Cir. 2007) (holding that motion for disqualification—raised two years after judge's impartiality was first questioned—made prior to entry of judgment and with demonstrated good cause for delay, not untimely).

At the same time, the Third Circuit has held that where a judge has knowledge of facts that lend themselves to an appearance of impropriety but fails to disclose this information, a party will not be charged with constructive or imputed knowledge of those facts when the court is determining whether the motion was made in a timely manner.[453] However, in a case in which a city board of education was charged with constructive knowledge of the facts it used as grounds for its disqualification motion, the district court held that by failing to file the motion in a timely manner "in the vain and remote hope that a jury would somehow rule in favor of the Board and against the Plaintiff," the board waived its right to raise the disqualification issue.[454]

The Second Circuit has said that untimeliness can "constitute the basis for finding an implied waiver. But the distinction is a critical one, because while waiver—whether express or implied—will preclude appellate [review], untimeliness need not do so."[455] Assuming the defendant's failure to move for disqualification until after the trial judge had ruled against her was a forfeiture and not an implied waiver, the Second Circuit could review the claim only for plain error, and it held that the judge's decision not to disqualify himself sua sponte was not plain error.

### 4. Evaluation of motion by merits judge

In a statutory scheme so committed to the appearance of impartial justice that it requires disqualification whenever a judge's impartiality "might reasonably be questioned," numerous commentators have found it problematic that the task of deciding whether a judge is (or appears to be) too biased or conflicted to decide a matter fairly is left to the judge who is allegedly too biased or conflicted to decide the matter fairly.[456] But given the presumption of impartiality to which a judge is

453. *In re* Kensington Int'l, Ltd., 368 F.3d 289 (3d Cir. 2004).

454. Drake v. Birmingham Bd. of Educ., 476 F. Supp. 2d 1341, 1349 (N.D. Ala. 2007).

455. United States v. Bayless, 201 F.3d 116, 127 (2d Cir. 2000).

456. *See, e.g.*, Russell Wheeler & Malia Reddick, *Judicial Recusal Procedures* p. 5 (June 2017), http://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf ("Allowing the judge who is the subject of the recusal motion to make a dispositive decision denying that motion flies in the face of the oft-invoked, age-old proposition that no person should be a judge in his own case."); Matthew Menendez & Dorothy Samuels, *Judicial Recusal Reform: Toward Independent Consideration of Disqualification* p. 1 (2016), https://www.brennancenter.org/sites/default/files/publications/Judicial_Recusal_Reform.pdf ("challenged judges themselves determine whether there are adequate grounds to question their own impartiality—a task for which, research and common-sense suggest, they are wholly unsuited"); Charles G. Geyh, *Why Judicial Disqualification Matters. Again.*, 30 Rev. Litig. 671, 710 (2011) ("The majority rule in the state and federal courts continues to be that the presumption of impartiality judges enjoy justifies them deciding their own disqualification

entitled, and the inefficiency of calling on a second judge to resolve a preliminary motion, the practice in most federal courts has been for disqualification motions to be decided by the judge whose disqualification is sought.

The First Circuit observed that "[a]lthough a trial judge faced with a section 455(a) [disqualification] motion may, in her discretion, leave the motion to a different judge, no reported case or accepted principle of law compels her to do so."[457] The weight of authority indicates that it is proper, indeed the norm, for the challenged judge to rule on a disqualification motion pursuant to § 455.[458] Because § 455 contains no provision about the transfer of disqualification motions to another judge, a district judge in the Southern District of Illinois ruled that the motion to disqualify "*must* be decided by the judge whose disqualification is sought."[459]

## 5. Postdisqualification procedure

Postdisqualification procedure involves two distinct issues: a) what further actions a judge may take in relation to the pending case after disqualification, and (b) what happens to rulings issued by the judge before disqualification.

### a. Postdisqualification actions

The Supreme Court has opined that after disqualification, the judge generally "simply steps aside and allows the normal administrative processes of the court to assign the case to another judge."[460] Most courts of appeals have held that after disqualification, a judge must take no nonministerial actions with respect to the case. The Third, Fourth, and Fifth Circuits concur with the First and Ninth Circuits that judges can take no nonministerial actions after announcing their

motions, while survey data shows that the vast majority of the public thinks that disqualification requests should be assigned to a different judge. In short, the prospects for an appearances-based disqualification regime to promote public confidence in the courts are undercut by recurrent divergence of public and judicial views over when a judge's impartiality appears doubtful."); Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. Kan L. Rev. 531, 571 (2005) ("The Catch-22 of the law of judicial disqualification is that the very judge being challenged for bias or interest is almost always the one who, at least in the first instance, decides whether she is too conflicted to sit on the case.").

457. *In re* United States, 158 F.3d 26, 34 (1st Cir. 1998) (citations omitted). *Accord* United States v. Heldt, 668 F.2d 1238, 1271 (D.C. Cir. 1981).

458. *See, e.g.*, Schurz Commc'ns, Inc. v. FCC, 982 F.2d 1057, 1059 (7th Cir. 1992) (opinion of Posner, J., in chambers); United States v. Balistrieri, 779 F.2d 1191, 1202–03 (7th Cir. 1985).

459. Cohee v. McDade, 472 F. Supp. 2d 1082, 1084 (S.D. Ill. 2006) (emphasis added).

460. United States v. Will, 449 U.S. 200, 212 (1980).

intention to disqualify.[461] Ministerial actions are limited to performing duties incidental to transferring a case to a new judge.[462]

A few litigants have objected to a disqualified judge transferring the case to another judge as an improper, nonministerial act. This claim has generally been rejected.[463] In *McCuin v. Texas Power & Light Co.*,[464] however, the Fifth Circuit concluded that permitting a disqualified judge to reassign the case "would violate the congressional command that the disqualified judge be removed from all participation in the case" and might also "create suspicion that the disqualified judge will select a successor whose views are consonant with his."[465]

One lingering issue concerns whether judges may, after disqualifying themselves, reconsider or amend their rulings to disqualify. Although entertaining a motion to reconsider a disqualification order is clearly more than a ministerial task, there is a conflict among the circuit courts as to whether judges who disqualify themselves may thereafter reconsider.

At least three circuits—the First, Ninth, and Fifth—have disallowed postdisqualification actions of this sort. In *El Fenix de Puerto Rico v. The M/Y Johanny*,[466] on motion from one party, the trial judge disqualified himself under § 455(a). When the other party moved for reconsideration, however, the judge listened to arguments and entered a reconsideration order vacating the disqualification order. The First Circuit found this action improper: "[A] trial judge who has recused

461. *See* Moody v. Simmons, 858 F.2d 137, 143–44 (3d Cir. 1988) (after disqualification, judge is limited to "the 'housekeeping' duties necessary to transfer a case to another judge"); Arnold v. Eastern Air Lines, Inc., 712 F.2d 899, 904 (4th Cir. 1983) ("a judge who is disqualified from acting must not be able to affect the determination of any cause from which he is barred"); Doddy v. Oxy USA, Inc., 101 F.3d 448, 457 (5th Cir. 1996) (district judge erred in vacating her disqualification order after disqualifying herself); El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136, 141 (1st Cir. 1994) ("As a general rule, a trial judge who has recused himself 'should take no other action in the case except the necessary ministerial acts to have the case transferred to another judge.'") (quoting 13A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3550 (2d ed. 1984)); Stringer v. United States, 233 F.2d 947, 948 (9th Cir. 1956) (judge's nonministerial involvement in case after disqualifying himself for cause was an "incurable error").

462. *Moody*, 858 F.2d at 143–44.

463. *See* United States v. Moody, 977 F.2d 1420, 1424 (11th Cir. 1992) (this judicial assignment "was a purely ministerial act, without any implications concerning the merits of the case"); *In re* Aetna Cas. & Sur. Co., 919 F.2d 1136, 1145 (6th Cir. 1990) ("even a judge who has recused himself ought to be permitted to perform the duties necessary to transfer the case to another judge"); *In re* Cement Antitrust Litig., 673 F.2d 1020, 1024–25 (9th Cir. 1982) (refusing to construe "proceeding" to include "ministerial duties" like "assigning a case to another judge").

464. 714 F.2d 1255 (5th Cir. 1983).

465. *Id.* at 1261.

466. 36 F.3d 136 (1st Cir. 1994).

himself 'should take no other action in the case except the necessary ministerial acts to have the case transferred to another judge.'"[467]

In *United States v. Feldman*,[468] the Ninth Circuit used similar reasoning when it reversed a district court order of partial disqualification. While the defendant's appeal was pending, a corporate merger made the judge a stockholder in an institution to which the defendant had been ordered to pay restitution. On remand, the trial judge disqualified himself from presiding over restitution-related issues, but not others. In reversing,[469] the Ninth Circuit noted that § 455(d)(1) disqualified the judge from a "proceeding," and defined "proceeding" to include "pretrial, trial, appellate review, or other stages of litigation." Thus, "when a judge determines that recusal is appropriate, it is not within his discretion to recuse by subject matter or only as to certain issues and not others. Rather, recusal must be from a whole proceeding, an entire 'stage of litigation.'"[470]

In *United States v. O'Keefe*,[471] the judge granted a party's motion for a new trial, then disqualified himself from further involvement. After the case was transferred to a new judge, the government moved for reconsideration of the order granting a new trial. The new judge transferred the case back to the original judge to rule on the motion for reconsideration, which the judge did. The Fifth Circuit ruled that this was improper, rejecting the contention "that an exception from the bright-line rule for recusals . . . should be created for motions for reconsideration because a [new] judge cannot reconsider what that judge has not considered previously."[472] New judges often must act on motions for reconsideration first heard by other judges who later died or became ill.[473] The Fifth Circuit acknowledged that its "ruling today may put one district court judge in the somewhat uncomfortable position of having to pass judgment on the discretionary rulings of another judge" but found this circumstance was outweighed by "the values underlying 28 U.S.C. § 455," which require that judges who have disqualified themselves take no further action.[474]

467. *Id.* at 141 (quoting 13A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3550 (2d ed. 1984)).

468. 983 F.2d 144 (9th Cir. 1992).

469. *Id.* at 145. *Accord* Stringer v. United States, 233 F.2d 947, 948 (9th Cir. 1956) ("once having disqualified himself for cause . . . it was incurable error for the district judge to resume full control and try the case").

470. *Feldman*, 983 F.2d at 145.

471. 128 F.3d 885 (5th Cir. 1997), *cert. denied*, 523 U.S. 1078 (1998).

472. *Id.* at 891.

473. *Id.*

474. *Id.* at 891–92 n.6.

The Second Circuit, in contrast, has authorized district judges to reconsider their decisions to disqualify, at least when disqualification was unnecessary and the case had yet to be transferred. In *Pashaian v. Eccelston Properties, Ltd.*,[475] the trial judge concluded that disqualification was not legally required but disqualified himself as a matter of prudence to avoid any possibility of reversal after prolonged proceedings. He chose, however, to make disqualification effective only after he ruled on a pending motion for preliminary injunction. On appeal, the Second Circuit found that disqualification was indeed unnecessary and rejected the contention that, "once he decided to recuse himself as a matter of discretion, such recusal had to be total and immediate."[476] The Second Circuit explained that it was "loath to articulate a rule that would frustrate or obviate the careful exercise of judicial discretion by district judges in responding to disqualification motions in unusual circumstances."[477]

In *United States v. Lauersen*,[478] the district judge owned an insubstantial amount of stock in a corporation that may have had a negligible restitution claim against the criminal defendant. The judge disqualified himself but later reversed his ruling. The Second Circuit agreed that disqualification was unnecessary and concluded that, "[t]here is no reason to prohibit a judge from reconsidering a recusal decision, at least in the absence of transfer of the case to another judge."[479] The Second Circuit justified its conclusion by pointing to the example of a judge who disqualifies himself because his wife owns stock in one of the parties, only to learn later that day that his wife had sold that stock months before. "No one," the court said, "could seriously maintain that the judge could not reconsider and revise his initial decision to recuse."[480] The court cited, without discussing, precedent in other circuits that placed greater weight on the judge's duty to take no further action following disqualification and that forbade judges from engaging in postdisqualification activity of this sort.

### b. Predisqualification orders

A difficult question arises with respect to orders that a disqualified judge issued prior to disqualification and whether such orders must be vacated. In cases where the grounds for disqualification do not come to light (and hence, disqualification is not sought or secured) until after judgment is entered, seeking relief from judgment is

475. 88 F.3d 77 (2d Cir. 1996).

476. *Id.* at 84.

477. *Id.* at 84–85.

478. 348 F.3d 329 (2d Cir. 2003).

479. *Id*. at 338.

480. *Id*.

governed by Federal Rule of Civil Procedure Rule 60(b). In cases where the judge is disqualified under § 455(a), on the grounds that the judge's "impartiality might reasonably be questioned," the operative analysis is Rule 60(b)(6), which entitles petitioners to relief from judgment "for any other reason that justifies relief."

In *Liljeberg v. Health Services Acquisition Corp.*,[481] the Supreme Court observed that Rule 60(b)(6) authorized judges to "vacate judgments whenever such action is appropriate to accomplish justice"[482] but cautioned that it was reserved for "extraordinary circumstances"[483] and that "[a]s in other areas of the law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance."[484] "[I]n determining whether a judgment should be vacated for a violation of § 455(a)," the Court introduced a three-factor analysis: "it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.[485]

In *Liljeberg*, the district judge served on a university board of trustees and attended board meetings where the university's interest in acquiring a hospital from Liljeberg, was discussed. Liljeberg, the petitioner, was a pharmacist, promoter, and half-owner of a real estate brokerage firm. The meetings occurred amid litigation over which the district judge presided, where Liljeberg's ownership rights to the hospital (and hence his right to sell the hospital to the university) were at issue—an issue the district judge resolved in Liljeberg's favor. Of the three factors the Court identified, it focused here on the third: the adverse impact on public confidence in the judiciary. If the district court's order were allowed to stand, it would create an understandable public perception that the judge was aware of the university's interest in the proceeding and was acting on the university's behalf. Accordingly, the Supreme Court vacated the judgment.

The courts of appeals have applied *Liljeberg* to reach different conclusions in different cases. In *United States v. Amico*,[486] the Second Circuit ruled that the district judge's previous business dealings with a key witness, coupled with his imprudent reactions to recusal, created an appearance of partiality that rendered vacatur advisable to discourage similar behavior in future cases and to preserve

481. 486 U.S. 847 (1988).

482. *Id.* at 864 (quoting Klapprott v. United States, 355 U.S. 601, 614–15 (1994)).

483. *Id.* (quoting Ackermann v. United States, 340 U.S. 193, 200 (1950)).

484. *Id.* at 862.

485. *Id.* at 864.

486. 486 F.3d 764 (2d Cir. 2007).

public perception.[487] Conversely, in *In re Continental Airlines Corp.*,[488] the Fifth Circuit concluded that disqualification—but not vacatur—was warranted when the district judge accepted an offer of employment the day after awarding $700,000 in legal fees to his future employer. It reasoned that disqualification, coupled with de novo review of the district judge's order, was sufficient to ensure fairness, discourage such judicial conduct in future cases, and protect public perception.[489]

*Liljeberg* arose in the context of a case seeking relief from judgment under Rule 60(b)(6) for orders issued by judges who were later disqualified from the proceeding under § 455(a). The courts of appeals have applied the same Rule 60(b)(6) analysis to litigants seeking relief from judgment ordered by district judges disqualified under § 455(b). In some cases, they have ordered vacatur.[490] In other cases, they have deemed vacatur unnecessary.[491]

Applying Rule 60(b)(6) and the *Liljeberg* factors when reviewing orders issued by judges subject to disqualification under § 455(b), however, warrants a caveat. As the Supreme Court explained in *Liljeberg*, judgments entered by judges whose impartiality might reasonably be questioned under § 455(a) are not automatically void but are voidable under Rule 60(b)(6) if the Court's three-part analysis

487. *See also* El Fenix de Puerto Rico v. The M/Y Johanny, 954 F. Supp. 23 (D.P.R. 1996) (ordering vacatur of order issued by judge after he invited friend with knowledge of subject to watch proceedings and give advice; concluding that vacatur was necessary to avoid risk of injustice to losing party, and to preserve public perception of fair trial).

488. 901 F.2d 1259 (5th Cir. 1990).

489. *Id.* at 1263. *See also* United States v. Van Griffin, 874 F.2d 634 (9th Cir. 1989) (magistrate judge's review of ex parte police report required disqualification under § 455(a); vacatur unnecessary because report duplicated other testimony, so improper ex parte communication posed no risk of injustice to parties and minimal risk to public perception; ordering disqualification ensured more prudent judicial conduct in future cases).

490. *See* Shell Oil Co. v. United States, 672 F.3d 1283 (Fed. Cir. 2012) (vacating judgment given district judge's failure to disqualify under § 455(b)(4), citing risk of prejudice in ongoing related cases and impact of judge's nondisqualification on the judiciary's reputation); Preston v. United States, 923 F.2d 731 (9th Cir. 1991) (vacating judgment because of district judge's failure to disqualify under 28 U.S.C. §§ 455(a) and (b)(2) and the consequent damage to public's perception of the judiciary).

491. *See* United States v. Robinson, 439 F.3d 777 (8th Cir. 2006) (declining to vacate for violation of § 455(b)(5)(iv) because evidence in question would have been introduced by other means); Patterson v. Mobil Oil Corp., 335 F.3d 476 (5th Cir. 2003) (declining to vacate summary judgment for nondisqualification under §§ 455(a) and (b)(2), reasoning that de novo review ensured fairness to appellant, that ordering disqualification will have sufficient salutary effect on future related litigation, and that enough time had passed to protect public perception without vacatur); Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994) (declining to vacate for nondisqualification under §§ 455(a) & 455(b)(5)(i) because doing so would result in adjudicatory delay for plaintiffs, there was no risk to other proceedings given the unique procedural posture, and disqualification alone was sufficient on its own to protect public perception).

warrants vacatur. If, however, a judgment is "void," it is subject to vacatur under Rule 60(b)(4) at any time, without recourse to the balancing of justice-related equities called for by Rule 60(b)(6) or *Liljeberg*. In *New York Life Insurance Co. v. Brown*,[492] the Fifth Circuit quoted a widely cited treatise on federal practice and procedure for the proposition that "[a] judgment is not void merely because it is erroneous."[493] "A judgment "'is void only if the court that rendered it lacked jurisdiction . . . or if it acted in a manner inconsistent with due process of law.'"[494]

The Supreme Court has held that nondisqualification gives rise to due process problems when the judge has "a direct, personal, substantial, pecuniary interest" in a case[495] and when the judge exhibits a "probability of bias."[496] As to the standard for "probability of bias," the Supreme Court has referred to "judicial reforms" (reflected in § 455(a) and in state codes of conduct) that aim "to eliminate even the appearance of partiality,"[497] which the Court characterized as "more rigorous" than due process required. That is because appearance-based standards—such as when a judge's impartiality "might reasonably be questioned"—can be met when a reasonable person might doubt the judge's impartiality, even if the likelihood of actual bias falls short of "probable." "Because the codes of judicial conduct provide more protection than due process requires," the Court concluded, "most disputes over disqualification will be resolved"[498] without recourse to the due process threshold. In other words, simple failure to disqualify under § 455(a), when the judge's impartiality might reasonably be questioned, does not give rise to a due process problem. Hence, orders issued under these circumstances are at most voidable, and the operative rule governing relief from judgment in such cases is Rule 60(b)(6), as interpreted by *Liljeberg*.

In some cases, however, nondisqualification under § 455(b), may need to be analyzed separately. If orders issued by judges subject to disqualification under § 455(b) violate due process, then the resulting judgments are arguably void and

492. 84 F.3d 137 (5th Cir. 1996).

493. *Id.* at 143 (quoting 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2862 (1973 ed.)).

494. *Id.* (quoting Williams v. New Orleans Pub. Serv., Inc., 728 F.2d 730, 735 (5th Cir. 1984) (quoting 11 Charles Alan Wright, Arthur Miller & Mary Kay Kane, Federal Practice and Procedure § 2862 (1973 ed.))). This analysis is, of necessity, speculative as it applies to disqualification, insofar as the federal courts have not been called on to address whether orders of judgment entered by judges whose failure to disqualify is so egregious as to violate due process, are void, and thus subject to relief under Rule 60(b)(4).

495. Tumey v. Ohio, 273 U.S. 510, 523 (1927).

496. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 884 (2009).

497. *Id.* at 888.

498. *Id.* at 890.

as such are eligible for relief under Rule 60(b)(4). The Supreme Court's rulings to date indicate that nondisqualification can violate due process in at least three circumstances regulated by § 455(b). First, judgments entered by judges subject to disqualification for actual bias under § 455(b)(1) may be categorically void, insofar as the "probability of bias" threshold for due process violations logically includes within its scope all cases of actual bias. Second, the Supreme Court has ruled that a state judge who presided over a case in which he had participated actively as a public official before being appointed to the bench (conduct that subjects federal judges to disqualification under § 455(b)(3)) created a probability of bias that violated due process.[499] Third, orders issued by judges subject to disqualification under § 455(b)(4) (or the state-rule corollary) for having a financial interest in a proceeding violate due process if that financial interest rises to the level of "direct, personal, substantial, [and] pecuniary."[500]

The foregoing analysis is necessarily speculative because cases in which the Supreme Court has held that nondisqualification violates due process have been limited to state judges whose nondisqualification violated the Due Process Clause of the Fourteenth Amendment. The federal courts have little occasion to address whether the nondisqualification of a federal judge violates the Due Process Clause of the Fifth Amendment because the federal disqualification statute imposes disqualification standards more rigorous than due process requires. If failure to disqualify violates the statute, disqualification will be ordered without need for recourse to due process analysis. Conversely, if failure to disqualify does not violate the statute, nondisqualification is sure to satisfy less exacting due process scrutiny. Whether nondisqualification of a federal judge violates the due process clause of the Fifth Amendment becomes relevant only when seeking relief from judgment, where judgments rendered in violation of due process are arguably void and hence eligible for relief under Rule 60(b)(4). And cases addressing this issue are in short supply.

So far, our discussion has focused on vacatur in the context of cases in which a party seeks postjudgment relief under Rule 60(b). Courts of appeals, however, have also applied *Liljeberg*'s multifactor analysis to cases in which parties seek relief from orders issued by judges who are disqualified *before* judgment is entered—often in the context of mandamus proceedings.

In *In re Khalid Shaikh Mohammad*,[501] for example, the D.C. Circuit ordered disqualification in light of the judge's comments on the defendant's guilt before being appointed as a judge, and vacated an order of the three-judge panel on

499. Williams v. Pennsylvania, 136 S. Ct. 1899, 1903 (2016).

500. *Tumey*, 273 U.S. at 523.

501. 866 F.3d 473 (D.C. Cir. 2017).

which the judge sat.[502] Similarly, in *In re Aetna Casualty & Surety Co.*,[503] the Sixth Circuit ordered disqualification under §§ 455(b)(4) and (b)(5)(ii) and vacated predisqualification orders. The district judge's daughter had conducted depositions in the matter prior to the judge being assigned the case, leading the circuit court to conclude that vacatur was necessary to avoid a risk of injustice to parties and damage to public perception of the courts.[504] In *In re School Asbestos Litigation*,[505] on the other hand, the Third Circuit declined to vacate orders that the district judge issued before being disqualified under §§ 455(a) and (b)(1) for disbursing litigation funds to sponsor a conference that the judge attended. In defense of its decision not to vacate predisqualification orders, the Third Circuit panel cited the high costs of duplicative proceedings and the low risk of harm to public perception given the court's disqualification order.[506]

502. *Id.* Recusal was required pursuant to Rule 902 of the Rules for Military Commissions which was modeled on § 455. Like § 455(b), Rule 902(b) is a strict provision specifying mandatory disqualification under its enumerated circumstances, one of which is where a military judge has "expressed an opinion concerning the guilt or innocence of the accused." R.M.C. 902(b)(3).

503. 919 F.2d 1136 (6th Cir. 1990).

504. *Id.* at 1146.

505. 977 F.2d 764 (3d Cir. 1992).

506. *Id.* at 787–88.

# III Disqualification Under 28 U.S.C. § 144

## A. Overview

Section 144 of Title 28 states in its entirety:

> 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.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.[507]

By its terms, § 144 applies only to district judges, as compared to § 455, which applies to any "justice, judge, or magistrate judge of the United States." A literal reading of § 144 suggests that a party can force disqualification automatically, simply by filing an affidavit alleging that the judge is biased against the affiant or in favor of the affiant's opponent. That interpretation would render § 144 akin to peremptory disqualification procedures adopted by judicial systems in a number of western states—and the legislative history of § 144 lends some support for this interpretation.[508]

The federal courts have indeed held that under § 144 a judge must step aside upon the filing of a facially sufficient affidavit, but they have been exacting in

507. 28 U.S.C. § 144. Originally enacted as § 21 of the Judicial Code of 1911, the statute was recodified as § 144 in 1948 without significant change.

508. 46 Cong. Rec. 2627 (1911) (remarks of Representative Cullop).

their interpretations of what a facially sufficient affidavit requires and of the procedural prerequisites to application of the statute. Thus, motions have been dismissed because of untimeliness, because the movant failed to submit an affidavit or submitted more than one affidavit, because the attorney rather than a party submitted the affidavit, because the movant's affidavit was unaccompanied by a certificate of counsel or failed to make allegations with particularity, and because the certificate of counsel certified only to the affiant's—not counsel's—good faith.[509]

As a consequence, § 144 has been rendered a much more cumbersome tool to obtain disqualification than § 455, even though the latter calls on judges to evaluate the merits of a movant's allegations and not simply the facial sufficiency of those allegations. Despite criticism of the federal courts for what is seen as a "stingy" construction of § 144, it bears note that none of Congress's bills to override federal court interpretation of § 144 have passed.[510]

Another reason why § 144 has fallen into relative disuse is that it requires the more difficult showing of actual bias, whereas § 455(a) requires a mere appearance of bias. Section 455 thus subsumes § 144. As the Supreme Court has observed of § 144, it "seems to be properly invocable only when § 455(a) can be invoked anyway."[511] Moreover, many of the circumstances that might qualify as actual bias under § 144 are specifically enumerated in § 455(b), which explicitly addresses various conflicts of interest, in addition to actual bias.[512] In short, while parties still file motions under § 144, they usually do so in tandem with § 455, with the latter section typically monopolizing the court's attention.

509. *See, e.g.*, United States v. Perkins, 787 F.3d 1329, 1343 (11th Cir. 2015) (denying defendant's pro se motion for recusal since it was not accompanied by good-faith certificate from his appointed counsel of record); United States v. Barnes, 909 F.2d 1059, 1072 (7th Cir. 1990) (counsel did not present certificate of good faith, "another requirement of section 144 with which Barnes failed to comply"); *In re* Cooper & Lynn, 821 F.2d 833, 838 (1st Cir. 1987) ("[N]o party filed an affidavit. . . . Rather the affidavit was filed by an attorney."); United States v. Merkt, 794 F.2d 950, 961 (5th Cir. 1986) ("Elder's affidavit violates the one-affidavit rule . . . and need not be considered."); United States v. Balistrieri, 779 F.2d 1191, 1200 (7th Cir. 1985) ("Because of the statutory limitation that a party may file only one affidavit in a case, we need consider only the affidavit filed with Balistrieri's first motion."); Roberts v. Bailar, 625 F.2d 125, 128 (6th Cir. 1980) (motion rejected because counsel, not plaintiff, signed and filed affidavit); United States ex rel. Wilson v. Coughlin, 472 F.2d 100, 104 (7th Cir. 1973) (same); Morrison v. United States, 432 F.2d 1227, 1229 (5th Cir. 1970) (motion rejected because there was no certificate of good faith by counsel); United States v. Hoffa, 382 F.2d 856, 860 (6th Cir. 1967) (same).

510. For a discussion of failed amendments, see Peter A. Galbraith, Comment, *Disqualifying Federal District Judges Without Cause*, 50 Wash. L. Rev. 109 (1974).

511. Liteky v. United States, 510 U.S. 540, 548 (1994).

512. *See id.* ("section 455 is the more modern and complete recusal statute").

## B. Grounds for disqualification

### 1. Bias or prejudice

As noted in the overview, under § 144, disqualification is triggered by an affidavit that alleges "the judge before whom the matter is pending has a personal bias or prejudice either against [the affiant] or in favor of any adverse party." Many courts of appeals have explained that "[t]o warrant recusal under § 144, the moving party must allege facts that would convince a reasonable person that bias actually exists."[513] In *Liteky v. United States*,[514] the Supreme Court noted that the standard for bias or prejudice under § 144 is identical to disqualification for bias and prejudice under § 455(b)(1).[515] In so stating, it distinguished § 455(a), which requires allegations of bias "to be evaluated on an *objective* basis, so that what matters is not the reality of bias or prejudice but its appearance."[516] The Ninth Circuit, however, has imported § 455(a)'s objective standard into its § 144 analysis (before and after *Liteky*), declaring that "[u]nder both recusal statutes, the substantive standard is '[W]hether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.'"[517]

### 2. "Extrajudicial source" doctrine revisited

The "extrajudicial source" doctrine (discussed in section II, in connection with § 455) likewise applies to § 144. Indeed, the doctrine was initially developed under § 144. Thus, ordinarily, disqualifying bias will have an extrajudicial origin—judges often acquire an unfavorable opinion of a party in light of what they learn in the course of judicial proceedings, but that will rarely warrant disqualification. It bears reemphasis, however, that in *Liteky* the Supreme Court took pains to emphasize that "there is not much doctrine to the doctrine"[518] and that *sometimes* a judge *is* subject to disqualification under §§ 144 and 455 for bias manifested in

513. Christo v. Padgett, 223 F.3d 1324, 1333 (11th Cir. 2000) (citing Phillips v. Joint Legislative Comm. on Performance & Expenditure Review, 637 F.2d 1014, 1019 n.6 (5th Cir. 1981)). *See also* United States v. Farkas, 669 F. App'x 122, 123 (4th Cir. 2016); *In re* Yunik, 425 F. App'x 112, 113 (3d Cir. 2011); Scott v. Metropolitan Health Corp., 234 F. App'x 341, 352 (6th Cir. 2007); West v. Litscher, 209 F. App'x 557, 559 (7th Cir. 2006).

514. 510 U.S. 540 (1994).

515. *Id.* at 548 ("paragraph (b)(1) entirely duplicated the grounds of recusal set forth in § 144").

516. *Id.*

517. Pesnell v. Arsenault, 543 F.3d 1038, 1043 (9th Cir. 2008) (citing United States v. Hernandez, 109 F.3d 1450, 1453 (9th Cir. 1997)).

518. *Liteky*, 510 U.S. at 554.

judicial proceedings if the "opinions formed . . . display a deep-seated favoritism or antagonism that would make fair judgment impossible."[519]

To illustrate the disqualifying bias that can manifest itself in judicial proceedings, the *Liteky* Court pointed to an alleged comment of the district judge in the 1921 case of *Berger v. United States*:[520] "'One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans' because their 'hearts are reeking with disloyalty.'"[521]

*Liteky* rejected an additional argument in support of a rigid extrajudicial source rule under § 144. Section 144 requires disqualification for "personal bias or prejudice." Limiting § 144 to "personal" bias arguably justifies the exclusion of official or "judicial" bias from its scope and so confines its application to allegations of extrajudicial or personal bias. In *Liteky*, the Supreme Court acknowledged that "a number of Courts of Appeals have relied upon the word 'personal' in restricting § 144 to extrajudicial sources" but concluded that "that mistakes the basis for the 'extrajudicial source' doctrine."[522] As Justice Scalia explained for the Court, "[b]ias and prejudice seem to us not divided into the 'personal' kind, which is offensive, and the official kind, which is perfectly all right."[523] To the contrary, bias and prejudice "are *never* appropriate."[524] Moreover, the Court added, "interpreting the term 'personal' to create a complete dichotomy between court-acquired and extrinsically acquired bias produces results so intolerable as to be absurd."[525] The Court illustrated disqualifying official bias with the example of "a lengthy trial in which the presiding judge for the first time learns of an obscure religious sect and acquires a passionate hatred for all its adherents."[526]

Some federal courts have since adopted *Liteky*'s more nuanced approach to § 144 and analyze allegations of in-court bias to see if they meet the "high degree of favoritism or antagonism" standard.[527] Others, however, continue to use the pre-*Liteky* analysis by rejecting § 144 motions if the accompanying affidavit does

519. *Id.* at 555.

520. 255 U.S. 22 (1921).

521. *Id.* at 28 (*quoted in Liteky*, 510 U.S. at 555).

522. *Liteky*, 510 U.S. at 548–49.

523. *Id.* at 549.

524. *Id.*

525. *Id.* at 550.

526. *Id.*

527. *See, e.g.*, Pesnell v. Arsenault, 543 F.3d 1038, 1044 (9th Cir. 2008) (quoting *Liteky* at length, noting allegations of bias were based on conduct in judicial proceedings, and upholding district court's assessment that "Pesnell failed to 'demonstrate any such "deep-seated favoritism that would make fair judgment impossible"'"); United States v. Jones, 294 F. App'x 624 (2d Cir. 2008) (citing *Liteky,* and concluding that judge's comment that defendant was "a violent person who does not deserve to be

not allege an "extrajudicial source" for the judge's purported bias or fails to show that the bias was "personal," as opposed to "judicial."[528]

### 3. Bias toward counsel

Of the cases dealing primarily with § 144, a sizable percentage involve a judge's alleged antipathy toward counsel. On its terms, § 144 requires bias against the party. Accordingly, a judge's hostility toward counsel is generally an insufficient ground for disqualification.[529] Yet courts have held that "under specific circumstances bias against an attorney can reasonably be imputed to a party."[530] As the Seventh Circuit explained, "the party seeking recusal on that theory must allege facts suggesting that the alleged bias against counsel might extend to the party."[531] The allegations to that effect cannot be "merely conclusory."[532]

Conversely, the Seventh Circuit rejected the contention that a lawyer's praise of the judge required disqualification. In *Sullivan v. Conway*,[533] the lawyer had written a letter to his client maintaining that, as a result of removal of the case to federal court, "we have a much better judge."[534] By mistake, the letter ended

a free person" did not rise to the level of deep-seated antagonism); LoCascio v. United States, 473 F.3d 493, 495 (2d Cir. 2007) (trial judge's decision to hold federal criminal defendant in contempt, which was subsequently vacated, and judge's denial of defendant's various motions during and after trial did not rise to the level of deep-seated antagonism, citing *Liteky*); Christo v. Padgett, 223 F.3d 1324, 1333–34 (11th Cir. 2000) (quoting *Liteky* and concluding that affiant's allegations did not show extrajudicial source of bias or reflect improper hostility or partiality).

528. *See, e.g.*, United States v. Miller, 355 F. Supp. 2d 404, 406 (D.D.C. 2005) ("Defendant's allegations concern judicial, non-personal matters and cannot properly be the basis of a motion for disqualification."); Young v. Track, Inc., 324 F.3d 409, 422–23 (6th Cir. 2003) (relying on pre-*Liteky* cases for the propositions that the "alleged bias 'must stem from an extrajudicial source'" and that "extrajudicial conduct encompasses only 'personal bias as distinguished from a judicial one,'" and concluding that "recusal is also unwarranted because Plaintiffs do not allege bias from extrajudicial sources").

529. *See, e.g.*, United States v. Sykes, 7 F.3d 1331, 1339 (7th Cir. 1993); Rhodes v. McDannel, 945 F.2d 117, 120 (6th Cir. 1991); Souder v. Owens-Corning Fiberglas Corp., 939 F.2d 647, 653 (8th Cir. 1991); *In re* Cooper & Lynn, 821 F.2d 833, 838 (1st Cir. 1987).

530. *Souder*, 939 F.2d at 653. *Accord Sykes*, 7 F.3d at 1339. *See also* United States v. Jacobs, 855 F.2d 652, 656 n.2 (9th Cir. 1988); *In re* Beard, 811 F.2d 818, 830 (4th Cir. 1987); United States v. Ritter, 540 F.2d 459, 462 (10th Cir. 1976); Davis v. Board of Sch. Comm'rs, 517 F.2d 1044, 1050–51 (5th Cir. 1975). *And see* Henderson v. Department of Pub. Safety & Corrs., 901 F.2d 1288, 1296 (5th Cir. 1990) ("Bias for or against an attorney, who is not a party, is not enough to require disqualification unless it can also be shown that such a controversy would demonstrate a bias for or against the party itself.").

531. *Sykes*, 7 F.3d at 1339.

532. *Id.* at 1340. *Accord Souder*, 939 F.2d at 653 n.6.

533. 157 F.3d 1092 (7th Cir. 1998).

534. *Id.* at 1095.

up in the hands of opposing counsel, who showed it to the judge and petitioned for disqualification. The Seventh Circuit rejected the contention that the affidavit evinced alleged bias sufficient to require referral of the matter to another judge:

> We can imagine, though only with great difficulty, a case in which public praise of a judge by a lawyer was so fulsome as to call into question the judge's psychological fortitude to rule against his encomiast. But here there was no public praise . . . and the praise would not have come to [the judge's] attention, and so would never have threatened to turn his head, had not the lawyer wishing to disqualify him brought it to his attention.[535]

## C. Disqualification procedure

Section 144 is triggered *only* by the submission of an affidavit and motion for disqualification (unlike § 455(a), which can be brought by motion but also requires judges to disqualify sua sponte where appropriate). Absent an affidavit and motion, there is no basis for disqualification under § 144, and no appeal based on § 144 will be heard.[536] Apart from meeting the substantive standard, § 144 sets forth several procedural requirements, and courts demand "strict compliance."[537]

### 1. Timeliness

Section 144 raises issues of timing twice—in the first paragraph, when it calls for the filing of a "timely" affidavit, and again in the second paragraph, when it states that a motion for disqualification "shall be filed not less than ten days before the beginning of the term [session] at which the proceeding is to be heard." With the abolition of terms of court in 1963, this latter provision no longer applies directly. Some federal courts have nonetheless required that the affidavit be filed within ten days of the beginning of the proceeding.[538] Other courts have determined timeliness on the basis of whether the affidavit was filed as soon as practicable[539] or promptly "after the facts forming the basis of the disqualification became

535. *Id.* at 1096.

536. *See, e.g.*, United States v. Sammons, 918 F.2d 592, 598 (6th Cir. 1999).

537. *In re* Martinez-Catala, 129 F.3d 213, 218 (1st Cir. 1997); *In re* Medlock, 406 F.3d 1066, 1073 (8th Cir. 2005).

538. *See, e.g.*, Bumpus v. Uniroyal Tire Co. Div. of Uniroyal, Inc., 385 F. Supp. 711 (E.D. Pa. 1974); United States v. Iddeen, 854 F.2d 52 (5th Cir. 1988); Wilson v. City of Chicago, 710 F. Supp. 1168 (N.D. Ill. 1989).

539. Danielson v. Winnfield Funeral Home of Jefferson, Inc., 634 F. Supp. 1110 (E.D. La. 1986).

known."[540] Either way, numerous cases have involved rejection of § 144 motions because of untimely affidavits.[541]

## 2. Facially sufficient affidavit

Section 144 conditions disqualification on the moving party filing a sufficient affidavit. If no affidavit is filed, disqualification will be denied. In the landmark case *Berger v. United States*,[542] the Supreme Court interpreted the statutory predecessor to § 144 to require that the challenged judge accept all facts alleged in the affidavit as true and not pass on the truth of the alleged facts. Rather, the judge's role was limited to evaluating the facial sufficiency of the affidavit for the purpose of determining whether a reasonable person could find "fair support" for the charge that the judge was biased against the movant or in favor of another party.[543] Many circuits have since reiterated this principle.[544]

In *Ronwin v. State Bar of Arizona*,[545] the Ninth Circuit departed from the prevailing view. The party had accused the judge of various improper ex parte communications. While acknowledging that judges are "generally required" to accept the allegations in a § 144 affidavit as true, the court made an exception because the allegation of bias "relates to facts that were peculiarly within the judge's knowledge."[546] The Ninth Circuit held that disqualification was unnecessary in part because the judge knew the allegations were false.

540. United States v. Boffa, 513 F. Supp. 505, 510 (D. Del. 1981).

541. *See, e.g.*, Green v. Dorrell, 969 F.2d 915, 919 (10th Cir. 1992); United States v. Young, 907 F.2d 867, 868 (8th Cir. 1990); Easley v. University of Mich. Bd. of Regents, 853 F.2d 1351, 1357 (6th Cir. 1988). *See also* United States v. Betts-Gaston, 860 F.3d 525, 538 (7th Cir. 2017) (upholding rejection of § 144 motion on tardiness grounds where it was filed eleven days after issuance of an adverse opinion and sufficiency of affidavit was questionable).

542. 255 U.S. 22 (1921).

543. *Id.* at 33–34.

544. *See In re* Martinez-Catala, 129 F.3d 213, 218 (1st Cir. 1997); United States v. Sykes, 7 F.3d 1331, 1339 (7th Cir. 1993); Souder v. Owens-Corning Fiberglas Corp., 939 F.2d 647, 653 (8th Cir. 1991); Weatherhead v. Globe Int'l, Inc., 832 F.2d 1226, 1227 (10th Cir. 1987); Albert v. United States Dist. Ct., 283 F.2d 61, 62 (6th Cir. 1960). *See also* United States v. Rankin, 870 F.2d 109, 110 (3d Cir. 1989) (noting trial court felt "bound by statute and Supreme Court precedent to accept Rankin's factual allegations as true"). *But see* Henderson v. Department of Pub. Safety & Corrs., 901 F.2d 1288, 1296 (5th Cir. 1990) ("the judge must pass on the legal sufficiency of the affidavit, but may not pass on the truth of the matter alleged") (quoting Davis v. Board of Sch. Comm'rs of Mobile Cty., 517 F.2d 1044, 1051 (5th Cir. 1975)).

545. 686 F.2d 692 (9th Cir. 1981), *rev'd on other grounds*, Hoover v. Ronwin, 466 U.S. 558 (1984).

546. *Id.* at 701.

The prevailing view—that judges must accept all allegations in a § 144 affidavit as true—has prompted concern that judges are left helpless to stop parties from disqualifying judges by filing false affidavits. There are isolated cases in which disqualification on the basis of sham affidavits may have occurred. For example, in *United States v. Rankin*,[547] the defendant alleged that in a previous trial, the judge had chased the defendant around the courtroom and assaulted him. While denying the bizarre accusation, the trial judge nevertheless disqualified himself from the second trial on the ground that § 144 bound him to accept the allegations as true.[548] In an earlier, unrelated case, the Third Circuit had held a refusal to disqualify improper, even though "[p]robably the district court is right that there is no basis for the allegations"[549] that the judge made improper statements (e.g., "If I had anything to do with it you would have gone to the electric chair"). The court of appeals expressed "sympathy with district judges confronted with what they know to be groundless charges of personal bias" but held that § 144 requires acceptance of factual allegations as true.[550]

Courts have, however, countered this potential problem by scrutinizing the facial sufficiency of § 144 affidavits.[551] As the First Circuit explained, "courts have responded to the draconian procedure—automatic transfer based solely on one side's affidavit—by insisting on a firm showing in the affidavit that the judge does have a personal bias or prejudice toward a party."[552]

Virtually every circuit has therefore imposed some variation of the requirement that movants' affidavits be sufficient to "convince a reasonable person" that their judge is biased.[553] In the Seventh Circuit,

> the facts averred must be sufficiently definite and particular to convince a reasonable person that bias exists; simple conclusions, opinions, or rumors

547. 870 F.2d 109 (3d Cir. 1989).

548. The second trial was reassigned. Then the government indicted the defendant for perjury arising out of the statements in his affidavit seeking the first judge's disqualification. The *Rankin* opinion concerned issues relating to this indictment.

549. Mims v. Shapp, 541 F.2d 415, 417 (3d Cir. 1976).

550. *Id.*

551. Hoffman v. Caterpillar, Inc., 368 F.3d 709, 718 (7th Cir. 2004) ("[W]hile a court must assume the truth of the factual assertions, it is not bound to accept the movant's conclusions as to the facts' significance").

552. *In re* Martinez-Catala, 129 F.3d 213, 218 (1st Cir. 1997).

553. *See, e.g.*, United States v. Story, 716 F.2d 1088, 1090 (6th Cir. 1983); Chitimacha Tribe v. Laws, 690 F.2d 1157, 1167 (5th Cir. 1982); United States v. Bray, 546 F.2d 851, 858 (10th Cir. 1976); United States v. Dansker, 537 F.2d 40, 53 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); Curry v. Jensen, 523 F.2d 387, 388 (9th Cir. 1975), *cert. denied*, 423 U.S. 998 (1975); Hodgdon v. United States, 365 F.2d 679, 686 (8th Cir. 1966), *cert. denied*, 385 U.S. 1029 (1967).

> are insufficient. . . . Because the statute "is heavily weighed in favor of recusal," its requirements are to be strictly construed to prevent abuse.[554]

In a similar vein, the Tenth Circuit observed that § 144 creates a rebuttable presumption that the challenged judge is impartial, which imposes a burden on the affiant to demonstrate the judge's partiality.[555] Several circuits have thus ruled that the movant's affidavit must state with particularity material facts supporting allegations of the judge's bias.[556] According to the D.C. Circuit, "stating the facts with particularity" means the affidavit "must be strictly construed [against the affiant]; it must be definite as to time, place, persons and circumstances."[557] The Tenth Circuit has reached a similar conclusion.[558] By requiring that the challenging party state facts material to the allegations of the judge's bias with particularity, the courts have excluded conclusory assertions, as well as opinions and rumors, from the realm of allegations that may support a judge's disqualification.[559] Even if the affidavit is deemed facially sufficient and the case is transferred, the First Circuit has observed that "the possibility remains, although not developed in the statute, that the transferee judge might hold a hearing, conclude that the affidavit was false and transfer the action back to the original judge."[560]

### 3. Counsel's certificate of good faith

Section 144 states: "A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."[561] The question has arisen whether counsel's certificate of good faith must assert that *counsel* believes the allegations to be true or whether counsel merely believes that his or her *client* is acting in good faith. The word "it" in the phrase quoted above seems to refer back to the party's affidavit and thus to require that counsel vouch for the good faith of the party's belief—not counsel's own belief—that the facts are true. But the two circuits that have addressed the question

554. United States v. Sykes, 7 F.3d 1331, 1339 (7th Cir. 1993) (citation omitted).

555. *In re* McCarthy, 368 F.3d 1266, 1269 (10th Cir. 2004) (citing United States v. Burger, 964 F.2d 1065, 1070 (10th Cir. 1992)).

556. Brokaw v. Mercer Cty., 235 F.3d 1000, 1025 (7th Cir. 2000); Henderson v. Department of Pub. Safety & Corrs., 901 F.2d 1288, 1296 (5th Cir. 1990); United States v. Alabama, 828 F.2d 1532, 1540 (11th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988).

557. United States v. Miller, 355 F. Supp. 2d 404, 406 (D.D.C. 2005) (quoting United States v. Haldeman, 559 F.2d 31, 135 (D.C. Cir. 1976)).

558. *Burger*, 964 F.2d at 1070. *See also* Weatherhead v. Globe Int'l, Inc., 832 F.2d 1226, 1227 (10th Cir. 1987).

559. *See, e.g.*, *Burger*, 964 F.2d 1065; *Weatherhead*, 832 F.2d 1226.

560. *In re* Martinez-Catala, 129 F.3d 213, 218 (1st Cir. 1997).

561. 28 U.S.C. § 144.

directly in modern times have held otherwise. The First Circuit held a § 144 motion inadequate in part because counsel's certificate of good faith asserted only that the party acted in good faith.[562] The court noted that "[i]f a certificate is to serve the purpose of shielding a court which cannot test the truth of claimed facts, it should at least carry the assertion that counsel believes the facts alleged to be accurate and correct."[563] The D.C. Circuit reached a similar conclusion.[564]

562. *In re* Union Leader Corp., 292 F.2d 381 (1st Cir. 1961).

563. *Id.* at 385.

564. Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R., 380 F.2d 570, 577–78 & n.17 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 327 (1967). *Cf.* United States v. Sykes, 7 F.3d 1331, 1339 (7th Cir. 1993) (certificate must "stat[e] that the affidavit is made in good faith"). *But see* Flegenheimer v. United States, 110 F.2d 379, 381 (3d Cir. 1936) ("As long as the [client] honestly believed that the Judge was biased and stated on what facts he based his opinion, it was his right to call on his counsel to give the certificate provided by the statute in order to have the question of bias determined.")

# IV Disqualification Under 28 U.S.C. § 47

A little-used disqualification statute, 28 U.S.C. § 47, provides that "no judge shall hear or determine an appeal from the decision of a case or issue tried by him."[565] One reason the statute has barely surfaced in the case law is that its applicability is limited to cases in which a trial judge subsequently serves as an appellate judge in the same matter, which may occur when a district judge is appointed to the circuit court or sits on the circuit court by designation. Another reason § 47 is so rarely employed is that on those occasions where it suggests a basis of disqualification, the same result would also be reached by reference to § 455(a). As an historical aside, however, it may be noted that this was not always so. When members of the Supreme Court "rode circuit" in the eighteenth and early nineteenth centuries, it was not uncommon for them to hear appeals as Supreme Court justices from cases they decided as circuit court judges.

In *Russell v. Lane*,[566] the trial judge in a habeas case reviewed a decision of a state appellate court in which the judge had been a member of the panel. The Seventh Circuit found that this created an appearance of impropriety in violation of § 455(a). In reaching that decision, however, the court cited the relevance of § 47 and noted that it "is an express ground for recusal . . . in modern American law for a judge to sit on the appeal from his own case."[567]

In a Fourth Circuit opinion explaining his disqualification from a school desegregation case, Judge James Craven Jr. discussed § 47 more extensively.[568] As a district judge years earlier, he heard and decided a case involving the same

565. For a rare usage, *see* United States v. Hudson, 685 F.3d 1260 (11th Cir. 2012) (disqualification of appellate judge who was formerly a district judge).

566. 890 F.2d 947 (7th Cir. 1989).

567. *Id.* at 948.

568. Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 135 (4th Cir. 1970).

parties. Although the instant case was a separate lawsuit, it raised the identical "ultimate question." Citing the Supreme Court's treatment of the predecessor statute to § 47, Judge Craven held that the statute must be "strictly construed" to prevent judges from, in effect, sitting in appellate judgment of their own earlier decisions.[569]

In *Rexford v. Brunswick-Balke-Collender Co.*,[570] the Supreme Court observed that it makes no difference whether "the question may be easy of solution or that the parties may consent to the judge's participation" because "the sole [statutory] criterion" is whether the case on appeal "involve[s] a question which the judge has tried or heard" in the proceedings below.[571] In *Cramp & Sons Ship & Engine Building Co. v. International Curtiss Marine Turbine Co.*,[572] the Supreme Court vacated an appellate decision notwithstanding the parties' consent to the trial judge sitting on the appeal, holding that the appellate panel was "not organized in conformity to law."[573]

The Third Circuit, however, rejected without explanation the contention that a district judge, sitting by designation on the Third Circuit panel (and the author of the court opinion), should be disqualified pursuant to § 47.[574] In his capacity as trial judge, he had accepted the defendant's conditional plea of guilt. On appeal, the defendant argued that his guilty plea should be vacated because the indictment against him resulted from prosecutorial vindictiveness. At oral argument, the judge informed counsel of his involvement in the case. Counsel did not object, and disqualification was waived. In a footnote, the Third Circuit, after "[h]aving independently considered this matter, . . . conclude[d] that there is no basis for recusal under 28 U.S.C. § 47."[575] The court's reasoning may have been based on the nature of the defendant's appeal, which did not claim any impropriety in the plea agreement or challenge any action taken by the judge. Rather, the defendant objected to the bringing of the indictment in the first place.

569. *Id.* at 136. *See also* Moran v. Dillingham, 174 U.S. 153 (1899). *And see* Weddington v. Zatecky, 721 F.3d 456, 461 (7th Cir. 2013).

570. 228 U.S. 339 (1913).

571. *Id.* at 344.

572. 228 U.S. 645 (1913).

573. *Id.* at 652.

574. United States v. Morrow, 717 F.2d 800 (3d Cir. 1983).

575. *Id.* at 801 n.1.

# V Disqualification on Appeal

## A. Routes of appellate review

Aggrieved parties often challenge a judge's refusal to disqualify. In general, parties may seek review of a district judge's decision not to disqualify via one of two routes. First, they may seek review via postjudgment appeal. Second, they may seek prejudgment review via a petition for writ of mandamus filed with the court of appeals, subject to the "extraordinary" circumstances needed to invoke the writ. Other means of interlocutory appeal have largely proved unsuccessful. Review under 28 U.S.C. § 1292(b), interlocutory decisions, is ordinarily unavailing. The statute limits interlocutory appeals to matters that concern a "controlling question of law as to which there is substantial ground for difference of opinion."[576] Disqualification will rarely meet that test. Review under the collateral order doctrine has likewise failed, given the availability of postjudgment appeal as a means to vindicate the movant's right to challenge the judge's nondisqualification (to obtain interlocutory review of review of a collateral order, the order must be "effectively unreviewable" later).

All courts of appeals allow a party to seek interlocutory review via mandamus,[577] reasoning that, at least in some cases, the damage to public confidence in

576. Jeffrey Stempel, *Rehnquist, Recusal, and Reform*, 53 Brook. L. Rev. 589, 635 (1987).

577. *See, e.g.*, *In re* Virginia Elec. & Power Co., 539 F.2d 357 (4th Cir. 1976). A motion for mandamus was brought under § 1292(b). The motion involved a "controlling question of law as to which there is substantial ground for difference of opinion" as to how the recently amended § 455 should be applied to the facts. *Id.* at 363 (quoting § 1292(b)). Although the decision against disqualification is not ordinarily appealable under § 1292(b), this case presented an exception because the trial judge's decision effectively meant that no judge residing in the state of Virginia could preside over the case, even though the lawsuit was filed in the Eastern District of Virginia. *Id.* at 364. *See also In re* Arunachalam, 812 F.3d 290, 292–94 (3d Cir. 2016).

the justice system (or perhaps to the litigants) would not be undone by postjudgment appeal.[578] The Third and Seventh Circuits have said that while petitioning for a writ of mandamus is a proper means for appellate review of a district court's refusal to disqualify pursuant to § 455(a), it is unavailable for a challenge under § 144.[579] The reasoning is that § 144, which addresses actual bias, protects litigants but that § 455, which concerns whether a judge's impartiality might reasonably be questioned, also protects public confidence in the judiciary. "While review after final judgment can (at a cost) cure the harm to a litigant, it cannot cure the additional, separable harm to public confidence that section 455 is designed to prevent."[580]

Most circuits apply their usual standard for mandamus—often placing a heavy burden on the movant.[581] Allocating the burden to the movant serves a "strong judicial policy" that disfavors piecemeal appeals.[582] After all, the movant has the opportunity to appeal the disqualification decision after the case has been decided on the merits[583] and a full "contextual assessment" can be done for allegations of partiality.[584]

578. *In re* Vazquez-Botet, 464 F.3d 54, 57 (1st Cir. 2006); *In re* Basciano, 542 F.3d 950, 956 (2d Cir. 2008); *In re* Briggs, No. 00-1434, 2000 WL 961881, at *1 (4th Cir. July 12, 2000); *In re* Cameron Int'l Corp., 393 F. App'x 133, 134 (5th Cir. 2010); *In re* Aetna Cas. & Sur. Co., 919 F.2d 1136, 1139–43 (6th Cir. 1990); *In re* Hatcher, 150 F.3d 631, 637 (7th Cir. 1998); Liddell v. Board of Educ., 677 F.2d 626, 643 (8th Cir. 1982); *In re* Cement Antitrust Litig., 673 F.2d 1020, 1025 (9th Cir. 1982); Hinman v. Rogers, 831 F.2d 937, 938 (10th Cir. 1987) (dealing with § 144) (citing Bell v. Chandler, 569 F.2d 556, 559 (10th Cir. 1978) (dealing with § 455)); *In re* Moody, 755 F.3d 891, 894 (11th Cir. 2014); *In re* Barry, 946 F.2d 913, 915 (D.C. Cir. 1991); *In re* Beyond Innovation Tech. Co., 166 F. App'x 490, 491 (Fed. Cir. 2006).

579. *See School Asbestos Litig.*, 977 F.2d at 774–78; SCA Servs., Inc. v. Morgan, 557 F.2d 110, 117 (7th Cir. 1977).

580. *School Asbestos Litig.*, 977 F.2d at 776.

581. *See, e.g.*, Mischler v. Bevin, 887 F.3d 271, 272 (6th Cir. 2018) (available only when "petitioner alleges that delay will cause irreparable harm"); *In re* Larson, 43 F.3d 410, 412 (8th Cir. 1994) (petitioner must establish "clear and indisputable right" to disqualification); *In re* McCarthy, 368 F.3d 1266, 1269 (10th Cir. 2004) (where party "lacks an adequate factual basis for disqualification," court of appeals will not issue mandamus).

582. Alexander v. Chicago Park Dist., 709 F.2d 463, 470 (7th Cir. 1983).

583. *See, e.g.*, *In re* Vazquez-Botet, 464 F.3d 54, 57 (1st Cir. 2006) (where motion for mandamus denied because of lack of "clear and indisputable" entitlement to relief, court did not have to address whether judge should have disqualified; so defendant was still free to raise denial of motion for disqualification on appeal after final judgment).

584. *Alexander*, 709 F.2d at 471. *See also* Scenic Holding, LLC v. New Bd. of Tr. of the Tabernacle Missionary Baptist Church, Inc., 506 F.3d 656, 665 (8th Cir. 2007) (although judge improperly injected his religious beliefs into proceedings, a reasonable person looking at totality of circumstances would not conclude religious favoritism on judge's part; thus refusing to disqualify not abuse of discretion).

The First Circuit, however, has adopted a separate standard for entertaining a mandamus action seeking disqualification: "[w]hen the issue of partiality has been broadly publicized, and the claim of bias cannot be labeled as frivolous."[585] It has also stated that the standard for granting mandamus should be relaxed "in a criminal case in which the government seeks the judge's recusal, for a defendant's verdict will terminate the case, thereby rendering the usual remedy, end-of-case appeal, illusory."[586] Where the government seeks disqualification in a criminal case, "the ordinary abuse-of-discretion standard rather than the more exacting standard usually applicable to petitions for mandamus" should be used.[587]

In the Seventh Circuit, the sole route to review a refusal to disqualify pursuant to § 455(a) had long been a writ of mandamus, although appeal after final judgment was available to challenge refusals to disqualify under § 144 and § 455(b).[588] A party that failed to seek mandamus forfeited its right to raise the issue in a postjudgment appeal, the Seventh Circuit reasoned, because if a party waited until judgment was entered it was too late to avoid the damage to public confidence that § 455(a) sought to prevent. In 2016, however, the Seventh Circuit reconsidered, concluding that because § 455(a) directs judges to disqualify on their own initiative, litigants should not be penalized for failing to seek prejudgment review of disqualification via mandamus.[589]

## B. Standards of review

When reviewing a trial judge's disqualification, every court of appeals—with the occasional exception of the Seventh Circuit—uses a deferential, "abuse of discretion" standard in which findings of fact are typically accepted unless

585. *In re* United States, 158 F.3d 26, 30 (1st Cir. 1998) (internal quotation marks omitted). *See also In re* Boston's Children First, 244 F.3d 164, 167 (1st Cir. 2001) (where question of judge's partiality was highly publicized, writ of disqualification issued where it may not have been under normal circumstances) (citing *In re* Martinez-Catala, 129 F.3d 213, 217 (1st Cir. 1997)).

586. *United States*, 158 F.3d at 30.

587. *Id.* at 31.

588. *See, e.g.*, United States v. Farrington, 27 F. App'x 640, 643 (7th Cir. 2001); United States v. Ruzzano, 247 F.3d 688, 694 (7th Cir. 2001); *In re* Hatcher, 150 F.3d 631, 637 (7th Cir. 1998); United States v. Horton, 98 F.3d 313, 316 (7th Cir. 1996); United States v. Balistrieri, 779 F.2d 1191, 1205 (7th Cir. 1985). *Cf.* United States v. Boyd, 208 F.3d 638, 650 (7th Cir. 2000) (Ripple, J., dissenting) (urging Seventh Circuit to join rest of courts of appeals in permitting appellate review of failure to disqualify under § 455(a)).

589. Fowler v. Butts, 829 F.3d 788, 794 (7th Cir. 2016).

"clearly erroneous."[590] The Seventh Circuit sometimes applies a de novo standard of review.[591]

There are sometimes ad hoc variations. In *Southern Pacific Communications Co. v. AT&T*,[592] for example, the D.C. Circuit used a stricter standard in reviewing a judge's factual findings that gave rise to Southern Pacific's claim that it was denied a fair trial because of the judge's legal and policy bias. Southern Pacific asked the court to remand the case for a new trial or, in the alternative, to abandon the "clearly erroneous" standard when reviewing the district court's factual findings. Although the court declined to abandon the standard, it "reviewed the District Court's findings against the record with particular, even painstaking, care" in view of the judicial misconduct allegations.[593]

In *SEC v. Loving Spirit Foundation Inc.*,[594] the D.C. Circuit adopted the "abuse of discretion" standard for disqualification under § 455 but did not articulate a binding standard of review for § 144, finding that it "need not decide which standard to adopt, for even reviewing de novo we can easily sustain [the trial judge's] decision."[595] In *United States v. Microsoft Corp.*,[596] however, the D.C. Circuit rejected greater scrutiny of the judge's fact findings because, absent evidence of actual bias, Federal Rule of Civil Procedure 52(a) "mandates clearly erroneous review of all district court factfindings."[597]

When applying the "abuse of discretion" standard, the appellate courts recognize that "there will be occasions in which [it] affirm[s] the district court even though [it] would have gone the other way" had the standard been de novo

590. *See, e.g.*, United States v. Johnson, 827 F.3d 740, 745 (8th Cir. 2016); United States v. Morrison, 833 F.3d 491, 506 (5th Cir. 2016); United States v. Torres-Estrada, 817 F.3d 376, 379 (1st Cir. 2016); United States v. Cordova, 806 F.3d 1085, 1092 (D.C. Cir. 2015); United States v. Apple Inc., 787 F.3d 131, 138 (2d Cir. 2015); United States v. Perkins, 787 F.3d 1329, 1342 (11th Cir. 2015); Decker v. GE Healthcare Inc., 770 F.3d 378, 388 (6th Cir. 2014); *In re* Marshall, 721 F.3d 1032, 1039 (9th Cir. 2013); Central Tel. Co. of Va. v. Sprint Commc'ns Co. of Va., 715 F.3d 501, 515 (4th Cir. 2013).

591. *See* United States v. Balistrieri, 779 F.2d 1191, 1203 (7th Cir. 1985) (applying de novo standard of review to motions brought under both §§ 144 and 455). *See also* Sac & Fox Nation v. Cuomo, 193 F.3d 1162, 1168 (10th Cir. 1999) (applying de novo standard where district judge "did not create a record or document her decision not to recuse"). *But see* Tezak v. United States, 256 F.3d 702, 716 (7th Cir. 2001) (applying "abuse of discretion" standard).

592. 740 F.2d 980 (D.C. Cir. 1984).

593. *Id.* at 984.

594. 392 F.3d 486 (D.C. Cir. 2004).

595. *Id.* at 492.

596. 253 F.3d 34 (D.C. Cir. 2001).

597. *Id.* at 117.

review.[598] Factors that may be used to assess whether trial judges have abused their discretion include whether a trial judge "engaged in measured and considered deliberations" before handing down a ruling;[599] whether a judge's ruling was "well-reasoned";[600] whether, after declining to disqualify, a judge's rulings and conduct called the judge's impartiality into question;[601] whether the judge provided the appellant an opportunity to argue and brief the appellant's positions;[602] and whether the judge fully considered the appellant's motions.[603]

In *Moran v. Clarke*,[604] the plaintiff moved to disqualify the judge after a defendant revealed at her deposition that she had known the judge socially for over twenty years. The district judge declined to disqualify himself without comment, and the Eighth Circuit, faced with a record insufficient to apply the "abuse of discretion" standard to the case before it, remanded to the same judge for further proceedings, with the following explanation and instructions:

> The district judge's appearances at the same social events as Clarke and Smith brooks [sic] little mention. Judges, attorneys and public officials will often share public appearances. This does little to create the appearance of impropriety. The social relationship, however, invites more scrutiny. The image of one sitting in judgment over a friend's affairs would likely cause the average person in the street to pause. That the judge and Clarke enjoyed a friendship of sufficient depth and duration as to warrant several reciprocal visits to one another's homes only exacerbates the problem. We find particularly worrisome the district court's failure to disclose this conflict himself, as permitted by section 455(e). Moreover, the record suggests a fractious relationship between the district court and Moran's attorneys. We do, however, have the utmost faith in the district court's ability to rule impartially, and have imposed on ourselves an obligation to reverse a district court only where we can say with certainty that it has abused its discretion. Accordingly, rather than remand to a different judge, we remand this question to the district court with the suggestion that it revisit and more thoroughly consider and respond to Moran's recusal request.[605]

598. Alloco v. City of Coral Gables, 159 F. App'x 921, 923 (11th Cir. 2005) (quoting United States v. Frazier, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc)).

599. Hoffman v. Caterpillar, Inc., 368 F.3d 709, 719 (7th Cir. 2004). *See also* Dixon v. Clem, 492 F.3d 665, 679 (6th Cir. 2007) (judge didn't abuse discretion by writing "lengthy and meticulous legal analysis" as to why he refused to disqualify himself, and by imposing sanctions against plaintiff's attorney).

600. *Alloco*, 159 F. App'x at 923.

601. *In re* Basciano, 542 F.3d 950, 956 (2d Cir. 2008) (citing United States v. Amico, 486 F.3d 764, 775 (2d Cir. 2007)).

602. Lewin v. Cooke, 28 F. App'x 186, 197 (4th Cir. 2002).

603. *Id.*

604. 296 F.3d 638 (8th Cir. 2002).

605. *Id.* at 649.

A party's motion must be timely. A few appellate courts are willing to entertain an argument about disqualification that was not raised in a timely manner but apply a "plain error" standard.[606]

## C. Issues on appeal

### 1. Harmless error

Section 455 tells judges when disqualification is required but does not spell out the appropriate remedy for a failure to disqualify. In *Liljeberg v. Health Services Acquisition Corp.*,[607] the Supreme Court held that Federal Rule of Civil Procedure 60(b), authorizing relief from a final judgment, is an appropriate remedy for a trial court's improper failure to disqualify. The Court cautioned that Rule 60(b)(6) relief is "neither categorically available nor categorically unavailable for all § 455(a) violations."[608] Rather, "there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance."[609]

In spelling out the factors to be considered in determining whether a new trial is the appropriate remedy, the Court cautioned against too casual a finding of harmless error:

> [I]t is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. We must continuously bear in mind that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'"[610]

Heeding the Court's warning, courts of appeals have been slow to deem a failure to disqualify harmless error. A few exceptions are instructive.

In *Harris v. Champion*,[611] a judge in a habeas case failed to disqualify himself even though his uncle had been a judge in some of the state cases challenged on

606. *See, e.g.*, United States v. Pearson, 203 F.3d 1243, 1276 (10th Cir. 2000); United States v. Arache, 946 F.2d 129, 140 (1st Cir. 1991); Osei-Afriyie v. Medical Coll. of Pa., 937 F.2d 876, 886 (3d Cir. 1991). *See also* United States v. Gray, 105 F.3d 956, 968 (5th Cir. 1997).

607. 486 U.S. 847 (1988).

608. *Id.* at 864.

609. *Id.* at 862. Courts have also applied the harmless error standard to § 455(b) violations. *See* Harris v. Champion, 15 F.3d 1538, 1571 (10th Cir. 1994); Polaroid Corp. v. Eastman Kodak Co., 867 F.2d 1415, 1421 (Fed. Cir. 1989); Parker v. Connors Steel Co., 855 F.2d 1510, 1527 (11th Cir. 1988).

610. *Liljeberg*, 486 U.S. at 864 (quoting *In re* Murchison, 349 U.S. 133, 136 (1955) (citation omitted)). For more on *Liljeberg*—and the circumstances in which predisqualification orders should be vacated under Rule 60(b)(6) and possibly 60(b)(4)—see section II.C.5.b.

611. 15 F.3d 1538 (10th Cir. 1994).

appeal. The Tenth Circuit found that disqualification was required under both § 455(a) and § 455(b)(5)(i). But the "case presented [a] very unusual situation [in] that . . . [the judge] did not act alone, but rather as one member of a three-judge panel that ruled unanimously."[612] In part for that reason, the court opted not to vacate the rulings. (The viability of the *Harris* analysis is in doubt, following the Supreme Court's decision in *Williams v. Pennsylvania*,[613] where the Court rejected the argument that a Pennsylvania Supreme Court justice's nondisqualification was harmless error because the justice did not cast a decisive vote, reasoning that the disqualified justice could have influenced the views of his colleagues.)[614]

In *Doddy v. Oxy USA, Inc.*,[615] the judge disqualified herself based on inaccurate information, then vacated her disqualification order when she realized the mistake. The Fifth Circuit held that it was error to vacate the disqualification order. The error was harmless, however, because:

> [R]ecusal was *sua sponte*, and based on incomplete and incorrect information. . . . [N]one of the parties ever moved to have the judge step aside, and none has suggested any actual bias or prejudice. . . . [T]here is no risk of undermining the public's confidence in the judicial process. Indeed, overturning the many decisions [the judge] made after vacating her recusal order—simply because she recused herself too hastily and in error—would be wasteful and unnecessary.[616]

The Fifth Circuit also found harmless error in an improper failure to disqualify in *United States v. Jordan*.[617] It concluded that the defendant's well-known, extremely antagonistic relationship with a close personal friend of the judge created an appearance of impropriety under § 455(a). The Fifth Circuit vacated the sentence and remanded the case for resentencing by a different judge. But, under the circumstances, it found that upholding the conviction would not undermine the public's confidence in the judicial process and would not be unjust to the appellant, who "never contend[ed] that she suffered any harm during trial because of any alleged bias or prejudice."[618]

Faced with a mandamus action seeking mistrial in the midst of complex mass tort litigation, the First Circuit, in *In re Allied-Signal Inc.*,[619] noted that while the *Liljeberg* analysis arose in the context of a Rule 60(b) motion, "we believe it

612. *Id.* at 1572.

613. 136 S. Ct. 1899 (2016).

614. *Id.* at 1903.

615. 101 F.3d 448 (5th Cir. 1996).

616. *Id.* at 459.

617. 49 F.3d 152 (5th Cir. 1995).

618. *Id.* at 158.

619. 891 F.2d 967 (1st Cir. 1989).

should apply as well to present circumstances, where 'mistrial' . . . would threaten to undo matters of considerable importance previously decided."[620] Thus, even assuming arguendo that disqualification was improperly denied, the court nevertheless denied the requested relief because it would mean retrying complex and costly litigation and reopening settlement agreements.[621] Moreover, no future injustice would result because there were no allegations of actual bias infecting any findings or rulings, and no rulings had been made that were "incurable or could have preclusive effect in some other action."[622] Finally, because the alleged appearance of impropriety—brothers of the judge's law clerks were among the attorneys in the case—was not egregious, the court did "not believe . . . that the relevant public's confidence in the judiciary would be seriously undermined were no mistrial declared."[623]

## 2. Reviewability of lower court decisions to disqualify

The majority of disqualification appeals concern a judge's refusal to disqualify. The courts of appeals are split as to whether a judge's decision to disqualify is reviewable.

Holding that a decision to disqualify is unreviewable, the Seventh Circuit explained its rationale:

> [W]e fail to conceive of any interest which the plaintiffs have as litigants for review of [the judge's] recusal order. The effect of his decision to step aside is merely to have the case reassigned to another judge of the district court. The order does not strip plaintiffs of a fair forum in which they can pursue their claim. . . . [T]hey have no protectable interest in the continued exercise of jurisdiction by a particular judge.[624]

The court held that the order to disqualify is not a final order and, because a party lacks a claim of right to the original judge, the collateral order doctrine does not apply.[625] The Eighth and Ninth Circuits have taken the same position.[626]

The Ninth Circuit has allowed a party to seek a writ of mandamus to review a decision to disqualify in "exceptional situations in which the costs of familiarizing a new judge, in terms of delay, will prove to be very great" and the litigation is

620. *Id.* at 973.

621. *Id.*

622. *Id.*

623. *Id.*

624. Hampton v. City of Chicago, 643 F.2d 478, 479 (7th Cir. 1981) (per curiam).

625. *Id.* at 479–80.

626. *See, e.g.*, Liddell v. Board of Educ., 677 F.2d 626, 644 (8th Cir. 1982); *In re* Cement Antitrust Litig., 673 F.2d 1020, 1022–24 (9th Cir. 1982).

"greatly disrupted."[627] The First Circuit addressed the reviewability of sua sponte disqualifications in *United States v. Snyder*.[628] The district court judge had exhibited pervasive hostility toward a federal prosecutor for what the judge perceived to be a selective and "grossly disparate" sentencing request.[629] The district judge disqualified himself sua sponte, and the defendant appealed the decision claiming the judge had a duty to sit.[630] The First Circuit held that a sua sponte disqualification must be examined in light of both the duty to sit and the duty to disqualify:

> [W]e have recognized that the duty to recuse and the duty to sit do not exert equal pull; in close cases, "doubts ordinarily ought to be resolved in favor of recusal." No one suggests that different principles of review apply here, where a judge has recused himself *sua sponte*. Hence, our review in this case, as in our prior cases, is both deferential and weighted: we inquire whether, in light of the policy favoring recusal in close cases, [the trial judge] abused his discretion in finding that he had a duty to recuse himself.[631]

Both the Fourth and Sixth Circuits have been willing to review orders by judges disqualifying themselves, at least in some circumstances.[632]

### 3. Mootness of underlying dispute

A claim for disqualification, like any other claim, cannot be adjudicated absent a live dispute between the parties. Courts have implicitly or explicitly rejected disqualification requests as moot in a variety of circumstances.[633] In *Pontarelli*

627. *Cement Antitrust*, 673 F.2d at 1025.

628. 235 F.3d 42 (1st Cir. 2000).

629. *Id.* at 47.

630. The "duty to sit," as used here, should not be misunderstood. As discussed in Section I.A, the traditional duty to sit ended in 1974. But federal judges nonetheless remain subject to an ethical duty to hear the cases they are assigned except when disqualification is necessary, which is at issue here.

631. *Snyder*, 235 F.3d at 46 (citation and footnote omitted).

632. *See* In re Virginia Elec. & Power Co., 539 F.2d 357, 363–65 (4th Cir. 1976) (decision to disqualify reviewable by mandamus, and as collateral order under 28 U.S.C. § 1292(b), where it raises important legal issue that would otherwise escape review); Kelley v. Metropolitan Cty. Bd., 479 F.2d 810, 811 n.1 (6th Cir. 1973) (decision to disqualify reviewable, apparently immediately, though court did not clarify).

633. *See, e.g.*, *In re* Starr, 152 F.3d 741, 751 n.23 (8th Cir. 1998) (holding party moving for disqualification lacked standing to bring underlying action); United States v. Kraus, 137 F.3d 447, 452 (7th Cir. 1998) (violation of Rule 11 required remand to a different judge anyway); Reynolds v. International Amateur Athletic Fed'n, 23 F.3d 1110, 1121 (6th Cir. 1994) (trial court's judgment reversed on substantive grounds unrelated to disqualification); United States v. Ahmed, 980 F.2d 161, 163 (2d Cir. 1992) (trial judge had already directed clerk of court to reassign case to a different judge); Mallory v. Eyrich, 922 F.2d 1273, 1282 (6th Cir. 1991) (trial judge had already withdrawn from case).

*v. Stone*,[634] after all the parties had settled the merits of the underlying disputes, one of the lawyers appealed the denial of attorney fees. The focus of the claim, however, was that the judge should have disqualified himself pursuant to § 455(a). The First Circuit found the issue moot.

> [B]efore an appellate court can make a ruling on the appropriateness of disqualification by a district judge . . . the underlying dispute as to which the district court ruling is relevant must still remain a live controversy. . . . If a trial judge has wrongly failed to disqualify him or herself, the remedy . . . is for the appellate court to reverse the decision . . . on the merits and to order a new trial before a different judge.[635]

Where, as here, the underlying case had settled, and no party challenged the settlement, the issue of disqualification was moot. The court noted that the lawyer's recourse was to file a disciplinary complaint pursuant to 28 U.S.C. § 351.[636]

### 4. Impact of guilty plea on reviewability of nondisqualification

The courts of appeals differ as to whether a defendant who pleads guilty waives the challenge to the trial judge's denial of a motion to disqualify. In the First and Second Circuits, a guilty plea does not waive a § 455 challenge. In *United States v. Chantal*,[637] a defendant was charged with, and pled guilty to, various drug-related offenses. At the sentencing hearing, the trial judge made critical comments about the defendant. It was later discovered that the defendant engaged in further drug-related activity while free on bond pending sentencing that resulted in a second indictment. The new case was assigned to the same judge, and the defendant moved to disqualify, but the judge refused. The defendant pled guilty to that charge as well. On appeal, when the defendant challenged the judge's refusal to disqualify himself with respect to the second indictment, the government argued that a guilty plea waives all but jurisdictional defenses and therefore waived the defendant's § 455(a) challenge. The First Circuit disagreed, reasoning that, "It is plain that Congress would never have thought its purpose to assure actions by judges who are not only impartial but appear to be, could be . . . eradicated by a plea engendered by the immediate prospect of a trial/decision by a biased judge."[638]

634. 978 F.2d 773 (1st Cir. 1992).

635. *Id.* at 775.

636. *Id.* at 776.

637. 902 F.2d 1018 (1st Cir. 1990).

638. *Id.* at 1021. *Accord* United States v. Brinkworth, 68 F.3d 633, 638 (2d Cir. 1995) (endorsing First Circuit's reasoning and conclusion).

The Fifth and Tenth Circuits have taken the opposite approach, holding that an unconditional guilty plea waives appeal of a § 455(a) disqualification motion.[639] They reason that since § 455(e) permits waiver of disqualification when a judge is faced with an appearance of impropriety under § 455(a) but makes full disclosure, waiver may also be found when a party enters a guilty plea without specifically preserving the issue for appeal.[640]

### 5. Jurisdiction

Courts of appeals have sometimes found that they have jurisdiction to review a refusal to disqualify—for example, on a habeas petition—even though they lack jurisdiction to review the underlying merits of the trial court's decision on the issue in the case.[641]

Under 28 U.S.C. § 1447(d), "an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." Yet the Fifth Circuit held that it had jurisdiction to determine whether the district court abused its discretion in denying a motion to disqualify. It reasoned that because a trial judge who has disqualified himself from a case may take no further action (except transferring the case to another federal judge), if the judge should have disqualified himself, then any orders entered after denying the motion to disqualify were improper.[642] Therefore, reviewing the refusal to disqualify would not really be reviewing the order of remand, even though a finding that disqualification was required would lead to vacating the remand order. "[W]e would be performing an essentially ministerial task of vacating an order that the district court had no authority to enter into for reasons unrelated to the order of remand itself."[643]

## D. Disqualification under 28 U.S.C. § 2106

In addition to the explicitly iterated disqualification statutes, appellate courts have used 28 U.S.C. § 2106 to disqualify judges on appeal. In *Liteky v. United States*,[644] the Supreme Court recognized this practice and acknowledged that

639. United States v. Hoctel, 154 F.3d 506, 507 (5th Cir. 1998); United States v. Gipson, 835 F.2d 1323, 1324 (10th Cir. 1988).

640. *Hoctel*, 154 F.3d at 508 (citing *Gipson*, 835 F.2d at 1325).

641. *See* Trevino v. Johnson, 168 F.3d 173 (5th Cir. 1999); Russell v. Lane, 890 F.2d 947 (7th Cir. 1989); Rice v. McKenzie, 581 F.2d 1114 (4th Cir. 1978).

642. Tramonte v. Chrysler Corp., 136 F.3d 1025, 1027–28 (5th Cir. 1998).

643. *Id.* at 1028.

644. 510 U.S. 540 (1994).

"Federal appellate courts' ability to assign a case to a different judge on remand rests not on the recusal statutes alone, but on the appellate courts' statutory power . . . 28 U.S.C. § 2106."[645]

Section 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct entry of such appropriate judgment, decree, or order, *or require such further proceedings to be had as may be just under the circumstances*.[646]

Appellate courts have interpreted this statute to require reassignment to a different judge on remand when "removal is essential to 'preserve[ ] both the appearance and reality of fairness.'"[647] Reassignment should only be used in "rare and extraordinary circumstances,"[648] including but not necessarily limited to circumstances manifesting personal bias.[649]

The presence of personal bias will warrant reassignment to a different judge on remand. In determining whether personal bias is evident, courts often rely on the framework set forth in § 455 and interpreted by *Liteky*.[650] For example, the First Circuit has held that when the district judge's views—even if arguably incendiary—were grounded entirely on information acquired at trial, there was no evidence of personal bias sufficient to require reassignment.[651] Likewise, the Ninth

645. *Id.* at 554.

646. 28 U.S.C. § 2106 (emphasis added).

647. Cobell v. Kempthorne, 455 F.3d 317, 332 (D.C. Cir. 2006).

648. *See, e.g.*, Arrowpoint Cap. Corp. v. Arrowpoint Asset Mgmt., LLC, 793 F.3d 313, 329 (3d Cir. 2015) ("Reassignment is 'an exceptional remedy, one that we weigh seriously and order sparingly.'") (citing United States v. Kennedy, 682 F.3d 244, 258 (3d Cir. 2012)); Villegas v. Metropolitan Gov't of Nashville, 709 F.3d 563, 580 (6th Cir. 2013) ("[r]eassignment . . . is an extraordinary power and should be rarely invoked. Reassignments should be made infrequently and with the greatest reluctance.") (quoting Solomon v. United States, 467 F.3d 928, 935 (6th Cir. 2006)). *See also* Candelario Del Moral v. UBS Fin. Servs. Inc. of Puerto Rico, 699 F.3d 93, 106 (1st Cir. 2012); Mustang Mktg., Inc. v. Chevron Prods. Co., 406 F.3d 600, 610 (9th Cir. 2005); Johnson v. Sawyer, 120 F.3d 1307, 1333 (5th Cir. 1997).

649. *See* Smith v. Mulvaney, 827 F.2d 558, 562 (9th Cir. 1987).

650. *See, e.g.*, *id.* at 562 (determining that "[r]emand to a different trial judge is appropriate under a demonstration of personal bias"). *See also* Arthur D. Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*, 69 U. Pitt. L. Rev. 189, 204 (2007) (highlighting appellate courts' use of § 2106 as "a device for enforcing an ethical standard almost identical to that of § 455(a)").

651. Hull v. Municipality of San Juan, 356 F.3d 98, 104 (1st Cir. 2004) (holding, as in *Liteky*, that "views formed by a judge in considering a case are normally not a sound basis either for required recusal or for directing that a different judge be assigned on remand" (citing Liteky v. United States, 510 U.S. 540, 555–56 (1994)).

Circuit has ruled that even though adopting a party's findings in their entirety is a "disfavored practice," this action does not meet the standard for personal bias necessary to require reassignment.[652]

Absent personal bias, the courts of appeals require a showing of "unusual circumstances" in order for reassignment on remand to be warranted.[653] They use two different tests to determine whether unusual circumstances exist: a three-factor test and an "objective observer" test.

The Second, Sixth, and Ninth Circuits apply the three-factor test to determine whether unusual circumstances exist that would merit reassignment: "(1) whether on remand the district judge can be expected to follow [the appellate] court's dictates; (2) whether reassignment is advisable to maintain the appearance of justice; and (3) whether reassignment risks undue waste and duplication."[654] In weighing these factors, "[t]he first two factors are considered to be of equal importance and a finding of either one will support a remand to a different judge."[655]

This test has been used most often by the Ninth Circuit where questionable judicial tactics have compromised the appearance of justice. For example, in *Living Designs v. E.I. Dupont de Nemours*,[656] the district court had adopted a party's summary judgment order wholesale with only minor changes, directed publication of the ghost-written order, and reversed a previously entered certification sub silento. The Ninth Circuit concluded that even though the district judge's impartiality was arguably still intact, his actions gave rise to the unusual circumstances necessary to require reassignment on remand.[657] Similarly, in *Beckman Instruments, Inc. v. Cincom Systems, Inc.*,[658] the district judge had displayed blatant disregard for the appellate court's mandates (by reaffirming his prior ruling without addressing or attempting to distinguish the appellate court's

652. *See* Vuitton et Fils v. J. Young, 644 F.2d 769, 778 (9th Cir. 1981).

653. *See, e.g.*, *Mustang Mktg.*, 406 F.3d at 610, discussing the two inquiries that must be made in applying § 2106 to decide whether reassignment is appropriate. Did the district court exhibit "personal bias requiring recusal from a case"? *Id.* (citing United States v. Sears, Roebuck & Co., 785 F.2d 777, 779–80 (9th Cir. 1986)). If not, are there "unusual circumstances" that merit reassignment? *Id.* (quoting *Sears, Roebuck*, 785 F.2d at 780).

654. United States v. Lyons, 472 F.3d 1055, 1071 (9th Cir. 2007). *See also* Solomon v. United States, 467 F.3d 928, 935 (6th Cir. 2007); United States v. Robin, 553 F.2d 8, 10 (2d Cir. 1977) (en banc).

655. Beckman Instruments, Inc. v. Cincom Sys., Inc., Nos. 99-55111 & 55453, 2000 U.S. App. LEXIS 18166, at *13 (9th Cir. July 25, 2000) (unpublished table opinion). *See also* Living Designs v. E.I. Dupont de Nemours, 431 F.3d 353, 372 (9th Cir. 2005).

656. 431 F.3d 353 (9th Cir. 2005).

657. *Id.* at 372.

658. Nos. 99-55111 & 55453, 2000 U.S. App. LEXIS 18166 (9th Cir. July 25, 2000) (unpublished table opinion).

determination) and overt animosity (by denying the party's motions without review). The Ninth Circuit ordered reassignment on remand.[659]

The Third, Eighth, Eleventh, and District of Columbia Circuits have adopted the more lenient, "objective observer" standard to determine whether unusual circumstances that would merit reassignment on remand are present.[660] This test requires reassignment when "facts 'might reasonably cause an objective observer to question [the judge's] impartiality.'"[661] In this way, the appellate courts can combat not only actual bias but also the *appearance* of bias by remanding to a different judge when "reasonable observers could believe that a judicial decision flowed from the judge's animus toward a party rather than from the judge's application of law to fact."[662]

In applying the objective observer test, courts of appeals have typically found reassignment necessary when judicial conduct exceeds the bounds of unquestioned impartiality. In *Cobell v. Kempthorne*,[663] the D.C. Circuit heard the ninth appeal in six years of a case involving a dispute between the beneficiaries of Indian land trusts and their trustee, the United States. Although the district judge's conduct had not met the *Liteky* standard for personal bias,[664] the harsh language in all eight of the judge's prior opinions, coupled with a string of reversals by the D.C. Circuit, required reassignment.[665] The D.C. Circuit concluded that, taken together, these facts would leave "'an objective observer . . . with the overall impression'[666] that the district court's professed hostility to [the defendant] has become 'so extreme as to display clear inability to render fair judgment.'"[667]

659. *Id.* at *14.

660. The Fifth Circuit uses both the "objective observer" test and the three-factor test, declining to specifically adopt either. *In re* DaimlerChrysler Corp., 294 F.3d 697, 701 (5th Cir. 2002).

661. United States v. Microsoft Corp. (*Microsoft I*), 56 F.3d 1448, 1463 (D.C. Cir. 1995) (per curiam) (quoting Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 865 (1988)). *See also* Haines v. Liggett Group, Inc., 975 F.2d 81, 93 (3d Cir. 1992); United States v. Torkington, 874 F.2d 1441, 1446 (11th Cir. 1989).

662. Cobell v. Kempthorne, 455 F.3d 317, 332 (D.C. Cir. 2006).

663. 455 F.3d 317 (D.C. Cir. 2006).

664. *Id.* at 332 (noting that it is a "rare case that meets the *Liteky* standard" for disqualification, in which "the judge's views have become 'so extreme as to display clear inability to render fair judgment'") (quoting Liteky v. United States, 510 U.S. 540, 551 (1994)).

665. *Id.* at 333–35.

666. *Id.* at 335 (quoting *Microsoft I*, 56 F.3d at 1463).

667. *Id.* (quoting *Liteky*, 510 U.S. at 551). *See also* Haines v. Liggett Group, Inc., 975 F.2d 81 (3d Cir. 1992). Although not citing to § 2106 explicitly, the Third Circuit found that the district judge's use of inflammatory language threatened the "appearance of impartiality." To preserve this impartiality, the court exercised its "supervisory powers" and remanded the case to a different judge. *Id.* at 98.

Similarly, in *United States v. Tucker*,[668] the Office of Independent Counsel (OIC) sought disqualification of the district judge because of "reported connections among Judge Woods, the Clintons, and [defendant] Tucker"—connections it chronicled with various newspaper articles.[669] Although none of the articles directly linked the judge to the defendant, the Eighth Circuit ordered remand of the case to a different judge under § 2106, noting that the judge had worked with and admired Hillary Clinton and had spent a night in the White House. The court further noted that "President and Mrs. Clinton have been reported to have expressed continued support for Tucker since his indictment by the grand jury"[670] and attended a fundraising luncheon for him. In the court's view, reassignment was necessary because of the "risk of a perception of judicial bias or partiality"[671] "[g]iven the high profile"[672] of the OIC's work and the widely reported connections.

The decision in *Tucker* also involved the use of an unusual procedure for requesting disqualification of the district judge. Instead of presenting the issue to the judge directly, the appellant presented the request for the first time on appeal. The Eighth Circuit held that it was empowered, pursuant to § 2106, to direct the entry of any order "as may be just under the circumstances," including the reassignment of the case to a different district judge where, under § 455(a), the judge's "impartiality might reasonably be questioned."[673]

The D.C. Circuit, in "a departure from [its] usual practice of declining to address issues raised for the first time on appeal,"[674] considered the appellant's request for disqualification of the trial judge where "the full extent of [the judge's] actions [were] not . . . revealed until this case was on appeal."[675]

668. 78 F.3d 1313 (8th Cir. 1996).

669. *Id.* at 1325.

670. *Id.* at 1323.

671. *Id.* at 1324.

672. *Id.* at 1325.

673. *Id.* at 1324.

674. United States v. Microsoft Corp., 253 F.3d 34, 109 (D.C. Cir. 2001).

675. *Id.* at 108.

# Appendix A

## Code of Conduct for United States Judges

*(Effective March 12, 2019)*

### Canons 3C and 3D

### Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently

C. *Disqualification.*

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

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

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or lawyer has been a material witness;

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's 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 affected substantially by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is:

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

(ii) acting as a lawyer in the proceeding;

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

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

(e) the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(2) A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system; the following relatives are within the third degree of relationship: parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece, and nephew; the listed relatives include whole and half blood relatives and most step relatives;

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

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, 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, or 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;

(d) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

(4) Notwithstanding the preceding provisions of this Canon, if a judge would be disqualified because of a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge (or the judge's spouse or minor child) divests the interest that provides the grounds for disqualification.

D. *Remittal of Disqualification.* Instead of withdrawing from the proceeding, a judge disqualified by Canon 3C(1) may, except in the circumstances specifically set out in subsections (a) through (e), disclose on the record the basis of disqualification. The judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding.

# Appendix B

## For Further Reference

Charles Gardner Geyh, James J. Alfini, Steven Lubet & Jeffrey M. Shaman, Judicial Conduct and Ethics (5th ed. 2013)

Richard E. Flamm, Recusal and Disqualification of Judges (3d ed. 2018)

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# About the Author

Charles Gardner Geyh is a distinguished professor and the John F. Kimberling Professor of Law at the Indiana University Maurer School of Law. His work on judicial independence, accountability, selection, administration, procedure, and ethics has appeared in over eighty books, articles, book chapters, reports, and other publications. Before entering the academy in 1991, he clerked for Thomas A. Clark on the U.S. Court of Appeals for the Eleventh Circuit, worked as an associate at the Washington D.C. firm of Covington & Burling, and served as counsel to the House Judiciary Committee. He joined the Indiana University faculty in 1998, where he has served as the law school's associate dean for research, and has received three faculty fellowships, three Trustees teaching awards, the Wallace teaching award, and a Carnegie Fellowship.

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*Judicial Disqualification: An Analysis of Federal Law* outlines the statutory framework of federal judicial disqualification law under statutes 28 U.S.C. §§ 455, 144, 47, and 2106. The monograph revises and expands on the previous edition, and analyzes the case law, with a focus both on substantive disqualification standards and procedural requirements.

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