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Specifying grounds for judicial disqualification in federal courts.

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Specifying Grounds for Judicial Disqualification in Federal Courts

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I. INTRODUCTION

One essential component of equal justice under the law is a neutral and detached judge to preside over the court proceedings. Public confidence in the legal system is maintained when a judge has no interest in the parties, attorneys or subject matter of the litigation. *Sua sponte* or by motion of a party, a federal judge is subject to disqualification for conflicts of interest on both constitutional and statutory grounds.¹

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1. In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 821-22 (1986)(quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)), the Supreme Court held that, although the Constitution does not reach every issue of judicial qualification, "it certainly violates the [Due Process Clause of the] Fourteenth Amendment . . . to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."

The federal statute discussed in this Article establishes standards more demanding than the due process constitutional requirement. See *United States v.*

The statutory grounds for recusal,² found at 28 U.S.C. § 455, are

Couch, 896 F.2d 78, 81 (5th Cir. 1990)(collecting cases); *In re IBM Corp.*, 618 F.2d 923, 932 n.11 (2d Cir. 1980)(holding that rejection of a claim under § 455 "a *fortiori* defeats due process allegations").

2. The federal statutory provisions are similar to the 1972 Code of Judicial Conduct of the American Bar Association. See generally LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT (2d ed. 1992).

The Judicial Conference of the United States adopted the Code with modifications approved April 6, 1973 and March 6, 1975. On December 5, 1974, the Judicial Disqualification Act, 88 Stat. 1609 was enacted and codified as 28 U.S.C. § 455. In pertinent part, 28 U.S.C. § 455 (1988), currently provides:

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

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

- (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
- (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
- (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
- (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
- (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
 - (ii) Is acting as a lawyer in the proceeding;
 - (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
 - (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

The first disqualification statute in the United States was the Act of May 8, 1792, ch.36, § 11, 1 Stat. 278, which was amended by the Act of March 3, 1821, ch. 51, 3 Stat. 643. The statute was further amended by the Act of March 3, 1911, ch. 231, § 20, 36 Stat. 1090, which provided:

Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; . . .

The 1911 statute was amended by the Act of June 25, 1948, ch. 646, § 41, 62 Stat. 908. Between 1948 and 1974, the federal statute provided no guidance on the question of how to determine the substantiality of the judge's interest in a party. The statute provided:

Any justice or judge of the United States shall disqualify himself in any

divided into two parts. The first, § 455(a), is a waivable catch-all provision requiring disqualification "in any proceeding in which [the judge's] impartiality might reasonably be questioned."³ The provision "asks what a reasonable person knowing all the relevant facts would think about the impartiality of the judge,"⁴ and "applies to the varied and unpredictable situations not subject to reasonable legislative definition in which judges must act to protect the very *appearance* of impartiality."⁵

case in which he has a substantial interest . . . or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal or other proceeding therein. Acts of June 25, 1948, ch. 646. § 41, 62 Stat. 908.

3. 28 U.S.C. § 455(a)(1988). Section 455(a) is not a catchall provision encompassing both the specifically enumerated grounds under subsection (b) as well as other unspecified grounds. See *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859 n.8 (1988). Circumstances which pose risks similar to, but outside the language of the specific points of § 455(b) "may call for disqualification under § 455(a)." *In re National Union Fire Ins. Co.*, 839 F.2d 1226, 1229 (7th Cir. 1988).
4. *Roberts v. Bailar*, 625 F.2d 125, 129 (6th Cir. 1980). In *In re Mason*, 916 F.2d 384 (7th Cir. 1990), Judge Easterbrook posed the dilemma of the objective standard in § 455(a):

An objective standard is essential when the question is how things appear to the well-informed, thoughtful observer rather than to a hypersensitive or unduly suspicious person. Because some people see goblins behind every tree, a subjective approach would approximate automatic disqualification. A reasonable observer is unconcerned about trivial risks; there is always *some* risk, a probability exceeding 0.0001%, that a judge will disregard the merits. Trivial risks are endemic, and if they were enough to require disqualification we would have a system of peremptory strikes and judge-shopping, which itself would imperil the perceived ability of the judicial system to decide cases without regard to persons. A thoughtful observer understands that putting disqualification in the hands of a party, whose real fear may be that the judge will *apply* rather than disregard the law, could introduce a bias into adjudication. Thus the search is for a risk substantially out of the ordinary.

An objective standard creates problems in implementation. Judges must imagine how a reasonable, well-informed observer of the judicial system would react. Yet the judge does not stand outside the system; as a dispenser rather than a recipient or observer of decisions, the judge understands how professional standards and the desire to preserve one's reputation often enforce the obligation to administer justice impartially, even when an observer might be suspicious. Judges asked to recuse themselves hesitate to impugn their own standards; judges sitting in review of others do not like to cast aspersions. Yet drawing all inferences favorable to the honesty and care of the judge whose conduct has been questioned could collapse the appearance of impropriety standard under § 455(a) into a demand for proof of actual impropriety. So although the court tries to make an external reference to the reasonable person, it is essential to hold in mind that these outside observers are less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be.

Id. at 386.

5. *United States v. Gipson*, 835 F.2d 1323, 1325 (10th Cir.), *cert. denied*, 486 U.S. 1044 (1988). In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), the

The general language of § 455(a) is particularized but not duplicated in § 455(b), which is not waivable⁶ and which enumerates several specific disqualification standards.⁷ While the § 455(a) "appearance of partiality" standard is necessarily judgmental in nature, the § 455(b) standards deal with ascertainable facts showing partiality.⁸ Some courts regard § 455(b) as a list of "per se" circumstances requiring recusal, i.e., "situations that may involve actual bias rather than § 455(a)'s concern with the public perception of the judicial process."⁹

... § 455(a) expands the protection of § 455(b), but duplicates some of its pro-

Supreme Court quoted the lower court's views about § 455(a). The Court of Appeals stated:

"The goal of section 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible. . . . Under section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge."

Id. at 860-61 (quoting *Health Servs. Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986))(citations omitted).

6. 28 U.S.C. § 455(e)(1988) states that a judge must not accept a waiver of any ground for recusal under § 455(b). By contrast, the judge may accept such a waiver of disqualification arising under § 455(a) "provided it is preceded by a full disclosure on the record of the basis for disqualification." See *United States v. Kelly*, 888 F.2d 732, 745-46 (11th Cir. 1989)(expressing a preference for a waiver where the judge determines the need for one without asking counsel for their views).
7. See *supra* note 2.
8. See *Hampton v. Hanrahan*, 499 F. Supp. 640, 641 (N.D. Ill. 1980). The purpose of specifying situations in § 455(b) "was to avoid any ambiguity inherent in" § 455(a). *In re Letters Rogatory from Supreme Court*, 661 F. Supp. 1168, 1173 (E.D. Mich. 1987).

Section 455(a) is broader than § 455(b)(1) in that it does not contain the term "personal." However, cases applying § 455(a) also require that the nature of any bias must be personal and not judicial. See, e.g., *Liteky v. United States*, — U.S. — (1994); *United States v. Devine*, 934 F.2d 1325, 1348 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 954 (1992). Both provisions require that the basis of the alleged bias or prejudice emanate from an extrajudicial source, "not conduct which arises in a judicial context." *Apple v. Jewish Hosp. and Medical Ctr.*, 829 F.2d 326, 333 (2d Cir. 1987).

9. *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1527 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989). See also *In re San Juan Dupont Plaza Hotel Fire Litigation*, 129 F.R.D. 409, 412 (D. P.R. 1989)("Section 455(b) leaves nothing to question. It is meant to automatically exclude judges from situations that fall under the specific provisions of the statute. In that sense, Section 455(b) is meant to supplement Section 455(a) by detailing situations that Congress considers to be tantamount to actual bias."); *Herrington v. County of Sonoma*, 834 F.2d 1488, 1502 (9th Cir. 1987), *cert. denied*, 489 U.S. 1090 (1989)("Section 455(b) covers situations in which an actual conflict of interest exists, even if there is no appearance of one.")

tection as well. . . . Within the area of overlap, it is unreasonable to interpret § 455(a) (unless the language *requires* it) as implicitly eliminating a limitation explicitly set forth in § 455(b). It would obviously be wrong, for example, to hold that "impartiality could reasonably be questioned" simply because one of the parties is in the fourth degree of relationship to the judge.¹⁰

Despite legislative efforts to specify the disqualifying circumstances in § 455(b), courts repeatedly must define its scope and meaning. This Article focuses on those specific bases for recusal.¹¹ Specifically, it discusses the issues of statutory interpretation found in the case law applying § 455(b). In addition, it offers proposed amendments to the current statutory language and suggests the addition of another specific ground for judicial recusal under § 455(b).

In sum, this Article argues that periodically, it may be appropriate to reexamine the statute for the purpose of (1) adding ethical duties not currently described such as a duty to disclose disqualifying circumstances; (2) broadening preexisting duties such as the judge's duty to inform himself or herself about financial holdings; or (3) adding new disqualifying conditions such as recusals involving former law clerks. Central to this last topic is concern about how legislators should decide when judicial experience with a possible disqualifying context justifies reclassifying a § 455(a) "appearance of partiality" situation as a § 455(b) "per se" basis for recusal. If, in every questionable instance of a given form of judicial behavior, average persons would feel uncomfortable having their case presided over by a judge whose bias, relationship or interest produces an appearance of partiality, serious

10. *Liteky v. United States*, — U.S. — (1994) (emphasis in original). The Court went on to say: "Section 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." *Id.*

Since subsection (a) deals with the *objective appearance* of partiality, any limitations contained in (b) that consist of a subjective-knowledge requirement are obviously inapplicable. Subsection (a) also goes beyond (b) in another important respect: It covers *all* aspects of partiality, and not merely those specifically addressed in subsection (b). However, when one of those aspects addressed in (b) *is* at issue, it is poor statutory construction to interpret (a) as nullifying the limitations (b) provides, except to the extent the text requires.

Id. at n.2.

11. 28 U.S.C. § 144 (1988) is another federal recusal statute dealing generally with allegations of personal bias and prejudice. It requires a party seeking a judge's recusal to file a timely affidavit alleging bias.

When faced with a motion under § 144, the court focuses on the movant's affidavit. The judge must pass on the legal sufficiency of the affidavit, but not on the truth of the matters alleged. An affidavit is sufficient if it alleges facts that, if true, would convince a reasonable person that bias exists.

Chitimacha Tribe v. Harry L. Laws Co., 690 F.2d 1157, 1165 (5th Cir. 1982)(citations omitted), *cert. denied*, 464 U.S. 814 (1983).

thought should be given to placing those circumstances on the list of disqualifying conditions in § 455(b).

II. SPECIFIC STATUTORY GROUNDS FOR DISQUALIFICATION

A. Personal Bias or Prejudice

Of the disqualifying factors specified in § 455(b), personal bias or prejudice is probably the most difficult to measure.¹² In part, the difficulty in applying the personal bias standard results from its subjectivity. Section 455(a)'s objective measurement depends upon an assessment of how a reasonable person would respond to the judicial conduct. By contrast, recusal for personal bias under § 455(b) requires that a judge exhibit conduct which reveals an actual personal attitude of bias or prejudice toward a party. Here, recusal is necessary not because the conduct *appears* biased but because the judge *is* biased toward a party.¹³

In explaining the nature of personal bias or prejudice, the courts have been more articulate in defining the type of bias to which the statute does not apply than in defining the conduct that is covered by this section. As a general matter, however, the courts have held that recusal is necessary when bias or prejudice toward a party¹⁴ stems from an extrajudicial source and results in an opinion on some basis other than what the judge learned from participating in the case.¹⁵

12. See ABRAMSON, *supra* note 2, at 23 ("A familial relationship or financial interest can be identified immediately and articulated in a recusal motion. Bias is necessarily more elusive, because it focuses on the judge's personal thoughts.")

13. If a judge's conduct suggests a personal bias, there is also an appearance of partiality, but the converse does not necessarily follow. The appearance of partiality does not indicate that the judge has a personal bias. Despite the assertion that the two sections are substantively "quite similar, if not identical," *Chitimacha Tribe v. Harry L. Laws Co.*, 690 F.2d 1157, 1165 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983), the nature of the inquiry is distinct. *In re Barry*, 946 F.2d 913, 914 (D.C. Cir. 1991).

14. To be disqualifying, the bias or prejudice must be personal. Some ill will or favoritism must be directed toward a party as opposed to an attitude toward the subject matter of the proceedings.

Each judge brings to the bench a background with neighbors, friends and acquaintances, and business and social relations. The results of these associations and the impressions they create in the judge's mind form a personality and philosophical disposition toward the world. . . . In short, a judge is expected to act according to his values. Indeed, proof that a judge's mind is a complete *tabula rasa* demonstrates lack of qualification, not lack of bias.

ABRAMSON, *supra* note 2, at 24.

15. *United States v. Grinnell*, 384 U.S. 563, 583 (1966). The Supreme Court recently stated that neither the presence nor the absence of an extrajudicial source determined the outcome of a challenge for bias. Justice Scalia went on to describe the content of what he termed the extrajudicial source *factor*.

Requiring litigants to establish an extrajudicial source for the bias they allege makes a great deal of sense. After all, nearly every decision a judge makes is partisan in the sense that it is more favorable to one side than the other. Indeed, the judicial system is predicated upon the requirement that judges and juries draw conclusions about facts and behavior presented to them in the context of the judicial process. Moreover, litigation frequently unveils unsavory facts about individuals and cases. Were disqualification to result merely because uncomplimentary facts were learned in the course of litigation or because conclusions were ultimately reached based on those facts the law of recusal would surely cause the judicial system to grind to a halt.

Fortunately the law of recusal is not so inimical to dispute resolution. A judge does not create questions of partiality merely by exercising his judgment.¹⁶

When the bias or prejudice has no extrajudicial source, allegations of bias or prejudice do not require recusal unless the judge's conduct demonstrates pervasive bias against a party.¹⁷

The extrajudicial source rule is relevant to all categories of cases relating to allegations of personal bias or prejudice, which include: (1) judicial comments in court or to third parties;¹⁸ (2) judicial familiarity with the proceedings;¹⁹ (3) the judge as an "adversary" of a party;²⁰ and (4) bias for or against a party's attorney.²¹

1. *Comments in Court or to Third Parties*

Comments made by judges in court, in chambers or to the press or other organizations may suggest that the judge has prejudged a case.²²

[J]udicial rulings alone almost never constitute valid basis for a bias or partiality motion. * * * [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.

Liteky v. United States, — U.S. — (1994) (citation omitted) (extrajudicial source factor applies to § 455(a) cases as well as § 455(b) cases). The test produced a four-justice concurrence, which criticized the "impossibility of fair judgment" standard as being "difficult to distinguish from a *per se* extrajudicial source rule, the very result the Court professes to reject." *Id.* (Kennedy, J., concurring).

16. *Spangler v. Sears, Roebuck and Co.*, 759 F. Supp. 1327, 1332 (S.D. Ind. 1991).
17. *See Wiley v. Wainwright*, 793 F.2d 1190, 1193 (11th Cir. 1986); *Ouachita Nat'l Bank v. Tosco Corp.*, 686 F.2d 1291, 1300 (8th Cir. 1982), *aff'd in part on rehearing en banc*, 716 F.2d 485 (1983); *Whitehurst v. Wright*, 592 F.2d 834, 838 (5th Cir. 1979); *Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).
18. *See infra* text accompanying notes 22-27.
19. *See infra* text accompanying notes 28-33.
20. *See infra* text accompanying note 34.
21. *See infra* text accompanying notes 35-39.
22. *See, e.g., United States v. MMR Corp.*, 954 F.2d 1040, 1044 (5th Cir. 1992) (finding no personal bias where judge's comments at sentencing were based on evidence heard during case); *In re Barry*, 946 F.2d 913, 914 (D.C. Cir. 1991) (finding no personal bias where judge gave law school speech in which he discussed the merits of the case while it was still on appeal); *Pau v. Yosemite Park and Curry Co.*, 928

Though an adversely affected party probably believes that a judge who makes an adverse ruling or comment is partial to the other side, no disqualifying personal bias occurs provided the judge is willing to consider all the parties' evidence or arguments.²³ Nonetheless, judicial use of racial or religious epithets may imply that the judge is making decisions based on irrational considerations and is biased toward a party.²⁴ Similarly, intemperate remarks, such as proclaiming the guilt of a criminal defendant prior to the conclusion of the case, also may show inappropriate bias.²⁵

Judicial disqualification for public comments about pending proceedings depends on the application of the extrajudicial source rule and the substance of the comments. In *In re Barry*,²⁶ for example, a trial judge gave a law school speech in which he discussed the defendant's character and the merits of a highly publicized case while it was still on appeal. When the case was subsequently remanded to the trial judge for resentencing, the judge denied a motion for recusal. The appellate court upheld the trial judge's denial of the motion on the basis that the remarks were not extrajudicial. Although the remarks were made outside of the courtroom, "[a] judge's candid reflections of what he has inferred from the trial about the defendant's character and conduct simply do not establish bias or prejudice."²⁷

F.2d 880, 885 (9th Cir. 1991)(finding no personal bias where judge at pretrial conference stated that he had seen better cases and where judge was gruff with both counsel at trial); *In re M. Ibrahim Kahn*, P.S.C., 751 F.2d 162 (6th Cir. 1984)(finding no personal bias where the court commented about a party's bad faith in its opinion).

23. In *United States v. Thompson*, 483 F.2d 527 (3rd Cir. 1973), the judge announced a sentencing policy of a minimum prison term regarding all persons convicted of violating selective service laws, even though there was no mandatory minimum sentence provided by statute for those offenses. Here, the Third Circuit found an impermissible, personal bias by the judge because of his predilection against a class of persons who had violated the selective service laws. *Id.* at 529. By contrast, a generally tough sentencing policy by a judge does not necessarily show personal bias. *United States v. Richards*, 737 F.2d 1307, 1310-11 (4th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985). See also *United States v. MMR Corp.*, 954 F.2d 1040, 1044-45 (5th Cir. 1992)(finding no personal bias where the judge's comments at sentencing were based on evidence heard during the case).
24. See, e.g., *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1020-21 (5th Cir. 1981)(holding that certain past racial comments were insufficient to justify recusal), *cert. denied*, 456 U.S. 960 (1982).
25. See *United States v. Sutherland*, 463 F.2d 641, 650 (5th Cir.)(finding recusal unnecessary when judge could give fair and impartial trial), *cert. denied*, 409 U.S. 1078 (1972).
26. 946 F.2d 913 (D.C. Cir. 1991).
27. *Id.* at 914. The court reached its conclusion by combining the standards of §§ 455(a) and (b)(1), finding that the judge's conduct did "not necessarily create an appearance of personal bias or partiality such as to require recusal under 28 U.S.C. § 455." *Id.*

Of course, the substance of the remarks is important. General statements about the wisdom of applying particular laws probably do not show prejudice

2. *Familiarity with Proceedings*

Judicial familiarity with the proceedings generally results in a simple application of the extrajudicial source rule. The charge of bias often results from (1) a judge's review of his or her own prior decision; (2) adverse rulings against the moving party²⁸ or (3) encounters with the moving party in an earlier, unrelated case.²⁹ The gist of such a claim is that the judge's background with the issues or parties may impair the judge's ability to hear both sides with an open mind.³⁰ However, the general rule is that a "judge's mere familiarity with a party and his legal difficulties through prior judicial hearings does not automatically or inferentially raise the issue of bias."³¹ If adverse rulings were sufficient to prove bias, judges would have to step aside anytime they disagreed with a party's counsel.³² Even in contempt proceedings, when the allegedly contemptuous behavior was directed at or witnessed by the judge, recusal is not automatic. However, offensive behavior which enrages the judge does call for recusal.³³

3. *Judge as "Adversary" of Party*

At some time during a proceeding, a party may, for a variety of

of a pending case. By contrast, declarations that certain claims should never be successful or that all prosecutions should result in maximum sentences indicate prejudgment of the matter.

28. *See, e.g.,* Duckworth v. Department of Navy, 974 F.2d 1140, 1142-43 (9th Cir. 1992)(holding that appellate judge's previous adverse ruling in refusing to dismiss attorney's complaint against trial judge was made in an administrative capacity and did not prevent the appellate judge from considering an appeal of the case which attorney's client lost at the trial level).
29. *See, e.g.,* Browning v. Foltz, 837 F.2d 276, 279-80 (6th Cir. 1988)(holding that judge's denial of earlier habeas corpus petition by petitioner did not show personal bias requiring recusal as to a successive petition, even though the judge commented in denying the first petition that petitioner may have committed the crimes), *cert. denied*, 488 U.S. 1018 (1989); United States v. Page, 828 F.2d 1476, 1481 (10th Cir.)(holding that judge's knowledge obtained during trial of the case did not constitute extrajudicial bias), *cert. denied*, 484 U.S. 989 (1987); Allen-Myland v. International Business Mach. Corp., 709 F. Supp. 491, 493-94 (S.D.N.Y. 1989)(finding that judge's conduct during prior cases involving a party did not constitute personal bias). *See also* United States v. Hillsberg, 812 F.2d 328, 335 (7th Cir.)(holding that a letter from the party's parent asking for mercy did not make the judge partial), *cert. denied*, 481 U.S. 1041 (1987); United States v. Hamilton, 792 F.2d 837, 839 (9th Cir. 1986)(holding that a defendant's prior appearance before a federal judge who was then a state judge was not a reasonable basis to question the judge's impartiality and did not show personal bias or prejudice).
30. ABRAMSON, *supra* note 2, at 31. While it may be difficult to prove personal bias when a judge reviews his or her prior decisions, the appearance of partiality exists when a judge is asked, in effect, to "second-guess" the prior decision.
31. Nerison v. Solem, 715 F.2d 415, 417 (8th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984).
32. Hayes v. National Football League, 463 F. Supp. 1174, 1181 (C.D. Cal. 1979).
33. *See* Spruell v. Jarvis, 654 F.2d 1090, 1095 (5th Cir. 1981).

reasons, view the judge as an adversary and look for some reason to have a different judge decide the case. One tactic used by dissatisfied litigants is to threaten the judge or to sue the judge in a collateral lawsuit for a civil rights or similar violation. Suing or threatening all federal judges, or reporting a judge to the appropriate judicial disciplinary tribunal fails to establish personal bias on the part of the judge.³⁴

4. *Bias Toward Counsel*

Section 455(b)(1) requires recusal when the judge has a personal bias or prejudice toward a *party*. Courts rarely find that animosity or affability between a judge and an attorney requires judicial disqualification under this statutory section.³⁵ Typically, the alleged bias derives from the performance of judicial duties in the instant or an unrelated proceeding and, therefore, does not result from an extrajudicial source.

[I]t is not at all unusual, given the combative nature of litigation for a judge to have an attorney before him with whom the judge has had prior acerbic relations. It is one of the earliest and most fundamental lessons of judging that a judge must rule on the merits without regard to the personality of the attorney or any unpleasant experiences the judge may have had with the attorney

34. See *United States v. Whitesel*, 543 F.2d 1176, 1181 (6th Cir. 1976)(holding that filing suit against all judges to halt the case at bar does not indicate judicial partiality), *cert. denied*, 431 U.S. 967 (1977). See also *Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1355-56 (3d Cir. 1990)(finding no partiality when a party's spouse's filed a complaint against the judge with the Judicial Inquiry Board); *United States v. Eisenberg*, 734 F. Supp. 1137, 1167 (D.N.J. 1990)(holding that the defendant's criticism of the judge's handling of the codefendant's case did not create an appearance of partiality); *United States v. Mattison*, 731 F. Supp. 831, 832 (M.D. Tenn. 1990)(threatening all federal judges does not require recusal; "a rule which would disqualify everybody must be held to disqualify nobody").

Another basis for recusal motions based on personal bias relates to the judge's extrajudicial familiarity with a party. With federal judges, the issue arises infrequently for two reasons. First, a judge from a small town may have a standing order that he or she will not sit in a case involving a party from his or her hometown. Second, with far fewer federal cases than state cases coming from the same geographic area, the incidence of a friend's case coming before the judge is relatively remote. Moreover, fellow judges can hear the cases involving the judge's long-time friends. Courts appear to exhibit less tolerance for this type of alleged favoritism. The basis for recusal is likely to be grounded more in the appearance of partiality than it is in any proof of personal bias. For example, in *Spires v. Hearst Corp.*, 420 F. Supp. 304 (C.D. Cal. 1976), the appearance of partiality led a judge to disqualify himself when a complimentary news article was written by a reporter for a party in a case before the judge.

35. Instead, recusal is sought through application of the § 455(a) appearance of partiality standard. See, e.g., *In re Allied Signal, Inc.*, 891 F.2d 974, 976 (1st Cir. 1989)(finding that a series of social and business relationships between the judge and counsel for a party before the judge's appointment to the bench did not cast significant doubt on the judge's impartiality under § 455(a)).

Bias solely against an attorney may also offend due process. See, e.g., *United States v. Singer*, 710 F.2d 431, 437 (8th Cir. 1983).

in the past.³⁶

Generally, a party need not fear that clashes between judge and attorney will color the court's perception of the party. "If anything, a court's impatience with counsel is often charged with the realization that the client is not getting what the client paid for."³⁷ However, recusal may be appropriate if it can be shown that the judge's extrajudicial bias or prejudice toward the attorney can be imputed to the attorney's client,³⁸ or if the attorney and party share a characteristic, such as race or ethnic background, and the bias is based on that shared characteristic.³⁹

It is tempting simply to add the aforementioned personal bias categories to § 455(b)(1) as specific but not exclusive examples of personal bias. While it would be possible to amend the federal statute to state precise types of bias and thereby avoid reliance on the judiciary, such

36. *United States v. Helmsley*, 760 F. Supp. 338, 341 (S.D.N.Y. 1991), *aff'd*, 963 F.2d 1522 (2d Cir. 1992).

37. *Spangler v. Sears, Roebuck and Co.*, 759 F. Supp. 1327, 1335 (S.D. Ind. 1991).

38. *See, e.g., United States v. Jacobs*, 855 F.2d 652, 656 n.2 (9th Cir. 1988) (finding that recusal may be warranted if the prejudice against the attorney is so virulent as to amount to bias against the party); *In re Beard*, 811 F.2d 818, 830 (4th Cir. 1987) (holding that alleged bias against an attorney must actually cause bias to the party).

See Diversified Numismatics, Inc. v. City of Orlando, 949 F.2d 382, 385 (11th Cir. 1991) (holding that prior recusals by the judge in cases in which counsel was involved did not show bias toward counsel in the instant case); *Gilbert v. City of Little Rock*, 722 F.2d 1390, 1398-99 (8th Cir. 1983) (also finding no bias where the judge had recused himself in previous cases involving counsel), *cert. denied*, 466 U.S. 972 (1984).

Cf. Jenkins v. Sterlacci, 849 F.2d 627, 634-35 (D.C. Cir. 1988) (finding no personal bias where a special master's private practice included an administrative appeal in which he was opposed by the same law firm appearing on behalf of party in the case over which he was presiding as special master); *In re Snowshoe Co.*, 137 B.R. 619, 621-22 (N.D. W. Va.) ("[A] judge's bias in favor of an attorney need not affect the judge's ability to decide cases fairly where that attorney represents one of the parties to the action but is not otherwise an interested party."), *aff'd*, 953 F.2d 639 (4th Cir. 1991).

See also In re Continental Airlines Corp., 901 F.2d 1259, 1261-63 (5th Cir. 1990) (holding that the judge's acceptance of a job with a law firm involved in the case shortly after issuing important orders created an appearance of partiality); *Panzardi-Alvarez v. United States*, 879 F.2d 975, 984 (1st Cir. 1989) (suggesting that extreme cases of judicial favoritism or hostility toward a party's attorney are rare), *cert. denied*, 493 U.S. 1082 (1990).

39. *Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

Allegations of judicial bias toward counsel may also be based upon the judge's employment of counsel. Generally, recusal is unnecessary if the judge's interest in litigation was official rather than personal and the litigation has been concluded. *See, e.g., United States v. Zagari*, 419 F. Supp. 494, 505-06 (N.D. Cal. 1976) (finding that recusal was not warranted where the prosecutor represented the judge in proceedings related to a motion to quash a subpoena because the matter involved the judge's judicial conduct).

amendments may omit unforeseen but important types of bias. In addition, the amendments would do no more than list a variety of examples of bias that are already well-known to the courts. Because of the subjective nature of personal bias, a list of examples of bias seems to be the most any statutory modification of § 455(b)(1) could accomplish.

B. Relationships and Interests

1. Past Private Relationships

Section 455(b)(2) prohibits a judge from presiding over a matter in controversy if he or she, while in private practice, was involved either as (1) former counsel or as an associate of counsel in the matter, or (2) a material witness in the matter.⁴⁰ The focus of this prohibition is the judge's association with a matter prior to becoming a judge.⁴¹ As the result of a prior professional connection with a case, the judge may

40. 28 U.S.C. 455(b)(2)(1988). This subsection was amended in 1974 to substitute objective criteria for the former subjective approach whereby the opinion of the judge was conclusive. Under the current section:

A judge is disqualified . . . when any one of four circumstances exist: 1. When the judge in private practice served as a lawyer in the matter in controversy; 2. When a lawyer with whom the judge practiced law served during such association as a lawyer concerning the matter in controversy; 3. When the judge has been a material witness concerning the matter in controversy; or 4. When the lawyer described in circumstance (2) has been a material witness concerning the matter in controversy.

In re Norton, 119 B.R. 332, 338 (Bankr. N.D. Ga. 1990). The *Norton* court concluded that the nature of a bankruptcy proceeding did not require judicial recusal from the entire case. *Id.* at 340.

The 1990 amendments to the American Bar Association Code of Judicial Conduct, upon which the federal statute is largely based, deleted the phrase "or such lawyer" from its text relating to material witnesses because "it created ambiguity as to whether it referred to any lawyer with whom the judge had practiced law - in which case the rule would be too broad, or to a lawyer serving on the matter with whom the judge was associated - in which case the phrase would be redundant." AMERICAN BAR ASSOCIATION, CODE OF JUDICIAL CONDUCT 18 (Discussion Draft 1989).

41. Disqualification may be appropriate even if the judge was unaware of his or her associates' earlier involvement in a matter. *Dixie Carriers, Inc. v. Channel Fueling Service, Inc.*, 669 F. Supp. 150, 152 (E.D. Tex. 1987). See also *E. & J. Gallo Winery v. Gallo Cattle Co.*, 955 F.2d 1327, 1342 n.7 (9th Cir. 1992) (finding a judge's lack of actual knowledge his former law firm's involvement with the plaintiff to be irrelevant if a person knowing all the facts could reasonably question the judge's partiality) (citing *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847 (1988)), amended and superseded as to other issues, 967 F.2d 1280 (1992).

A judge's mere former professional association with counsel appearing in the case at bar does not satisfy the language of § 455(b)(2), or the § 455(a) appearance of impropriety standard. See, e.g., *Alvarado Morales v. Digital Equipment Corp.*, 699 F. Supp. 16, 18 (D.P.R. 1988); *Bumpus v. Uniroyal Tire Co.*, 385 F. Supp. 711, 714 (E.D. Pa. 1974). Similarly, a judge's prior association with an attorney who is a trustee for a party may not raise an appearance problem, especially when the

have significant knowledge about the case. This standard is especially significant for a new judge. Theoretically, the longer a judge is on the bench, the less frequently the judge's prior professional relationships will require disqualification.

Most of the case law construing § 455(b)(2) relates to interpretation of the phrase "matter in controversy." A judge is not forever disqualified by the fact that the judge or someone with whom the judge practiced represented a party on an *unrelated* matter in the past.⁴² Disqualification is necessary only if the judge or the judge's former associate represented the party on the *same* matter.⁴³

[S]ome matters that might otherwise be thought "unrelated" to the proceeding are considered sufficiently related to require disqualification. . . . That Congress chose to ground disqualification in section 455(b)(2) on a judge's relation to service "concerning the matter" suggests that disqualification is required where the proceeding relates in any broad sense to the suspect matter, even though such has not been made part of the current proceeding.⁴⁴

Effective judicial application of the term "matter in controversy" is necessary to address the valid concerns of § 455(b)(2). Suppose, for example, that in private practice a judge had represented a police officer charged with the crime of seriously assaulting a victim. Following an acquittal, the defense attorney became a judge, and the victim sued civilly for injuries incurred during the assault. The civil case now before the judge is neither the same "proceeding" as defined by statute⁴⁵ nor the same "case"⁴⁶ as interpreted by the courts in other

trustee is not expected to testify and has no personal liability in the case. *See Gray v. University of Arkansas*, 883 F.2d 1394, 1397-98 (8th Cir. 1989).

42. *Chitimacha Tribe v. Harry L. Laws Co.*, 690 F.2d 1157, 1166 (5th Cir. 1982)(holding that recusal was not required where the judge, while in private practice, represented a party on an unrelated matter), *cert. denied*, 464 U.S. 814 (1983). *See also United States v. Lovaglia*, 954 F.2d 811, 815-16 (2d Cir. 1992)(holding that the judge's prior representation of the crime victim regarding unrelated matters was not a basis for disqualification under § 455(a)); *National Auto Brokers v. General Motors Corp.*, 572 F.2d 953, 958 n.9 (2d Cir. 1978)(reaching the same conclusion under either the pre-1974 or post-1974 federal statute), *cert. denied*, 439 U.S. 1072 (1979).

Courts use the § 455(a) appearance of partiality standard when the judge as an attorney *opposed* an instant party in an unrelated case. *United States v. Hurst*, 951 F.2d 1490, 1503 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1952 (1992).

43. *See, e.g., Hauptmann v. Wilentz*, 555 F. Supp. 28, 32 (D.N.J. 1982)(finding no basis for recusal when the judge's association with the attorneys who represented clients on matters related to the case at bar did not begin until approximately twenty years after the earlier proceeding had concluded). *See also Hampton v. Hanrahan*, 499 F. Supp. 640, 644-45 (N.D. Ill. 1980)(finding that recusal was not necessary under § 455(b)(2) where a fellow attorney's relation to the matter in controversy was as a client, not as an attorney; case reassigned to another judge on § 455(a) appearance of partiality grounds).

44. *In re Letters Rogatory from Supreme Court*, 661 F. Supp. 1168, 1174 (E.D. Mich. 1987).

45. *See infra* note 51.

recusal contexts. By applying a transactional standard to "matter in controversy," the differences in the parties and the nature of the relief sought in the two cases become immaterial to the issue of disqualification. The same course of events is relevant to both cases, i.e., the events leading to the assault, the facts relating to the performance of duty, and the relative use of force are relevant in each case. Both cases concern the same "matter in controversy."⁴⁷

46. 28 U.S.C. § 455(b)(3) refers to a judge's prior role as a governmental employee in the "case in controversy." See *infra* note 52.

47. See *Rushing v. City of Georgiana*, 361 So.2d 11, 12-13 (Ala. 1978), for a comparable fact pattern where the court found one "matter in controversy" under Canon 3C(1)(b) of the American Bar Association's Code of Judicial Conduct.

In re Rodgers, 537 F.2d 1196 (4th Cir. 1976), applied the "matter in controversy" in broader terms. The judge's former law partner represented the owners of a race track, participating in drafting proposed legislation and making an unsuccessful offer to purchase another race track. That race track later was purchased by the defendants who were charged with mail fraud and racketeering by using unlawful means to secure passage of the same legislation. These defendants planned to call the judge's former law partner as a witness to show that the conduct for which they were indicted was no more culpable than that of the client represented by the law partner. Although the prosecution's case consisted of the charges in the indictment, the case before the court involved the defenses as well. The Fourth Circuit held that the former partner's work for the client before the judge withdrew from the law firm was a "matter in controversy" within the meaning of the federal disqualification statute, and that the judge was therefore disqualified from presiding further in the case. *Id.* at 1198. The appellate panel in *Rodgers* did not require the replacement judge to review all the rulings of the disqualified judge because the petitioners agreed that the judge was not personally biased or prejudiced toward them. *Id.*

In *Dixie Carriers, Inc. v. Channel Fueling Service*, 669 F. Supp. 150 (E.D. Tex. 1987), a party moved to disqualify the judge from presiding over a damage suit for fraud. Previously, one of the judge's partners had been counsel in a suit to perpetuate testimony in order to learn about possible defamation, illegal release of information about barge cargo, and the loss of fuel from specific barge voyages. The court denied the motion, citing *Rodgers*, but recused itself due to the appearance of partiality.

Other courts have given the term "matter in controversy" a more limited meaning. In *Little Rock Sch. Dist. v. Pulaski County Special School District*, 839 F.2d 1296 (8th Cir. 1988), *cert. denied*, 488 U.S. 869 (1988), the court found that the trial judge's former law partner's submission of an amicus brief in a case involving "to a large extent" different issues and remedies did not require recusal. The Eighth Circuit found that "the question of what kinds of cases are sufficiently related for the purposes of § 455(b)(2) would remain a question of judgment and degree." *Id.* at 1302. The earlier case formed part of the historical background of the dispute in the later case. *Id.* at 1301.

In another case, the Eighth Circuit affirmed the denial of a motion to recuse. *Patterson v. Masem*, 774 F.2d 251, 254 n.2 (8th Cir. 1985). The trial judge had denied a motion to consolidate a case with the older case referred to in the *Little Rock* case. The court reasoned that, because the trial judge denied the motion to consolidate, the "matter in controversy" in the older case and the current case were not the same. *Id.* The appellate court may have reached the correct result, but grounding the denial of the recusal motion on the exercise of discretion in

The fact that two lawsuits have some facts in common is not determinative of the recusal issue. For example, in *United States v. Alabama*,⁴⁸ the judge had represented a party alleging a violation of equal protection in the recruitment of African-American athletes and the award of scholarships by the University of Alabama. A case assigned to the judge alleged racial segregation in all institutions of higher learning in Alabama. The motion to recuse under § 455(b)(2) was denied because the legal theories and the relevant facts of the cases were different. While the former case concerned policies and practices thirteen years earlier, the pending case challenged the vestiges of *de jure* segregation in all of the state universities. The court concluded that to "hold that the actions are the same 'matter in controversy' under § 455 would suggest that [the judge] is precluded from presiding over any kind of race discrimination claim against" any defendant.⁴⁹

The meaning of the term "matter in controversy" defines the scope of the § 455(b)(2) prohibition. A well-drafted statute reflecting the case law and clarifying the breadth of its coverage would both preclude a judge from presiding in a case in which the judge was formerly counsel or an associate of counsel in the matter in controversy and include a definition of "matter in controversy." As amended, § 455(b)(2) would require disqualification:

(2) Where in the private practice of law, the judge's connection with a matter in controversy was as:

- (i) an attorney;
- (ii) an associate of the attorney serving during the association as counsel; or
- (iii) a material witness.

A "matter in controversy" is the same transaction or course of events.

This draft of the statutory section explains in clearer language the proper focus of the prohibition which is disqualifying the judge based upon prior affiliations with the matter. As to the definition of "matter in controversy", a court still must examine the facts of each claim to resolve a recusal motion, just as it does, for example, in assessing an objection to joinder of parties or a defense of claim preclusion. The important purpose in defining "matter in controversy" is to express the intention that it is a broader term than the standards of "case" or "proceeding"⁵⁰ have previously been defined or interpreted.

deciding the consolidation motion is illogical. The recusal standards are objective and once satisfied leave no room for discretion.

48. 582 F. Supp. 1197 (N.D. Ala. 1984).

49. *Id.* at 1207.

50. *See infra* notes 51-52.

2. *Prior Government Employment*

Recusal is also necessary when a federal judge, as a government employee, served as counsel or an adviser in a proceeding⁵¹ or expressed an opinion concerning the merits of the particular case in controversy.⁵² The justification for a separate prohibition for former government employees is recognition that lawyers in a governmental agency do not necessarily have the same type of relationship with other lawyers in the agency⁵³ as do lawyers in private practice. The prohibition is "intended to cover the situations which can occur during the first two or three years of judicial service of a lawyer who is appointed to the bench from service as a government lawyer."⁵⁴ Two issues dominate the case law: 1) the similarities and differences between the earlier governmental employment and the current case before the judge⁵⁵ and 2) the extent of prior participation as a governmental employee necessary to justify disqualification.⁵⁶

A typical application of the provision involves the former-prosecutor-now-judge who pursued criminal investigations or indictments against a defendant. Later, when the government is conducting an

51. The statutory definition of a "proceeding" "includes pretrial, trial, appellate review, or other stages of litigation". 28 U.S.C. § 455(d)(1)(1988). The use of the term "proceeding" in the first portion of § 455(b)(3) is probably narrower than the term "case" as used in the pre-1974 statute and the term "matter in controversy" used in § 455(b)(2).

52. 28 U.S.C. § 455(b)(3)(1988). Use of the phrase "particular case in controversy" differs significantly from the phrase "matter in controversy" found in § 455(b)(2). A case in controversy appears to refer to a specific civil claim for relief or criminal charge, in contrast to the matter in controversy previously discussed. The latter term, as interpreted by state courts, has been given a broader meaning, analogous to a transactional or occurrence standard. See ABRAMSON, *supra* note 2, at 53-54.

Another provision of § 455(b)(3) requires disqualification when the judge, as a government employee, was a material witness in a proceeding. This standard also requires analysis beyond simple application of the language of the statute. The case law construing the meaning of a material witness under the Code of Judicial Conduct suggests an analysis of whether the witness is offering testimony concerning some fact affecting the merits of the case about which no other witness will testify. See, e.g., Callahan v. State, 557 So. 2d 1292, 1307-08 (Ala. Crim. App.), *aff'd*, 557 So. 2d 1311 (Ala. 1989), *cert. denied*, 498 U.S. 881 (1990).

53. AMERICAN BAR ASSOCIATION, CODE OF JUDICIAL CONDUCT, Commentary to Canon 3 (1972). "[T]o say that all lawyers in the Justice Department or the FCC or any other agency are to be considered in the same way that you would consider the lawyers in a private law firm, [is] too sweeping a disqualification and there [is] no good reason for it. . . ." *Hearing on S. 1064 before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary*, 93d Cong., 1st Sess., 100 (1971-1973)(Statement of E. Thode).

54. H.R. REP. NO. 1453, 93d Cong., 2d Sess. 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355-56.

55. See *infra* text accompanying notes 57-59.

56. See *infra* text accompanying notes 60-63.

other criminal investigation of the same defendant, the person who was the prosecutor in the earlier case is now the judge. Disqualification is required when the judge is asked to hear the same case in which the judge participated as counsel,⁵⁷ *i.e.*, the former and current cases have a common, single transaction or event at issue.⁵⁸ “[A]bsent a *specific* showing that that judge was previously involved with a case while [a prosecutor] that he or she is later assigned to preside over as a judge,”⁵⁹ no recusal is necessary.

The cases also resolve the recusal issue by examining the nature and extent of the former prosecutor's participation in the earlier case. A former prosecutor who was counsel of record for the United States in an earlier proceeding cannot preside over the same case as a judge.⁶⁰ One step removed from actual participation as counsel of record is the direct supervision of the prosecutor who is trying the case. Recusal appears necessary if the current case is factually identical to the former case *and* the judge, as a former supervisory attorney, either advised counsel of record about the case or otherwise expressed an opinion about the merits of the case. A situation yet another step removed from direct participation occurs when the judge's prior contact with a case was merely administrative, such as where the judge's relationship with a case was strictly formal while serving in a govern-

57. *United States v. Di Pasquale*, 864 F.2d 271, 278 (3d Cir. 1988)(citing *In re Grand Jury Investigation*, 486 F.2d 1013, 1015 (3d Cir. 1973)), *cert. denied sub nom. Testa v. United States*, 417 U.S. 919 (1974)).

58. When the transactions are different, recusal is unnecessary. *See United States v. Heffington*, 952 F.2d 275, 279 (9th Cir. 1991)(finding recusal unnecessary where the judge, as a federal defender, represented the instant defendant for the same category of offense five years earlier); *United States v. Outler*, 659 F.2d 1306, 1312-13 (5th Cir. 1981)(holding that a prosecutor in a prior probation revocation can, as a U.S. Magistrate, sign a search warrant in a different case involving a different factual transaction), *cert. denied*, 455 U.S. 950 (1982).

59. *United States v. Di Pasquale*, 864 F.2d 271, 279 (3d Cir. 1988), *cert. denied*, 492 U.S. 906 (1989). Often, the judge can simply observe that the acts that are the basis of the current charge occurred after the judge's departure from the prosecutor's office. *See, e.g., id.* at 278. *Accord Kendrick v. Carlson*, 995 F.2d 1440, 1444 (8th Cir. 1993).

Somewhat less precise language was used in *United States v. DeLuna*, 763 F.2d 897, 908 (8th Cir.), *cert. denied sub nom. Thomas v. United States*, 474 U.S. 980 (1985), where the court stated: "If 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."

60. *See, e.g., Mixon v. United States*, 620 F.2d 486 (5th Cir. 1980). In this case, a Magistrate was the Assistant United States Attorney who represented the prosecution in an earlier motion to reduce the sentence. When a later motion to reduce the sentence was filed, the former prosecutor had become the Magistrate. Although neither the Magistrate nor counsel noticed the problem at the time and the district court ratified the Magistrate's findings of fact and conclusions of law, the Fifth Circuit treated the proceedings and the disposition by the district court as a nullity because of the disqualification. *Id.* at 487.

mental position such as United States Attorney or Attorney General.⁶¹ In the statute,

the word "participated" implies a higher degree of activity than simply being "of counsel." The latter association with a case arises simply because the prosecutor holds his office. One need do nothing to be "of counsel." "Participation" connotes activity, however. One cannot "participate" without doing something.

. . . Mandatory disqualification then is restricted to those cases in which a judge had previously taken a part, albeit small, in the investigation, preparation, or prosecution of a case.⁶²

Even a merely administrative role in a case may suggest participation, however. For example, a United States Attorney may review and approve immunity applications or review and submit applications for the empanelment of a grand jury. Such activities may suggest participation which later requires disqualification.⁶³ In *Muench v. Israel*,⁶⁴ after a judge denied a petition for habeas corpus, the petitioner sought relief from the judgment because the judge should have refused to consider the merits of the petition. The judge formerly represented the State of Wisconsin as Attorney General pursuant to statutory duties at the time petitioner had appealed a criminal conviction to the Wisconsin Supreme Court. The habeas corpus petition raised issues similar to those in the state appeal. In denying petitioner's motion for relief from judgment, the court found that the substance of the relationship to the state appeal had been "merely pro forma".⁶⁵ To reach the conclusion that he had not "participated" as counsel in the state appeal, the judge examined the structure of the Attorney General's office and the case management procedures at the time he had served as Attorney General.⁶⁶

61. *Muench v. Israel*, 524 F. Supp. 1115, 1118 (E.D. Wis. 1981). See John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 624 (1947) (observing that "there is no impropriety where the judge's role as prosecutor has been largely formal, as in the case of Attorneys General, who have only theoretical responsibility for minor cases in their departments"). For examples of United States Supreme Court Justices who declined recusal in Justice Department cases where their connection with the cases while employed there was purely formal, see *Laird v. Tatum*, 409 U.S. 824 (1972), and *Schneiderman v. United States*, 320 U.S. 118 (1943).

62. *United States v. Gipson*, 835 F.2d 1323, 1326 (10th Cir. 1988) (holding that judge who had been a United States Attorney during the initial prosecution of the defendant, but did not participate as counsel, was not disqualified from presiding over the case).

63. *Cf. United States v. Pepper & Potter, Inc.*, 677 F. Supp. 123, 125 (E.D.N.Y. 1988) (finding it unnecessary to resolve the participation issue, concluding instead that recusal was required under § 455(a)).

64. 524 F. Supp. 1115 (E.D. Wis. 1981).

65. *Id.* at 1119.

66. *Id.* at 1118-19.

There are no facts in the instant case to suggest petitioner's appeal to the Wisconsin Supreme Court was handled differently than the usual procedure followed by the Criminal Appeals Unit, or that this Court stepped

Rather than focusing on the scope of participation, some courts have examined the timing of the employee's departure from the government position later giving rise to concern about judicial objectivity. In *United States v. Kelly*,⁶⁷ the United States Attorney became a district judge after the offense was committed but before it was discovered, investigated or prosecuted. The appellate court affirmed the judge's denial of the recusal motion under any possible reading of the statute finding that the relevant date for deciding the disqualification issue was the date the prosecution was initiated, not the date of the underlying offense. First, no "proceeding"⁶⁸ had begun when the judge was still a prosecutor. Second, the judge had not "participated" by taking some active role in the proceeding. Finally, the judge had not been counsel "concerning" the case because the investigation had not begun until after the judge left office.⁶⁹

In summary, an approach focusing on the extent of a judge's earlier participation in a case as a governmental employee results in inconsistent application of the statutory standard. Is there a more precise way to express the legislative concern in this area and spare courts the task

outside its predominant role and assumed an active posture in petitioner's case. Indeed, this Court did not have personal knowledge of that appeal, nor did it express any opinion on the merits of petitioner's case. To say that this Court "participated as counsel" in petitioner's appeal would be to ignore the realities of case management within the complex bureaucracy of the Wisconsin Attorney General's Office.

Id. at 1119. See *Tedder v. Odel*, 890 F.2d 210 (9th Cir. 1989)(affirming lower court's denial of a motion for disqualification where the defendant in a civil rights claim against the state assistant Attorney General argued for recusal on the basis that the judge once held the same governmental position as the defendant).

67. 556 F.2d 257 (5th Cir. 1977), *cert. denied*, 434 U.S. 1017 (1978).

68. See *supra* note 51.

69. *United States v. Kelly*, 556 F.2d 257, 263 (5th Cir. 1977), *cert. denied*, 434 U.S. 1017 (1978).

The statutory prohibition applies not only to those who have acted as counsel or adviser, but also to judges who, as government employees, expressed an opinion about the merits of a particular case. Undoubtedly, counsel of record and their advisers express oral or written views as participants in the adversary process. Other government employees may have opportunities to express their views as well. See *City of New York v. Exxon Corp.*, 683 F. Supp. 70, 73 (S.D.N.Y. 1988)(finding no appearance of partiality by a judge who, as a public employee, had made general statements concerning the investigatory competence of the department the judge had headed, but who had not made specific statements about the particular personnel or investigations that were the subject of case at bar).

In *Limeco, Inc. v. Division of Lime*, 571 F. Supp. 710 (N.D. Miss. 1983), a party successfully sought recusal of the judge who, forty-one years earlier, as a legislator, had voted against a measure establishing limestone crushing plants as a state-sponsored function. Thus, the party argued, the judge had expressed an opinion on the merits of state-run lime crushing plants, an issue apparently implicit in the case at bar. Because the judge could not recall the vote itself, much less rationale for the vote, the judge granted the recusal motion based on the appearance of a long-standing adverse opinion about state operation of lime crushing plants.

of construing terms like "participated" or "expressed an opinion"? The following redrafted subsection would mandate recusal:

- (3) Where as a government employee, the judge:
- (i) as an attorney or a material witness participated personally and substantially in a proceeding; or
 - (ii) expressed an opinion about the merits of a matter in controversy.

This statutory maxim for judicial recusal is clearer and more precise than the current statute. It also accurately reflects the case law at this point. The reference to personal and substantial participation more clearly defines the scope of the judge's prior participation in a matter, and is analogous to the Model Rule of Professional Conduct standard for attorneys moving from government to private employment.⁷⁰ Even if the judge did not participate personally and substantially, the judge can still be disqualified by having expressed an opinion on the merits of the matter in controversy. Moreover, even without *both* personal and substantial participation by the judge, the possibility of recusal remains under the § 455(a) "appearance of partiality" residuary standard.

3. Family Relationships

Judicial disqualification may also be necessary when the judge or a close relative of the judge has some connection with a proceeding.⁷¹ Disqualification is mandatory when a relative of the judge or the judge's spouse, who falls within the third degree of relationship as calculated according to the civil law system,⁷² is involved in the proceeding. Involvement in a proceeding requires disqualification if the judge or the close relative: 1) is a party or an officer, director, or trustee of a party; 2) is, to the judge's knowledge, likely to be a material witness; 3) is acting as an attorney or 4) is known by the judge to have an interest that could be substantially affected by the outcome.⁷³

Two issues dominate the case law on recusal when the judge or the

70. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(a)(1983).

71. See *supra* note 51 for a discussion of the statutory definition of "proceeding."

72. 28 U.S.C. §§ 455(b)(5), (d)(2)(1988). Because the civil law system traditionally recognizes only blood relationships, the third degree of relationship standard disqualifies on the basis of a judge's or the judge's spouse's parent, grandparent, uncle, aunt, brother, sister, niece, nephew, son, or daughter.

The American Bar Association's Code of Judicial Conduct was amended in 1990 to explicitly define the third degree of relationship. It includes the above relatives, plus great-grandparents and great-grandchildren. AMERICAN BAR ASSOCIATION, CODE OF JUDICIAL CONDUCT, Terminology (1990).

73. 28 U.S.C. § 455(b)(5)(i)-(iv)(1988). The last of the four disqualifying criteria is discussed in the text dealing with financial and other interests. See *infra* notes 103-106 and accompanying text.

Despite the broad statutory prohibition against a judge presiding over a case where the judge's relative is involved, § 455(c) limits the judge's duty of inquiry

judge's relative is a party to the proceeding. First, despite the apparent clarity of the statute, automatic disqualification is unnecessary when the court perceives that the judge or a relative has been named as a party by a plaintiff engaged in judge-shopping.⁷⁴ Similarly, when all judges are named as parties to a lawsuit, the applicable legal maxim is that if all are disqualified, none is disqualified.⁷⁵ The second primary issue involves the situation in which the judge or a close relative is a member of the class in a class action. Prior to certification of the class, it may be permissible for the judge to issue orders.⁷⁶ Once the judge or close relative is a member of a certified class, the defini-

about such matters to the financial interests of the judge, the judge's spouse and the judge's minor children residing in the judge's household.

Other circumstances involving judges' relatives are decided under the § 455(a) appearance of partiality standard. *See, e.g., In re* of Billedeaux, 972 F.2d 104, 105-06 (5th Cir. 1992)(holding that a claim that the judge's spouse is a partner in the firm which, though not counsel in the instant case, represents the instant party in other cases, is too remote and speculative to warrant recusal); *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864, 871 (9th Cir. 1991)(finding that the employment relationship between a party and the judge's child is one factor to consider; other factors are number of employees, the nature of the judge's child's position, and whether the child's employment area is involved in case), *cert. denied*, 112 S. Ct. 1667 (1992); *Perkins v. Spivey*, 911 F.2d 22, 33 (8th Cir. 1990)(finding no appearance of partiality in a labor law case when the judge's spouse is a labor law specialist not connected with the case), *cert. denied*, 499 U.S. 920 (1991); *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 882 F.2d 1556, 1568-69 (Fed. Cir. 1989)(holding that employment by a party of the judge's offspring does not, in and of itself, mandate disqualification), *cert. denied*, 493 U.S. 1076 (1990); *In re Faulkner*, 856 F.2d 716, 721 (5th Cir. 1988)(finding the appearance of partiality where a relative communicated to the judge material facts and opinions about the case before the judge and where the relative was an important participant in transactions forming the basis for the indictment); *TV Communications Network, Inc. v. ESPN, Inc.*, 767 F. Supp. 1077, 1079-80 (D. Colo. 1991)(finding no appearance of partiality when the judge's relative was employed by a shareholder of a party); *In re Hathaway Ranch Partnership*, 116 B.R. 208, 215 (Bankr. C.D. Cal. 1990)(finding no question of the judge's impartiality when the judge's spouse's law firm represented a bankruptcy litigant in cases other than the one before the judge).

74. A blatant example of judge-shopping occurred in *Andersen v. Roszkowski*, 681 F. Supp. 1284, 1289 (N.D. Ill. 1988), *aff'd*, 894 F.2d 1338 (1990), where the plaintiff added the judge as a party-defendant only after the judge dismissed the complaint. The judge denied the motion for recusal under 28 U.S.C. § 455(b)(5)(i). *Id.* at 1289.

An alternative statutory source for denying such motions is the appearance of partiality standard in § 455(a). When a plaintiff is dissatisfied with the judge assigned to the case before or after pretrial rulings, the plaintiff may allege personal bias, but usually loses the recusal motion. *See, e.g., State v. Meyer*, 571 P.2d 550, 553 (Or. Ct. App. 1977); *Commonwealth v. Leventhal*, 307 N.E.2d 839, 841 (Mass. 1974).

75. *See, e.g., United States v. Whitesel*, 543 F.2d 1176, 1181 (6th Cir. 1976), *cert. denied*, 431 U.S. 967 (1977).
76. *See, e.g., New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 719 F.2d 733, 734-35 (5th Cir. 1983)(referring to a letter from the Advisory Committee on Codes of Judicial Conduct of the Judicial Conference of the United States); *LeRoy v.*

tion of a "party" becomes important. In the absence of a statutory definition, courts distinguish between classes where some financial or other interest is at stake⁷⁷ (possibly requiring disqualification) and other classes such as civil rights classes (no disqualification) where the judge's concern is no different than any other judge or lay person.⁷⁸

Disqualification is also required when the judge knows that he or she is likely to be a material witness in the proceeding. "The purpose of this provision is to prevent a judge from having to pass on the competence and veracity of his own testimony given with respect to a matter presently in controversy before him."⁷⁹ A material witness is a person who gives testimony about some fact affecting the merits of a case and about which no other witness will testify. A judge's background information about the controversy at issue does not make the judge a material witness.⁸⁰

Recusal is necessary when a relative of the judge is acting as a lawyer in the proceeding.⁸¹ Judicial interpretation of the statutory prohi-

City of Houston, 592 F. Supp. 415, 419 (S.D. Tex. 1984) ("If the case at bar is not a class action, I am only a member of a putative class.").

77. See *infra* text accompanying notes 85-106.

78. *In re* City of Houston, 745 F.2d 925, 929-30 (5th Cir. 1984). In *Houston*, the court observed:

Many civil rights suits are brought in the form of class actions. Considering the broad declaratory and injunctive relief that federal courts are called upon to dispense, it is hard to imagine a case in which a minority judge would not have a family member within the class - and thus, . . . within the definition of "party."

Id. at 930. *Accord*, *United States v. State of Alabama*, 828 F.2d 1532, 1542 (11th Cir. 1987) (holding disqualification to be unnecessary where judge's children were part of a certified class defined as all children eligible to attend public higher education institutions in the Montgomery, Alabama, area), *cert. denied*, 487 U.S. 1210 (1988).

79. *In re* Continental Vending Mach. Corp., 543 F.2d 986, 995 (2d Cir. 1976). The court went on to state:

The mere fact that [the judge] may have testified with respect to some wholly unrelated matter should not disqualify him, . . . since it does not require him to pass upon the credibility of his own testimony and there is no reason to suppose that his decision might be affected by his unrelated testimony.

Id.

When a judge is scheduled to be a material witness in a proceeding, the judge can nevertheless decide the propriety of holding such a proceeding. See, e.g., *King v. United States*, 576 F.2d 432, 437 (2d Cir.), *cert. denied*, 439 U.S. 850 (1978).

80. See, e.g., *In re* Wyoming Tight Sands Antitrust Cases, 726 F. Supp. 288, 291-92 (D. Kan. 1989) (finding that judge's testimony before federal agency given years before provided only background information). See also *In re* A.H. Robins Co., Inc., 602 F. Supp. 243, 251 (D. Kan. 1985) (finding that judge's affidavit in support of a fellow judge in a disciplinary proceeding commenced at the request of the same party seeking recusal, was filed in a judicial capacity and did not relate to the merits of the case).

81. Attorneys have at times attempted to use this provision as a matter of legal strategy. In *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255 (5th Cir. 1983), the

biton requires actual participation by the relative in the proceeding,⁸² but recusal may be necessary even though the relative has not filed a formal appearance.⁸³ Because the scope of the section is limited to lawyers who actually participate, a relative's affiliation with the law firm appearing as counsel does not constitute actual participation.⁸⁴

A new subsection clarifying the current language of § 455(b)(5) would require disqualification when:

judge's brother-in-law apparently was retained by the defendants in order to disqualify the judge six years after the plaintiffs filed their complaint. On appeal of the judge's reassignment order, the Fifth Circuit remanded the case, stating that the judge should have immediately reassigned the case after becoming aware of the judge's relative's employment as counsel. *Id.* at 1257. On remand, the trial court was to determine whether the sole or primary motive for hiring the judge's relative had been to disqualify the judge. *Id.* at 1265. If so, the relative was to be disqualified. The Court of Appeals observed:

If a party who is offended by a judge's ruling could disqualify the judge by employing new counsel after the case has been pending before that judge for years, he could force on other litigants and the courts the penalty of starting over before a new judge. . . . If, after seeing who the judge is or weighing his rulings for a period of years, 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, it would become possible for any party to disrupt preparation for, or, indeed, the trial itself.

. . . The general rule of law is clear: a lawyer may not enter a case for the primary purpose of forcing the presiding judge's recusal.

Id. at 1263-65.

82. United States *ex rel.* Weinberger v. Equifax, Inc., 557 F.2d 456, 463 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).

Recusal is unnecessary when the judge's relative withdraws from the proceeding prior to any substantive actions by the judge in the case. *See* S.J. Groves & Sons Co. v. International Bhd. of Teamsters, 581 F.2d 1241, 1248 (7th Cir. 1978)(holding recusal to be unnecessary where the judge's brother was a senior partner in the firm which was counsel of record, but withdrew before substantive decisions were made by judge).

However, resignation of the relative from the law firm representing the party does not cure the violation when the relative has participated in such pretrial matters as taking depositions.

A party should not be required to object to questions in depositions asked by members of the judge's family. Whether the deposition will be used or not, it is there to be used. Whether it will be important or not, it is there to become important. The statute contemplates a bright line test.

In re Aetna Casualty & Sur. Co., 919 F.2d 1136, 1147 (6th Cir. 1990)(Kennedy, J., concurring)

83. *See* McCuin v. Texas Power & Light Co., 714 F.2d 1255, 1259 (5th Cir. 1983)(disqualifying the judge because his relative participated in the discovery aspect of the case even though the relative was not counsel of record).
84. *See, e.g.,* Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1112-13 (5th Cir.)(holding that the fact that the judge's father was a partner of counsel of record did not require disqualification), *cert. denied*, 449 U.S. 820 (1980); Wilmington Towing Co. v. Cape Fear Towing Co., 624 F. Supp. 1210, 1211 (E.D.N.C. 1986)(holding recusal to be unnecessary where the judge's son was a summer as-

(5) the judge, the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:

(i) Is a party (or officer, director, or trustee of a party) to the proceeding, unless the evidence shows either that such person has been named as a party merely to compel recusal or that such person has an interest in the case which is no different than any other person;

(ii) Is personally and substantially acting as an attorney in the proceeding; or

(iii) Is known by the judge to be a likely material witness in the proceeding.

This rewritten statute codifies the case law construing the issues discussed in this section and contains standards that should be easier for a judge to apply prospectively. In proposed subsection (5)(i), the standard for recusal includes the previously discussed exceptions which courts have applied to avoid litigants' manipulation of the recusal process. Proposed (5)(ii) requires automatic recusal only when the relative is acting as an attorney in the proceeding as opposed to merely being a member of the party's law firm.

4. *Financial and Other Interests*

A judge also must be disqualified when the 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."⁸⁵ The

sociate and had tentatively accepted an offer with the firm that was counsel of record).

The Commentary to Canon 3C of the 1972 ABA Code of Judicial Conduct noted:

The fact that a lawyer in a proceeding is affiliated with a law firm with which the lawyer-relative of the judge is affiliated does not itself disqualify the judge. Under appropriate circumstances, the fact that "his impartiality might reasonably be questioned" under Canon 3C(1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" . . . may require his disqualification.

85. 28 U.S.C. § 455(b)(4)(1991). The provision was enacted not only to conform with the ABA Code of Judicial Conduct but also because there was a concern that a "judge's direct economic or financial interest, even though relatively small, in the outcome of the case may well be inconsistent with due process." H.R. REP. NO. 1453, 93d Cong., 2d Sess. 6 (1974), *reprinted in* 1974 U.S.C.A.N. 6351, 6356. The provision disqualifies a judge from presiding over a case even when the judge is not the fact-finder. *Gladhill v. General Motors Corp.*, 743 F.2d 1049, 1051 (4th Cir. 1984).

Although the federal statute does not define the meaning of "knows", the 1990 version of the ABA Code of Judicial Conduct defines "knows" as actual knowl-

legislative concern underlying this provision is that a "judge's direct economic or financial interest, even though relatively small, in the outcome of the case may well be inconsistent with due process."⁸⁶

Several preliminary observations about this prohibition are in order. First, the judge must know both that a potentially compromising interest exists and that the interest involves either the subject matter in controversy or a party before the judge.⁸⁷ Second, this automatic recusal provision extends only to minor children residing with the judge.⁸⁸ Courts address the disqualifying interests of adult children under the residuary appearance of partiality clause.⁸⁹ Third, two types of disqualifying interests require recusal: 1) a financial interest and 2) any other interest. The latter interest requires recusal only when it could be substantially affected by the outcome of the proceeding, but a financial interest commands recusal if no specified exception applies and regardless of whether the outcome of the proceeding could have any effect on the interest.⁹⁰ Finally, unlike other grounds for disqualification already discussed, recusal may not be required if the disqualifying financial interest is divested.⁹¹

edge of facts and knowledge that may be inferred from the circumstances. AMERICAN BAR ASSOCIATION, CODE OF JUDICIAL CONDUCT, Terminology (1990).

In addition, the 1990 Code expands the bases for disqualification under this provision well beyond the federal statute to include economic interests of the judge's parents or children of any age, regardless of whether they share the same household, and to any member of the judge's family residing in the judge's household. *Id.* Cannon 3(E)(1)(C).

86. H.R. REPORT NO. 1453, 93d Cong., 2d Sess. 6 (1974), reprinted in 1974 U.S.C.C.A.N. 6351, 6356. For a discussion of issues related to disqualification for financial interests, see Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 698-705 (1985).
87. See *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 866-67 (1988) (finding a violation of § 455(b)(4) where the judge had actual knowledge of a conflict of interest as a fiduciary for an entity with an interest in the litigation, but did not step down); *NEC Corp. v. Intel Corp.*, 654 F. Supp. 1256, 1257-58 (N.D. Cal. 1987) (holding that the disqualification based on a judge's financial interest in a party applies only to rulings made after the judge has knowledge of such disqualifying interest).
88. See, e.g., *Moody v. Simmons*, 858 F.2d 137, 142 (3d Cir.), cert. denied, 489 U.S. 1078 (1988); *In re National Union Fire Ins. Co.*, 839 F.2d 1226, 1228 (7th Cir. 1988).
89. *In re National Union Fire Ins. Co.*, 839 F.2d 1226, 1229 (7th Cir. 1988).
90. *In re Cement Antitrust Litigation*, 688 F.2d 1297, 1308 (9th Cir. 1982); *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794, 796 (10th Cir. 1980); *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 706 F. Supp. 776, 780 (D. N.M. 1989).
91. If the judge discovers that the judge, the judge's spouse, or minor child residing in the judge's household has a financial interest in a party, 28 U.S.C. § 455(f) permits a judge to continue presiding over a matter after devoting substantial judicial time to it if the holder of the interest divests it. Section 455(f) permits a trial judge to cure a disqualification. *In re Aetna Casualty & Sur. Co.*, 919 F.2d 1136, 1147 (6th Cir. 1990) (Kennedy, J., concurring). Its existence "suggests that Congress intended to exclude the types of cure not permitted by this provision, for

A financial interest is "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. . . ."92 Even the slightest financial interest by the judge, the judge's spouse or the judge's minor child requires disqualification.⁹³ Courts often assume the presence of a fi-

Congress had the opportunity to enact a broader amendment than it devised with section 455(f)." *Id.* (holding that the resignation of the judge's daughter from the firm involved in the proceeding did not fall under § 455(f) and did not otherwise cure the statutory violation).

The rationale for this provision appears to spring from the concerns expressed in such documents as UNITED STATES JUDICIAL CONFERENCE, ADVISORY COMMITTEE ON CODES OF CONDUCT, Advisory Opinion No. 69 (1981), which states:

In those cases in which a great deal of time and effort had been invested by the judge, by counsel, and by the litigants, when the existence of the disqualifying interest came to light, the public interest in the efficient administration of justice would appear to outweigh concern for an appearance that the judge is seeking to continue participation in a particular case.

For example, in *Kidder, Peabody & Co., Inc. v. Maxus Energy Corp.*, 925 F.2d 556, 561 (2d Cir.), *cert. denied*, 111 S. Ct. 2829 (1991), the judge and the judge's spouse sold their stock in a corporation which held a large percentage of the outstanding stock of a party as soon as the judge learned of the relationship between their ownership and the party. The Second Circuit approved of the judge's curative action under § 455(f) which avoided the waste of "three years of the litigants' time and resources and substantial judicial efforts" in the case. *Id.*

92. 28 U.S.C. § 455(d)(4)(1988)(emphasis added).

The definition of a financial interest has four exceptions. First, ownership in a mutual or common investment fund in which the judge does not participate in managing the fund is not a financial interest. § 455(d)(4)(i). The likely effect of a decision on the value of the securities held through such a fund is irrelevant. *New York City Dev. Corp. v. Hart*, 796 F.2d 976, 979-80 (7th Cir. 1986). Second, an office in an educational, religious, charitable, fraternal or civic organization does not constitute a financial interest in securities held by the organization. § 455(d)(4)(ii). Third, a proprietary interest in an organization such as an insured in a mutual insurance company, a depositor in a mutual savings association, or similar proprietary interest, and ownership of government securities, if the proceeding's outcome could not substantially affect the value of the interest, are not financial interests. § 455(d)(4)(iii). *See Christiansen v. National Sav. and Trust Co.*, 683 F.2d 520, 526 (D.C. Cir. 1982)(finding that judges subscribing to a health insurance program hold an exempt "similar proprietary interest").

The 1990 ABA Code replaced the term "financial interest" with the term "economic interest." An economic interest "denotes ownership of more than a de minimis legal or equitable interest," unlike the 1972 ABA Code of Judicial Conduct which required disqualification for any financial interest however small. "De minimis" denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality." AMERICAN BAR ASSOCIATION, CODE OF JUDICIAL CONDUCT, Terminology (1990). Otherwise, the definition is comparable to the 1972 ABA Code definition of a financial interest.

93. *See, e.g., Herrington v. County of Sonoma*, 834 F.2d 1488, 1503 (9th Cir. 1987), *cert. denied*, 489 U.S. 1090 (1989); *New York City Housing Dev. Corp. v. Hart*, 796 F.2d 976, 980 (7th Cir. 1986); *In re Cement Antitrust Litigation*, 688 F.2d 1297, 1308 (9th Cir. 1982), *aff'd mem.* 459 U.S. 1191 (1983); *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794, 796 (10th Cir. 1980).

nancial interest and are usually more adept at identifying what is not a financial interest. Bar association membership, for example, is not a financial interest.⁹⁴ A remote, contingent or speculative benefit or interest is not a financial interest in the subject matter in controversy⁹⁵ or in a party⁹⁶ to the proceeding.

Congress replaced [the previously existing standard with] a flat prohibition. Although the prohibition results in recusal in cases where the interest is too small to sway even the most mercenary judge, occasional silly results may be an acceptable price to pay for a rule that both is straightforward in application and spares the judge from having to make decisions under an uncertain standard apt to be misunderstood.

Union Carbide Corp. v. United States Cutting Serv., Inc., 782 F.2d 710, 714 (7th Cir. 1986).

The *Cement* litigation presents a graphic example of the operation of this ethical standard. The judge's spouse owned a stock interest worth \$29.70 in several members of a plaintiff class. The consequence of holding that the statutory term "party" included class members was that a new judge had to be found. "[A]fter five years of litigation, a multi-million dollar lawsuit of major national importance, with over 200,000 class plaintiffs, grinds to a halt over . . . \$29.70." *In re Cement Antitrust Litigation*, 688 F.2d at 1313. See *supra* note 91.

94. *Plechner v. Widener College, Inc.*, 569 F.2d 1250, 1262 (3d Cir. 1977).

95. Neither the statute nor the legislative history provides guidance concerning the meaning of the phrase "in the subject matter in controversy." In *Department of Energy v. Brimmer*, 673 F.2d 1287, 1295 (Temp. Emer. Ct. App. 1982), the court reasoned that the use of the term "subject matter" suggested that this portion of the statute would be most significant in *in rem* proceedings. The Third Circuit relied on a dictionary definition in *United States v. Nobel*, 696 F.2d 231, 234 (1982), *cert. denied*, 462 U.S. 1118 (1983).

96. See, e.g., *Herrington v. County of Sonoma*, 834 F.2d 1488, 1503 (9th Cir. 1987) (finding a judge's security interest in a nearby property too remote), *cert. denied*, 489 U.S. 1090 (1989); *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983) (finding that disposition of the land claim would not affect the judge's title to nearby land); *Christiansen v. National Sav. and Trust Co.*, 683 F.2d 520, 526 (D.C. Cir. 1982) (finding the interest of a judge who was a subscriber to a health plan in the lawsuit seeking a refund of interest was too remote); *In re Virginia Elec. & Power Co.*, 539 F.2d 357, 366-67 (4th Cir. 1976) (finding that the judge held a bare expectancy in the utility's refund); *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794, 796 (10th Cir. 1980) (finding the judge's status as a natural gas consumer to be insubstantial).

"In cases where the judge has a financial interest . . . in a non-party, the court examines how direct an effect the litigation before it will have on the interested non-party." *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 706 F. Supp. 776, 781 (D.N.M. 1989). See also *McCann v. Communications Design Corp.*, 775 F. Supp. 1535, 1540-41 (D. Conn. 1991) (finding no recusal to be required where the judge was a trustee of the university receiving donations from a party's parent corporation). The judge's financial interest may be in a separate entity which is in the same industry as a litigant before the judge whose decision financially may affect both the litigant and the separate entity. For example, in *In re Placid Oil Co.*, 802 F.2d 783 (5th Cir. 1986), the judge held a large investment in a non-party bank that could have been affected by any rulings in the case. The parties argued that any rulings adverse to the party banks would dramatically affect the entire banking industry and therefore the judge's investment. The Fifth Circuit denied a writ of mandamus, refusing to adopt a rule requiring recusal in every case in which a judge has a stake in a company in the same industry as one of the parties

Even if a judge or a judge's close relative lacks a financial interest in a party or the subject matter, recusal is still necessary if the person has "any other interest that could be substantially affected by the outcome of the proceeding." Although no statutory definition exists for "any other interest", courts have inferred that it includes an interest not entailing direct ownership in a party or the subject matter in controversy.⁹⁷ Courts have determined that, unlike a "financial interest" where any such interest however small requires recusal, a judge with a *de minimis* "other interest" may preside over a case if the litigation could not substantially affect that interest.⁹⁸ For example, in *In re New Mexico Gas Antitrust Litigation*,⁹⁹ the Tenth Circuit reversed a *sua sponte* order of recusal by a judge who was a natural gas consumer, holding that the judge's interest was too insubstantial to warrant disqualification.¹⁰⁰ The court also identified the practical and

to the case. The whole industry was not the subject matter in controversy. *Id.* at 786-87. Similarly, in *Department of Energy v. Brimmer*, 673 F.2d 1287, 1295 (Temp. Emer. Ct. App. 1982), the judge's ownership of a stock interest in energy companies participating in the same government regulatory program as the plaintiff was not a financial interest in the subject matter of the litigation because the judge lacked a direct economic or financial interest in the outcome.

In *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 706 F. Supp. at 783-84, the court decided that its financial interest in non-party entities which were once part of a single entity was within the subject matter in controversy and required recusal. The litigation related to predivestiture conduct in the telephone industry, and contingent liability provisions of the reorganization plan connected the party and non-party entities together for predivestiture debts. Finally, in *United States v. Nobel*, 696 F.2d 231 (3rd Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983), the court held that a judge could preside over a criminal case even though the judge owned stock in a non-party corporation which was a corporate victim of the crime. Although the stock ownership was a financial interest, the outcome of the case could have no effect on the defrauded company. Without a connection to the judge's financial interest, the case did not draw his interest into the subject matter of the controversy. *Id.* at 234-35.

97. See *Department of Energy v. Brimmer*, 673 F.2d 1287, 1295 (Temp. Emer. Ct. App. 1982); *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794 (10th Cir. 1980); *In re Virginia Elec. & Power Co.*, 539 F.2d 357, 367-68 (4th Cir. 1976).

98. *Department of Energy v. Brimmer*, 673 F.2d 1287, 1295 (Temp. Emer. Ct. App. 1982). See *In re Virginia Elec. & Power*, 539 F.2d 357, 368 (4th Cir. 1976)("[A] judge who is a customer of a company must necessarily consider the remoteness of the interest and its extent or degree.")

99. 620 F.2d 794 (10th Cir. 1980).

100. Congress did not intend to require disqualification in all cases in which the judge might benefit as a member of the general public. . . . First, the policy to promote public confidence in the impartiality of the judicial system is not served to as great an extent by disqualifying a judge who would receive only such a benefit. It is not simply a question of *de minimis* effect; a personal benefit or detriment shared in common with the community at large is perceived to have a different psychological effect on a judge than would a benefit or detriment not so shared.

Id. at 796-97. Similarly, in *United States v. Alabama*, 828 F.2d 1532, 1541 (11th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988), the judge's two minor children were members of a class of all children eligible to attend universities in the Montgom-

systemic costs of a broad recusal rule. First, it is very common for litigation to have far-reaching effects. Where a party involved is a business or regulated industry which can pass on any loss to a large number of consumers, a judgment against that party can increase the judge's cost of living. Second, reassignment of cases can cause substantial inconvenience to counsel, parties and judges, especially when litigation takes several years to complete.¹⁰¹

A redrafted recusal provision dealing with financial and other interests should clarify the prohibition in line with the case law on this issue. In the following form, a judge would be prohibited from presiding over a case when:

- (4) The judge knows about an interest which is more than de minimis which is:
 - (i) a personal or fiduciary financial interest in the subject of or a party to a proceeding, or
 - (ii) any other interest which could be substantially affected by the outcome of the proceeding, either of which type of interest is held by the judge, the judge's spouse, the judge's parent, or the judge's child, or the spouse of any of them.

The proposed changes set forth above are comparable to several modifications already made by the American Bar Association in its 1990 Code of Judicial Conduct.¹⁰² The primary substantive change effected by the statute would be to eliminate automatic recusal when the interest involved is merely *de minimis*. Obviously, it may be preferable to quantify this interest for ease of prospective application.¹⁰³ In addition, the proposed language requires recusal for a financial or any other interest held by any child of the judge, not merely minor children living with the judge. Finally, the scope of close relatives here is expanded to include interests held by the judge's parent as well as the judge's spouse and child. Including a judge's parents completes the triad of close relatives who are subject to this standard.

A closely related, but somewhat broader issue of recusal arises under § 455(b)(iii) when the judge knows that the judge or the judge's relative has an interest that could be substantially affected by the out-

ery, Alabama area. As Alabama residents, they were technically members of the class and possessed an interest in the outcome of the case. The court concluded that the interest of the children was not "substantial" enough to require recusal by their parent. *Id.* "Any potential interest [by the children] . . . is shared by all young black Alabamians." *Id.*

101. *In re New Mexico Gas Antitrust Litigation*, 602 F.2d 794, 797 (10th Cir. 1980).

102. See AMERICAN BAR ASSOCIATION, CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(C)(1990).

103. The 1990 ABA Code of Judicial Conduct's attempt to define "de minimis" is not very helpful. Under the Code, "De minimis" denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality." AMERICAN BAR ASSOCIATION, CODE OF JUDICIAL CONDUCT, Terminology (1990).

come of the proceeding.¹⁰⁴ The nature of the interest may be economic¹⁰⁵ or non-economic.¹⁰⁶ For example, when the judge's relative is a partner in the law firm representing a party before the judge-relative, a win or a loss in the lawsuit could substantially affect the partner's interest in the law "firm's reputation, its relationship with its clients, and its ability to attract new clients."¹⁰⁷

A new subsection further clarifying the current language of § 455(b)(5) and reflecting the case law would require disqualification when:

(5) the judge, the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:

104. 28 U.S.C. § 455(b)(5)(iii)(1988). The interest must have the potential to be substantially affected by the outcome. The case law is split on the scope of the term "substantially." The broad view is that any relative's law firm has an interest that could be substantially affected by the outcome of a proceeding before the judge. See *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1260 (5th Cir. 1983)(recusal required when judge's brother-in-law was retained as counsel by a party); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1113 (5th Cir.)(the statute requires disqualification when the relative's interest could actually or potentially be affected by the result), *cert. denied*, 449 U.S. 820 (1980).

The narrower view is that the loss of a client or a client's case substantially affects the firm's (and therefore the relative's) interest only if the client is a major client with no other outside counsel. See *Diversifoods, Inc. v. Diversifoods, Inc.*, 595 F. Supp. 133, 139 (N.D. Ill. 1984)(holding that the loss of a party as a client would not affect a substantial pecuniary or nonpecuniary interest of the judge's spouse's law firm).

105. Presumably, the "interest" referred to in 28 U.S.C. § 455(b)(5)(iii) includes a financial interest. For example, in *Securities Investor Protection Corp. v. Bell & Beckwith*, 28 B.R. 285, 287 (Bankr. N.D. Ohio 1983), the judge used the definition of a financial interest in 28 U.S.C. § 455(d)(4) to recuse himself under 28 U.S.C. § 455(b)(5)(iii) after concluding that the his nephew and his spouse held customer accounts with the debtor in a bankruptcy action.

106. *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 115-16 (7th Cir. 1977). See *Hearings on S. 1064 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 93d Cong., 1st Sess. 51-52, 106-108 (1973).

107. *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1113 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980). See *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1260 (5th Cir. 1983). By contrast, the judge's relative's status as an associate in the law firm removes the concerns connected with partners. See *United States ex rel. Weinberger v. Equifax, Inc.* 557 F.2d 456, 463 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).

When the judge's relative is receiving fixed compensation as "of counsel" to a firm representing a party before the judge, the relative has no discernible financial or nonfinancial interest. *Miller Indus., Inc. v. Caterpillar Tractor Co.*, 516 F. Supp. 84, 86 (S.D. Ala. 1980).

When a law firm withdraws from the representation of a party, the law firm arguably lacks the requisite statutory, disqualifying interest (financial or otherwise). See *S.J. Groves & Sons Co. v. International Bhd. of Teamsters*, 581 F.2d 1241, 1247 (7th Cir. 1978)(holding that withdrawal of the judge's brother's law firm cured the disqualifying interest).

....

(iv) Is known by the judge to have an interest, including an interest as a member of a law firm that is counsel of record in the proceeding, that could be substantially affected by the outcome of the proceeding.

As the case law suggests, the related standard in proposed (5)(iv) would prohibit the judge from sitting in a case if a relative was part of the party's firm *and* had an interest in the outcome of the proceeding.

5. Law Clerks: Another "Bright-Line" Standard?

Although the practice of hiring law clerks is little more than a century old,¹⁰⁸ law clerks are an essential part of a judge's staff.

The law clerk has no statutorily defined duties but rather performs a broad range of functions to assist his judge. . . . The association with law clerks is also valuable to the judge; in addition to relieving [the judge] of many clerical and administrative chores, law clerks may serve as sounding boards for ideas, often affording a different perspective, may perform research, and may aid in drafting memoranda, orders and opinions.

. . . A law clerk, by virtue of [the] position, is obviously privy to [the] judge's thoughts in a way that the parties cannot be.¹⁰⁹

While "the clerk is forbidden to do all that is prohibited to the judge,"¹¹⁰ the language of § 455(b) is unambiguous in that it addresses conflicts involving only a *judge's* prior or current professional and personal interests.¹¹¹ Judicial disqualification decisions relating to the conduct and relationships of judicial clerks are therefore made under the § 455(a) appearance of partiality standard. Most of the decisions pertain to: 1) what the clerk does before or after acceptance of em-

108. See *Fredonia Broadcasting Corp., Inc. v. RCA Corp.*, 569 F.2d 251, 255 (5th Cir.), *cert. denied*, 439 U.S. 859 (1978):

Historically, the practice of employing federal judicial law clerks began in 1882 when Justice Horace Gray was appointed to the Supreme Court. Justice Oliver Wendell Holmes, who continued this practice when he succeeded Justice Gray, termed law clerks "puisne judges." Congress has provided that "district judges may appoint necessary law clerks." 28 U.S.C. § 752 (1970).

109. *Id.* at 255-56.

110. *Hall v. Small Business Admin.*, 695 F.2d 175, 179 (5th Cir. 1983). See *Baugh v. City of Milwaukee*, 829 F. Supp. 274, 275-76 (E.D. Wis. 1993) (law clerk's marriage to party not basis for recusal, because clerk was never assigned to work on spouse's case).

111. Because of the specific and forceful nature of [§ 455(b)], it must be construed narrowly. Thus, when Congress says judges, it means judges; not their law clerks, secretaries or courtroom staff. The various staff members of a judge may have something to do with the public's perception of that court - but Congress wisely left that matter to an *ad hoc* interpretation by the courts when it fashioned Section 455(a). . . . Congress' certain designation of one person, a judge, in the limiting language of Section 455(b), is an absolute exclusion of all others, including law clerks.

In re San Juan Dupont Plaza Hotel Fire Litigation, 129 F.R.D. 409, 412 (D.P.R. 1989).

ployment with counsel for a party in a case in the judge's court and 2) when the former clerk appears in a case before the judge.

During the period when he or she is simultaneously interviewing for a future job and clerking for a judge, the law clerk should be cautious to avoid the appearance of impropriety. It is doubtful that any clerk would attempt to influence a judicial decision on behalf of a law firm or party with whom the clerk was interviewing. A prospective employer's interest in hiring the law clerk as an associate would likely be diminished if the employer believed that the clerk had been disloyal to his or her most recent employer. In order to give the judge the option of removing a clerk from a case, the clerk should advise the judge about future job possibilities well before a job offer is extended to the clerk. Preferably, the judge should be advised as soon as any contact is made between the clerk and a law firm which has the goal of prospective employment. Though reallocation of the clerk's workload with the judge may result, the judge could still preside over the case.¹¹²

Once a law clerk accepts an offer of employment with an attorney who is counsel for a party in a case pending before the clerk's judge, the clerk should cease further participation in the case.¹¹³ If the judge removes the clerk from all cases involving the clerk's future employer immediately upon the clerk's notification to the judge about a job offer, no reasonable impression of judicial impropriety exists if the judge continues to preside in the case.¹¹⁴ By contrast, courts require disqualification of the judge when the clerk continues to work on a case involving the clerk's future employer after the clerk has accepted an offer of employment.¹¹⁵

112. If a judge could be disqualified merely because the judge's law clerks are interviewing with the best law firms or parties appearing before the judge, the incentive for the judge to hire the best clerks available would be reduced.

113. Several cases cite the contents of ALVIN B. RUBIN & LAURA B. BARTELL, *LAW CLERK HANDBOOK 23* (rev. ed. 1989), which is distributed to many federal law clerks and contains a somewhat broader standard than that cited in the text: "When a clerk has accepted a position with an attorney or with a firm, that clerk should cease further involvement in those cases in which the future employer has an interest."

114. *See, e.g.,* *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 714-15 (9th Cir. 1990) (holding that where he had notified all counsel that the clerk had been removed from case, the "judge did everything he could to preserve the impartiality of the court, both in fact and appearance"); *Hunt v. American Bank & Trust Co.*, 783 F.2d 1011, 1016 (11th Cir. 1986) (finding recusal unnecessary where the judge removed the file from the clerk once the clerk accepted a job with a party's law firm); *Reddy v. Jones*, 419 F. Supp. 1391, 1391 (W.D.N.C. 1976) (holding that recusal was not required when the clerk was taken off case).

115. *Hall v. Small Business Admin.*, 695 F.2d 175, 179 (5th Cir. 1983); *Miller Indus., Inc. v. Caterpillar Tractor Co.*, 516 F. Supp. 84, 89 (S.D. Ala. 1980). However, denial of the recusal motion was upheld in *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987), where the clerk continued

After law clerks leave the employ of the judge, they generally may appear before the judge for whom they clerked. To prohibit a former law clerk from *ever* appearing "would cast an undue burden on the law clerk,"¹¹⁶ both as to the clerk's willingness to take the job as well as the clerk's ability to find employment after completing a term for the judge.¹¹⁷ Later appearances as counsel in cases in which the clerk was involved while with the judge are prohibited, but generally courts permit appearances in other cases. An example of the former circumstance occurred in *Fredonia Broadcasting Corp., Inc. v. RCA Corp.*,¹¹⁸ where the former law clerk had worked on the case in question when it was first tried on the merits. After trial on the merits, the clerk accepted employment with counsel for one of the parties, began working on the case as an attorney, and actively participated in the retrial of the matter. The appellate court held that the trial judge should have recused himself: 1) because of the possibility that the former clerk's client might have an unfair advantage as a result of the former association with the judge and 2) out of concern for the "purity of the judicial process and its institutions."¹¹⁹

Without regard to the time lapse between the end of the clerk's term and the former clerk's appearance before the judge, federal courts have denied recusal motions when a former clerk appears before the judge in any case the clerk did *not* work on for the judge.¹²⁰ The decisions note, however, that judges should seriously consider

working on a case after being hired by counsel in the case. The case had been before the judge for years, the judge had formed his conclusion about the merits before hiring the clerk, and the judge had granted the motion for summary judgment orally, leaving to the clerk only the work on the written opinion. *See also* *Perkins v. Spivey*, 911 F.2d 22, 33 (8th Cir. 1990) (finding that recusal was unnecessary when the law clerk continued to work on a case after accepting a job with a law firm which previously had represented a party in the case but was not representing that party in the case at bar).

116. *Fredonia Broadcasting Corp. v. RCA Corp.*, 569 F.2d 251, 256 (5th Cir.), *cert. denied*, 439 U.S. 859 (1978).

117. *See Smith v. Pepsico, Inc.*, 434 F. Supp. 524, 526 (S.D. Fla. 1977):

[S]ome judges . . . employ law clerks with the specific expectation that the clerks will remain in that city or area to practice law. If a court were to accept the contention that recusal was necessary whenever counsel had been a prior law clerk to a judge, this would be an unfair penalty placed upon former law clerks of Federal Judges.

118. 569 F.2d 251 (5th Cir. 1978), *cert. denied*, 439 U.S. 859 (1978).

119. *Id.* at 256 (quoting *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 403 F.2d 437, 439-40 (5th Cir. 1968), *cert. denied*, 404 U.S. 941 (1971)).

120. *See, e.g.*, *Patzner v. Burkett*, 779 F.2d 1363, 1372 (8th Cir. 1985) (clerk appeared before judge nine months after completing clerkship); *United States v. Hollister*, 746 F.2d 420, 425-26 (8th Cir. 1984) (clerk appeared three months later); *Cheeves v. Southern Clays, Inc.*, 726 F. Supp. 1579, 1581-82 (M.D. Ga. 1990) (clerk appeared three years later); *Smith v. Pepsico, Inc.*, 434 F. Supp. 524, 525-26 (S.D. Fla. 1977) (clerk appeared two years later).

recusal when a *recent* law clerk appears as counsel before the judge.¹²¹ While no bright line rule exists in the decisions, several circuits, by rule, prescribe a one or two-year limitation period.¹²²

Judges simply act differently when a former law clerk appears in the judge's court, regardless of the nature of the relationship between the judge and the former clerk. The failure of a judge to withdraw when a recent law clerk appears in the judge's court is dramatized in *United States v. Bosch*,¹²³ where the majority upheld the trial court's denial of the recusal motion. The importance of the case lies not so much in what the judge said about his former law clerk, but that the judge allowed himself to say anything - to go beyond appearances, to let his guard down, and to express what many judges probably feel about former clerks and other employees. On several occasions, the trial judge specifically referred to the former law clerk who was now a federal prosecutor. First, following the grant of an extension of time to the prosecutor, the judge referred to the former clerk and stated, "And just out of humanitarian milk of kindness I want to make things easier for him, if that's possible." The dissenting judge remarked:

On its face, this comment demonstrates the judge's strong affection and close friendship with the prosecuting attorney. It also demonstrates that the judge had feelings of sympathy for [the prosecutor] and a desire "to make things easier for him" - a desire based on considerations neither relevant nor related to Bosch's trial.¹²⁴

Second, during arguments for a new trial, the judge said about the former clerk, "I think as a good father would - and I feel like that about him - looked at his performance with a particularly jaundiced eye." Again, the dissenting judge observed:

Here, the trial judge states that his affection and admiration for the young prosecutor amounted to the special feelings of a father for his son. The statement contradicts what it attempts to prove: that the judge can treat [the prosecutor] as he would any other attorney who might appear before him. We cannot treat our children as strangers, no matter how we might try. Although the judge's affection for [the prosecutor] may not in fact have been as strong as the parent-child bond, or as difficult to disregard, I reluctantly conclude that the statement created an appearance of bias.¹²⁵

Later in the same hearing, in response to allegations of prosecutorial misconduct, the judge said, "But I would be very critical of him, as I would have, as I say, one of my sons." The dissenting judge observed:

Again, this comment appears to deny what it purports to prove: that the judge had a normal, professional relationship with the prosecutor that allowed him to judge that attorney's conduct with the same eyes with which he would

121. *Patzner v. Burkett*, 779 F.2d 1363, 1372 (8th Cir. 1985); *United States v. Hollister*, 746 F.2d 420, 426 (8th Cir. 1984).

122. *See, e.g.*, 1ST CIR. R. 46 (one year); 8TH CIR. R. 47G (one year). *See also* SUP. CT. R. 7 (two years).

123. 951 F.2d 1546 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2975 (1992).

124. *Id.* at 1553 (O'Sclannlain, J., dissenting).

125. *Id.*

judge any other attorney's conduct. The judge's statements would give a reasonable observer cause to believe that the judge shared an extraordinarily close friendship with the prosecutor, who had served as his law clerk only two years before the commencement of Bosch's trial.¹²⁶

Section 455(b) should be amended with a "bright-line" standard requiring recusal on the basis of a law clerk's participation or conduct. First, former law clerks are in a situation factually comparable to a judge's relatives, whose presence in the judge's court as a party, counsel, witness or possessor of an interest in the proceeding requires the judge's recusal. Judicial recusal is mandated not because all judges love and will favor all of their relatives. Rather, the practice of presiding over a case in which close relatives are involved threatens the integrity of the judicial process. Likewise, the intense professional relationships between judges and their clerks support a definite, predictably applied criterion for conduct. Moreover, with close relatives, the judge is disqualified not as a result of any personal fault, but simply as a result of the "fortuity" of the relative's presence in the judge's court. The same predicament is true for law clerks. While working for a federal judge, they may work on cases where their future employer is counsel for a party or, following their clerkship, they may soon appear in the judge's court as a practicing attorney.

Second, a specific recusal standard relating to law clerk conduct or appearance in a case is justified by judicial experience in dealing with law clerk situations such as clerks appearing before the judge immediately after leaving the judge's employ or the clerk accepting a job with a law firm which is counsel for a party in the judge's court. The starting point in the evolution of legal standards is often a general legislative or common law maxim. Over time, judicial experience with a group of cases produces a clear, specific common law principle which the legislative branch can then use to declare a precise statutory standard which stands on its own or as a complement to an already existing general standard. The case law on law clerks suggests that a definite recusal requirement for judges is ripe for consideration. Such a statutory addition to § 455(b) would mandate recusal by a judge when:

(6) The judge's law clerk:

(i) continues to work on a case where the clerk has accepted [or, has received an offer of] a position of future employment and the

126. *Id.* at 1554. Curiously, in previous remarks, the trial judge had referred to the fact that the prosecutor had been his clerk "many years ago." *Id.* at 1553.

In *Verela v. Jones*, 746 F.2d 1413 (10th Cir. 1984), one of the judge's former law clerks appeared as trial counsel in a case while simultaneously handling the estate of the judge's mother. The appellate court found no abuse of discretion in denying the recusal motion, because the client was the estate and the personal representative, rather than the judge, selected counsel. *Id.* at 1417.

clerk's future employer [or, the offeror] is a party or attorney for a party in a case assigned to the judge; or
(ii) is the attorney of record or appears as a practicing attorney in a case assigned to the judge within — year(s) after terminating employment with the judge.

III. CONCLUSION

28 U.S.C. § 455(b) describes the specific circumstances in which a judge can be disqualified *sua sponte* or by motion of one of the parties for a proscribed conflict of interest. This Article has noted specific ways in which trial and appellate courts have interpreted or applied the statute beyond its terms. The common law of judicial disqualification which has developed indicates the difficulty in drafting a statute which addresses every specific situation that might arise. Such an evolution should invite periodic statutory modification to reflect legal developments in the areas already addressed by specific sections and to add new fact patterns to the specific grounds for judicial disqualification.