

Recusal:

Analysis of Case Law Under 28 U.S.C. §§ 455 & 144

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Preface

Litigants often move for trial judges to recuse themselves on grounds of partiality or the appearance of partiality. Improper denial of motions seeking recusal may have serious consequences. First, it can deprive citizens of their right to a “neutral and detached judge.”¹ Second, it can diminish public trust in the judicial system, which requires confidence in the impartiality of judges.

This monograph offers a synthesis and analysis of the case law under 28 U.S.C. §§ 455 and 144 to assist judges in ruling on recusal. It identifies the core principles and recurring issues in the voluminous case law, and it examines how the courts of appeals have applied these principles. The monograph does not propose reforms or critique court decisions. Judges should, of course, review the applicable decisions in their own circuits, as cases may exist in addition to the representative cases discussed here.

This monograph does not discuss the requirements of the Code of Conduct for United States Judges or the opinions on recusal issued by the Codes of Conduct Committee of the Judicial Conference of the United States.² Decisions rendered under the recusal statutes sometimes differ from advice provided by the committee under Canon 3C of the Code of Conduct. Also, recusal problems other than those covered by the statutes may be raised by the Code of Conduct. Consequently, judges should consult the committee’s opinions for advice on how to proceed under the Code. The Code of Conduct, Published Advisory Opinions, and a Compendium of Selected Opinions of the Committee may be found in Volume II, Chapters 1, 4, and 5, respectively, of the *Guide to Judiciary Policies and Procedures*.

This monograph was prepared by Alan Hirsch, Esq., and Kay Loveland, of the Federal Judicial Center, with substantial editorial assistance from Kris Markarian, also a Center staff member. The

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

2. The D.C. Circuit has stated that “[t]he Code of Conduct is the law with respect to the ethical obligations of federal judges.” *United States v. Microsoft Corp.*, 253 F.3d 34, 113 (D.C. Cir. 2001).

Federal Judicial Center acknowledges the contribution of the Codes of Conduct Committee of the Judicial Conference of the United States and staff members of the Office of the Associate Director and General Counsel of the Administrative Office of the U.S. Courts.

PART ONE

The Recusal Statutes

I. Summary

The two principal statutes dealing with judicial recusal are 28 U.S.C. § 144, “Bias or prejudice of judge,” and 28 U.S.C. § 455, “Disqualification of justice, judge, or magistrate.” The relationship between the two has been a source of some confusion. While section 455 substantially overlaps and subsumes section 144, there are some important differences. First, section 144 aims exclusively at *actual* bias or prejudice, whereas section 455 deals not only with actual bias as well as other specific conflicts of interest, but also with the *appearance* of partiality. Second, section 144 is triggered by a party’s affidavit, whereas section 455 not only may be invoked by motion but also requires judges to recuse sua sponte where appropriate. Third, section 144 applies only to district judges while section 455 covers “any justice, judge, or magistrate of the United States.”

There is a third, little-noted recusal statute, 28 U.S.C. § 47, that applies only to appellate judges (or trial judges sitting by designation on appellate panels). This statute provides that “[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him,”³ thereby prohibiting a recently promoted appellate judge from hearing an appeal of a case that the judge tried.

3. 28 U.S.C. § 47 (1948).

II. History of Section 455

The first federal judicial disqualification statute dates back to 1792⁴ and was later amended several times until it became section 20 of the Judicial Code of 1911.⁵ In 1948, the U.S. Congress reconstituted and recodified it as section 455. The 1948 version of section 455 stated that “[a]ny justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.”⁶

In subsequent years, Congress perceived several problems with this statute. First, determining whether a conflict merited disqualification was entirely subjective—a judge might decide, for instance, that he could maintain his impartiality even if he had a substantial financial stake in the outcome of the case or if a family member were a litigant. Second, the statute’s vague language (“so related to or connected with any party or . . . attorney”) provided little guidance. Finally, a judicial “gloss” on section 455 created a “duty to sit” whereby judges resolved close questions against recusal.

In order to resolve these issues, in 1974 Congress enacted an extensive revision of section 455⁷ based on the 1972 American Bar Association Code of Judicial Conduct, which was adopted with only slight modifications by the Judicial Conference in 1973 as the Code of Conduct for United States Judges. The legislative history made it clear that in revising the statute, Congress wished to remove the “duty to sit.”⁸ The wording of section 455 now parallels that of Canon 3C of the Code.⁹ The current version of section 455 reads:

4. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278.

5. Act of Mar. 3, 1911, ch. 23, § 20, 36 Stat. 1090.

6. Act of June 25, 1948, ch. 646, § 455, 62 Stat. 908.

7. Dec. 5, 1974, Pub. L. 93-512, § 1, 88 Stat. 1609.

8. H.R. Rep. No. 1453, 93d Cong., 2d Sess. 5, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6351, 6355.

9. While Canon 3C of the Code of Judicial Conduct uses gender-neutral lan-

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(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.

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

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

guage, this monograph occasionally cites directly to the statute, section 455, which does not contain gender-neutral language exclusively.

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

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

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

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

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

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

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

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

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

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

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or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for disqualification.¹⁰

The new section 455(a) replaced the subjective standard of the 1948 statute with an objective standard. It is no longer the case that a judge should recuse where “in his opinion” sitting would be improper, but rather where his or her impartiality “might reasonably be questioned.” Also, section 455(b) spells out certain situations in which partiality is presumed and recusal is required.

Judges should keep in mind that sections 455(a) and (b) provide separate (though substantially overlapping) bases for recusal. The former deals exclusively with the appearance of partiality in any circumstance, whereas the latter pertains to conflicts of interest in specific instances. Thus, the existence of the facts listed in section 455(b) requires recusal, even if the judge believes they do not create an appearance of impropriety.¹¹ Any circumstance in which a judge’s impartiality might reasonably be questioned, whether or not touched on in section 455(b), requires recusal under section 455(a).¹²

In addition, where section 455(b) sets forth a particular situation requiring recusal, it will tend to control any section 455(a) analysis with respect to that specific circumstance. For example, section 455(b)(5) requires recusal where one of the parties is of a third degree of relationship to the judge. Consequently, it would be improper for a court to find that a fourth-degree relationship *alone* created an appearance of partiality requiring recusal under section 455(a). As the Supreme Court explained, “[s]ection 455(b)(5), which addresses the matter of relationship specifically, ends the disability at the *third* degree of relationship, and that should obviously govern for purposes of Sec. 455(a) as well.”¹³

There is another important difference between sections 455(a) and (b). Under the express terms of section 455(e), in cases in-

10. 28 U.S.C. § 455 (1988).

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

12. *See id.*

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

volving an appearance of impropriety under section 455(a) the parties may waive disqualification of the judge. By contrast, waiver is not permitted when recusal is pursuant to section 455(b).

Because section 455(b) deals with explicitly enumerated conflicts of interest in which recusal is mandatory and nonwaivable, it is more specific and thus easier to apply than the broader provision of section 455(a). Also, as noted above, section 455(b)'s specific provisions often mark boundaries for decisions under section 455(a). For these reasons, this monograph covers section 455(b) first, and then goes on to cover section 455(a).

III. Disqualification: Section 455(b)

A. Personal Bias, Prejudice, or Knowledge: Section 455(b)(1)

Subsection 455(b)(1) requires a judge to disqualify himself “[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.” The standard for determining disqualification is “whether a reasonable person would be convinced the judge was biased.”¹⁴ “Recusal under Section 455(b)(1) ‘is required only if actual bias or prejudice is proved by compelling evidence.’”¹⁵

The Seventh Circuit Court of Appeals held that section 455(b)(1) required recusal where a judge who was briefed privately by a panel of experts declined to inform the parties about the briefing’s contents. The court acknowledged that section 455 is primarily concerned with knowledge gained “outside a courtroom”; however, knowledge acquired in a judicial capacity typically “enters the record and may be controverted or tested by the tools of the adversary process. . . . Off-the-record briefings in chambers, by contrast, leave no trace in the record—and in this

14. *Brokaw v. Mercer County*, 235 F.3d 1000, 1025 (7th Cir. 2000) (citing *Hook v. McDade*, 89 F.3d 350, 355 (7th Cir. 1996)).

15. *Id.* at 1025 (concluding that a reasonable person would not be convinced of bias based solely on judicial rulings, which didn’t demonstrate evidence of “personal animosity or malice,” and thus recusal wasn’t required under section 455(b)(1); also holding recusal not required under section 144 using identical analysis).

case the judge has forbidden any attempt at reconstruction. . . . This is ‘personal’ knowledge”¹⁶

In another Seventh Circuit case, the court held that section 455(b)(1) did not require recusal. The judge’s son had assisted in the prosecution of a defendant in a case related to the case before the judge, and the judge had sat in on the trial to observe his son’s performance. The judge “was present only as a spectator in the courtroom. He therefore learned nothing . . . that any member of the public could not also have learned by attending the trial or reading a good newspaper account of its progress. This limited exposure is simply not the kind of *personal* knowledge of disputed evidentiary facts with which section 455(b)(1) is concerned.”¹⁷

The Fifth Circuit reversed a refusal to recuse where a relative of the judge was a major participant in transactions relating to the defendant’s indictment and “that relative had communicated to the judge . . . material facts and her opinions and attitudes regarding those facts.”¹⁸

In *United States v. Alabama*,¹⁹ the Eleventh Circuit held that the trial judge should have recused himself from a lawsuit against Alabama and its state universities where the judge had been a state legislator involved in legislative battles germane to the litigation. The judge was “forced to make factual findings about events in which he was an active participant.”²⁰

Alabama is reconcilable with *Easley v. University of Michigan Board of Regents*,²¹ where the Sixth Circuit rejected the contention that knowledge gained by the judge while serving on a law school’s “committee of visitors” required him to recuse himself from a discrimination suit against the law school. In *Easley*, the judge’s posi-

16. *Edgar v. K.L.*, 93 F.3d 256, 259 (7th Cir. 1996).

17. *In re Hatcher*, 150 F.3d 631, 635 (7th Cir. 1998). The court held that recusal was required under section 455(a), however, because the cases were so closely related. *Id.* (see *infra* text accompanying notes 137–38).

18. *In re Faulkner*, 856 F.2d 716, 721 (5th Cir. 1988).

19. 828 F.2d 1532 (11th Cir. 1987).

20. *Id.* at 1545.

21. 906 F.2d 1143 (6th Cir. 1990).

tion did not give him knowledge of the events at issue in the litigation.

The D.C. Circuit remanded a case to a different trial judge where, among other things, the original judge appeared to be influenced in his handling of a case by his private reading of a book related to the case.²² While the court did not explicitly cite section 455(b)(1), the facts and holding of the case suggest the relevance of this subsection. The court noted that “[t]he book’s allegations are, of course, not evidence on which a judge is entitled to rely.”²³

**B. Previous Service Connected to “Matter in Controversy”:
Section 455(b)(2)**

Subsection 455(b)(2) requires disqualification “[w]here in private practice [the judge] served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it.”

The “matter in controversy” has been defined broadly by courts of appeals, requiring recusal even in cases where the matter under consideration seemed separate from the earlier case. For example, in *In re Rogers*²⁴ defendants were charged with using unlawful means to secure passage of a bill in the state legislature. A former law partner of the trial judge had represented a company in its own efforts to get the bill passed. Defendants planned to argue that their conduct was no more culpable than that of the company represented by the judge’s former partner, whom they planned to call as a witness. Holding that recusal was required under section 455(b)(2), the Fourth Circuit observed that “the actual case before the court consists of more than the charges brought by the government. It also includes the defense asserted by the accused. Here, this defense, in part at least, will consist of matters in which the judge’s former partner served as lawyer.”²⁵

22. *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995).

23. *Id.* at 1463.

24. 537 F.2d 1196 (4th Cir. 1976).

25. *Id.* at 1198.

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In *United States v. DeTemple*,²⁶ the Fourth Circuit distinguished *Rogers* and held recusal unnecessary where the judge had represented a creditor of the defendant several years before the current charges of bankruptcy fraud. The creditor “played no role in either the defense or the prosecution of the case. . . . The connection between the judge’s prior professional associations and the case before him is far more tenuous here than in *Rogers*.”²⁷

The Ninth Circuit held that recusal was required where the judge’s former law firm represented a nonparty company that faced a potential claim for indemnification if the government were found liable. The firm also represented that client in a state court action brought by the same plaintiff concerning the same events as before the trial court.²⁸

C. Previous Government Employment: Section 455(b)(3)

Subsection 455(b)(3) requires recusal where the judge has “served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.”

The Eighth Circuit held that “[i]f an indictment or investigation leading directly to the indictment began after a former prosecutor took office as a judge, he or she is not considered to have been ‘of counsel’ and is not required by § 455 to disqualify himself or herself.”²⁹

The Ninth Circuit held that a judge, who was formerly a U.S. attorney when the case at hand was under investigation, should have recused himself from ruling on the appellant’s motion for a

26. 162 F.3d 279 (4th Cir. 1998).

27. *Id.* at 284.

28. *Preston v. United States*, 923 F.2d 731, 734–35 (9th Cir. 1991). *Cf. In re FCC*, 208 F.3d 137 (2d Cir. 2000) (per curiam) (holding sua sponte that law firm hired to represent debtor on appeal must withdraw from case because it would compromise appellate judge, a member of the panel, who used to be partner at firm).

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

new trial.³⁰ The court noted that its analysis “imputes to the United States Attorney the knowledge and acts of his assistants.”³¹

The Seventh Circuit held recusal was not required where the judge presiding over a tax evasion case had previously served as an assistant U.S. attorney at the same time, and in the same district, where the defendant had been indicted.³² The court of appeals stated that, “[a]s applied to judges who were formerly [assistant U.S. attorneys], § 455(b)(3) requires some level of actual participation in a case to trigger disqualification.”³³ Because no evidence of actual participation was presented, the court found the judge did not commit plain error in not recusing himself.³⁴

D. Financial Interest: Section 455(b)(4)

Subsection 455(b)(4) requires disqualification where a judge “knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.” Section 455(d)(4) defines “financial interest” for the purposes of section 455(b), and provides specific exemptions, such as investment in a mutual fund or ownership of government securities. Note that, apart from such exemptions, even the smallest financial interest (e.g., ownership of a single share of stock) requires recusal. It is a judge’s duty to keep abreast of all of his or her financial interests.³⁵

30. *United States v. Arnpriester*, 37 F.3d 466, 467 (9th Cir. 1994).

31. *Id.* The court held that both sections 455(a) and (b) required recusal in this case.

32. *United States v. Ruzzano*, 247 F.3d 688 (7th Cir. 2001).

33. *Id.* at 695 (citing *United States v. Boyd*, 208 F.3d 638, 647 (7th Cir. 2000); *Mangum v. Hargett*, 67 F.3d 80, 83 (5th Cir. 1995); *Kendrick v. Carlson*, 995 F.2d 1440, 1444 (8th Cir. 1993); *United States v. Di Pasquale*, 864 F.2d 271, 279 (3d Cir. 1988); *cf.* *United States v. Pepper & Potter, Inc.*, 677 F. Supp. 123, 126 (E.D.N.Y. 1988)).

34. *Ruzzano*, 247 F.3d at 696. Because the defendant didn’t request recusal at trial and raised the issue for the first time on appeal, the court of appeals could only review for plain error. *Id.* at 695.

35. In June 2001 the Standing Committee on Rules of Practice & Procedure

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Courts of appeals have interpreted “financial interest” to refer to a direct interest, not a “remote or contingent” interest.³⁶ In a case involving the constitutionality of a “privilege” tax as applied to federal judges working within Jefferson County, the Eleventh Circuit raised the issue of recusal sua sponte where “nine of the *en banc* panel’s twelve judges [had] sat in Jefferson county at least one day—and some a few days more.”³⁷ Because the city had never tried to collect the privilege tax from a federal judge who did not have chambers in the county, and none of the Eleventh Circuit judges had chambers in Jefferson County, the court held that any possible interest the judges may have was too remote and contingent to constitute a financial interest.³⁸ Similarly, in an antitrust case alleging price-fixing by oil companies, all of the trial judges in the district were residents of New Mexico whose future utility bills could have been affected by the outcome of the litigation. The Tenth Circuit held that this was too remote and contingent to qualify as a “financial interest” under section 455(b)(4).³⁹ In each case, the courts considered the potential benefit an “other interest” under the statute, which meant, under section 455(b)(4), that recusal was required only if this “other interest” would be “substantially affected by the outcome of the proceeding.”

of the Judicial Conference approved proposed amendments to the civil, criminal, and appellate rules that require a nongovernmental corporate party to a proceeding to file a statement identifying any parent corporation or publicly held corporation that owns 10% or more of its stock. This disclosure is meant to aid judges in decisions about disqualification under Canon 3C(1)(c). Under the proposed criminal rule, the government must also file a statement identifying an organizational victim of a crime and providing the same information on a corporate victim that a nongovernmental corporate party must file.

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

37. *Jefferson County v. Acker*, 92 F.3d 1561, 1581 (11th Cir. 1996). The issue of recusal was discussed in an appendix to the opinion.

38. *Id.* at 1582. The court also held that disqualification would be contrary to the rule of the necessity. *Id.* at 1583, 1584. See *infra* note 293 and accompanying text.

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

The Fifth Circuit held that where the judge or someone in his family is a member of a class seeking monetary relief, section 455(b)(4) imposes a “per se rule” requiring recusal.⁴⁰

In *United States v. Rogers*,⁴¹ a Ninth Circuit mail fraud case, the trial judge was “one of millions of stockholders” in the defrauded bank. In holding that recusal was not required under section 455(b)(4), the Ninth Circuit explained that the bank, which was the victim of the crime, is not a party to the proceeding under section 455(b)(4).⁴² Moreover, “stock ownership in the corporate victim of a crime cannot be deemed a financial interest in the subject matter in controversy” under section 455(b)(4).⁴³

E. Party to, Attorney in, or Other Substantial Interest in Proceeding: Section 455(b)(5)

Under subsection 455(b)(5)(i), a judge shall disqualify himself where “[h]e or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person . . . [i]s a party to the proceeding, or an officer, director, or trustee of a party.” Based on this subsection, the Tenth Circuit held that a trial judge should have recused himself on the habeas claims challenging state court cases in which his uncle had participated as a criminal appeals judge. His uncle, who had since died, was a named defendant in the claims.⁴⁴

Subsection 455(b)(5)(ii) requires recusal where the judge “or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person . . . is acting as a lawyer in the proceeding.” The Seventh Circuit held that a judge’s

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

41. 119 F.3d 1377 (9th Cir. 1997).

42. *Id.* at 1384. *See also* *United States v. Aragon*, No. 99-50341, 2000 U.S. App. LEXIS 15423 (9th Cir. June 29, 2000).

43. *Rogers*, 119 F.3d at 1384. Recusal was not required under section 455(a) either, the court ruled. *See infra* text and accompanying note 197.

44. *Harris v. Champion*, 15 F.3d 1538, 1571 (10th Cir. 1994) (“[A]lthough [the judge’s] uncle had died by the time [the judge] was assigned to these cases, his uncle is, nonetheless, a named party in this action. Therefore, recusal under § 455(b) was required.”). *Id.* at 1571.

attendance at a related trial, to watch his son act as assistant counsel, did not require recusal under section 455(b)(1).⁴⁵ The defendant also sought recusal under section 455(b)(5)(ii). Although the son, who was a third-year law student, “acted as a lawyer,” the court held that recusal was not required under this subsection because the proceeding was not the same as that involving the defendant. It involved a defendant charged with conduct arising from the same conduct as the defendant in the case at bar, but the two men were not co-defendants. “No matter how closely related the two cases were factually or legally . . . the fact remains that they were separate ‘proceedings.’”⁴⁶

In similar circumstances, the Sixth Circuit, sitting en banc, required recusal. In *In re Aetna Casualty & Surety Co.*,⁴⁷ seven claims against an insurance company were consolidated for trial, and the trial judge initially recused himself because his daughter’s law firm represented four of the claimants. The judge later separated the cases and planned to try the three claims in which his daughter’s firm was not involved. On mandamus petition the court reversed because the cases remained intimately connected: A “decision on the merits of any important issue in any of the seven cases . . . could constitute the law of the case in all of them, or involve collateral estoppel, or might be highly persuasive as precedent.”⁴⁸ The court did not specify whether it based its decision on section 455(a) or section 455(b)(5)(ii), but a concurring opinion, joined by seven judges, emphasized that there was an actual conflict of interest pursuant to section 455(b)(5) as well as an appearance of partiality.

Subsection 455(b)(5)(iii) states that a judge must disqualify himself “where he or his spouse, or a person within the third de-

45. *In re Hatcher*, 150 F.3d 631 (7th Cir. 1998) (*see supra* text accompanying note 17).

46. *Id.* at 637. The court found that recusal was required under section 455(a), which illustrates that the appearance of impropriety may require recusal even absent ground for recusal specifically enumerated in § 455(b). *See infra* text accompanying notes 137–38.

47. 919 F.2d 1136 (6th Cir. 1990).

48. *Id.* at 1143.

gree of relationship to either of them or the spouse of such a person . . . is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.”

In *Potashnick v. Port City Construction Co.*,⁴⁹ the Fifth Circuit adopted a per se rule requiring recusal where a relative of the judge is a partner in a law firm representing a party in the case: “[W]hen a partner in a law firm is related to a judge within the third degree, that partner will always be ‘known by the judge to have an interest that could be substantially affected by the outcome’ of a proceeding involving the partner’s law firm.”⁵⁰

However, the Second Circuit explicitly rejected this per se approach in *Pashaian v. Eccelston Properties, Ltd.*⁵¹ The court found recusal unnecessary where a partner in the law firm representing the defendant was married to the sister of the judge’s wife. “It would simply be unrealistic to assume . . . that partners in today’s law firms invariably ‘have an interest that could be substantially affected by the outcome of any case in which any other partner is involved.’”⁵² The trial court had noted that the law firm in question had sixty partners and gross revenue in excess of \$100 million. Moreover, the case was not likely to affect the firm’s reputation. The judge had concluded that his sister-in-law’s interest would not be “substantially affected” by the outcome of the case, and the court of appeals agreed.

The Eighth Circuit likewise found recusal unnecessary in a case where the judge’s daughter had clerked for one summer and accepted a permanent job offer as associate starting in the fall, with one of the law firms involved in a case before the judge. The court said “an employment relationship between a party and a judge’s son or daughter does not *per se* necessitate a judge’s disqualification.”⁵³ The decision is fact dependent, and the facts in this case

49. 609 F.2d 1101 (5th Cir. 1980).

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

51. 88 F.3d 77 (2d Cir. 1996).

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

53. *In re Kansas Pub. Employees Ret. Sys.*, 85 F.3d 1353, 1364 (8th Cir. 1996).

didn't show an actual conflict under section 455(b)(iii).⁵⁴ The daughter was not and would not, as a future employee of the law firm, be involved in the present litigation. She "was to be a salaried employee . . . , not a partner whose income is directly related to the profit margin of the firm and could be substantially affected by the outcome of this case."⁵⁵ Finally, the firm was only one of many firms representing the parties and its share of any damages almost certainly wouldn't affect the salary or benefits of a first-year associate.

In *Southwestern Bell Co. v. FCC*,⁵⁶ a court of appeals judge found that his son's employment as a nonmanagement entry-level computer programmer for an intervenor in the case on appeal did not require the judge's recusal from the panel hearing the appeal.

IV. Disqualification Based on Question of Partiality: Section 455(a)

A. Standard for Applying

When Congress amended section 455(a), it made clear that judges should apply an objective standard in determining whether to recuse. A judge contemplating recusal should not ask whether he or she believes he or she is capable of impartially presiding over the case. The statute requires recusal in any case "in which [the judge's] impartiality might reasonably be questioned." Because of that language, every circuit has adopted some version of the "reasonable person" standard.⁵⁷

54. *Id.* at 1364. The court also held that there was no appearance of a conflict of interest in violation of section 455(a). *Id.* at 1365.

55. *Id.* at 1364.

56. 153 F.3d 520 (8th Cir. 1998).

57. See, e.g., *United States v. DeTemple*, 162 F.3d 279, 286 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 1793 (1999); *In re Hatcher*, 150 F.3d 631, 637 (7th Cir. 1998); *Baldwin Hardware Corp. v. Franksu Enter. Corp.*, 78 F.3d 550, 557 (Fed. Cir. 1996); *Blanche Rd. Corp. v. Bensalem Township*, 57 F.3d 253, 266 (3d Cir. 1995); *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992); *Vieux Carre Prop. Owners v. Brown*, 948 F.2d 1436, 1448 (5th Cir. 1991); *In re Barry*, 946 F.2d 913, 914 (D.C. Cir. 1991); *United States v. Nelson*, 922 F.2d 311, 319 (6th

The Fourth Circuit has clarified that the hypothetical reasonable observer is not a judge, because judges, keenly aware of the obligation to decide matters impartially, “may regard asserted conflicts to be more innocuous than an outsider would.”⁵⁸ At the same time, the hypothetical observer “is not a person unduly suspicious or concerned about a trivial risk that a judge may be biased.”⁵⁹ The Fifth and Seventh Circuits have noted that while a judge must ask “how things appear to the well-informed, thoughtful observer rather than to a hypersensitive or unduly suspicious person,”⁶⁰ an outside observer is “less inclined to credit judges’ impartiality and mental discipline than the judiciary”⁶¹

The First, Fifth, Sixth, Tenth, and Eleventh Circuits have said that close questions should be decided in favor of recusal.⁶² The Seventh Circuit remarked that “[a] judge *may* decide close calls in favor of recusal.”⁶³ However, most circuits have also said “there is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is.”⁶⁴

Cir. 1990); *Little Rock Sch. Dist. v. Arkansas*, 902 F.2d 1289, 1290 (8th Cir. 1990); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988); *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987); *United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986); *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981).

58. *United States v. DeTemple*, 162 F.3d 279, 287 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 1793 (1999).

59. *Id.*

60. *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990). *See also United States v. Jordan*, 49 F.3d 152, 156 (5th Cir. 1995); *O’Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 988 (7th Cir. 2001).

61. *Mason*, 916 F.2d at 386; *Jordan*, 49 F.3d at 157.

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

63. *New York City Hous. Dev. Corp. v. Hart*, 796 F.2d 976, 980 (7th Cir. 1986) (emphasis added).

64. *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987). *Accord Nakell v. AG of N.C.*, 15 F.3d 319, 325 (4th Cir. 1994); *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988); *Easley v. University of Mich. Bd. of Regents*,

There is a second respect, apart from application of the reasonable person standard, in which the determination under section 455(a) is objective. The Supreme Court has held that a violation of section 455(a) takes place even if the judge is unaware of the circumstance that created the appearance of impropriety. In *Liljeberg v. Health Services Acquisition Corp.*,⁶⁵ the trial judge was a member of the board of trustees of a university that had a financial interest in the litigation, but he was unaware of the financial interest when he conducted a bench trial and ruled in the case. The court of appeals nevertheless vacated the judgment under Fed. R. Civ. P. 60(b) because the judge failed to recuse himself pursuant to section 455(a), and the Supreme Court agreed. Noting that the purpose of section 455(a) is to promote public confidence in the integrity of the judicial process, the Court observed that such confidence “does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew.”⁶⁶

Courts of appeals have applied this principle in various circumstances. The Seventh Circuit, for example, remanded a habeas case directing the judge to whom the case had been reassigned to provide the petitioner the opportunity to challenge the dismissal of four counts by the previously assigned district judge. That judge had ruled on the habeas petition without realizing that he, as a state court judge years earlier, had been on the panel whose decision was now challenged.⁶⁷

In *In re Continental Airlines*,⁶⁸ the Fifth Circuit found a violation of section 455(a) where a law firm for one of the parties ap-

853 F.2d 1351, 1356 (6th Cir. 1988); *Suson v. Zenith Radio Corp.*, 763 F.2d 304, 308–09 n.2 (7th Cir. 1985); *Brody v. President & Fellows of Harvard College*, 664 F.2d 10, 12 (1st Cir. 1981).

65. 486 U.S. 847 (1988).

66. *Id.* at 860.

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

68. 901 F.2d 1259 (5th Cir. 1990).

pearing before the judge was considering him for employment, even though he was unaware of it. Quoting from *Liljeberg*, the court explained that section 455(a) “does not call upon judges to perform the impossible.”⁶⁹ “To hold that § 455(a) was violated . . . does not mean that [the judge] was required to stand recused before discovering that he was being considered for employment. Rather, when an offer of employment was received the day after his approval of \$700,000 in legal fees to the firm making the offer, [the judge] was ‘required to take the steps necessary to maintain public confidence in the judiciary.’”⁷⁰ In this case that meant “either . . . reject[ing] the offer outright, or, if he seriously desired to consider accepting the offer, stood recused and vacated the rulings made shortly before the offer was made.”⁷¹

An Eighth Circuit case, *United States v. Tucker*,⁷² is noteworthy for the court’s ruling on the standard for recusal. The Office of Independent Counsel (OIC) sought recusal of the district judge because of “reported connections among Judge Woods, the Clintons, and [defendant] Tucker,”⁷³ connections it chronicled with various newspaper articles. Although none of the articles directly connected the judge to the defendant, the Eighth Circuit ordered remand of the case to a different judge, noting the judge’s connection

69. *Id.* at 1262.

70. *Id.* (quoting *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 861 (1988)).

71. *Id.* at 1262–63. The court held, however, that the violation of section 455(a) constituted harmless error. *Id.* at 1263.

72. 78 F.3d 1313, 1324–25 (8th Cir. 1996). The decision also involved the use of an unusual procedure for requesting recusal of the district judge. Instead of presenting the issue to the judge directly, the appellant presented the request for the first time on appeal. The court of appeals held that it was empowered, pursuant to 28 U.S.C. § 2106, to direct the entry of any order “as may be just under the circumstances,” including the reassignment of the case to a different district judge where, under 28 U.S.C. § 455(a), the judge’s “impartiality might reasonably be questioned.” *Id.* at 1324. See also *United States v. Microsoft Corp.*, 253 F.3d 34, 109 (D.C. Cir. 2001) (In “a departure from [its] usual practice of declining to address issues raised for the first time on appeal,” the D.C. Circuit considered Microsoft’s request for disqualification of the trial judge since “the full extent of [the judge’s] actions [were] not [] revealed until this case was on appeal.”). *Id.* at 108.

73. *Tucker*, 78 F.3d at 1325.

to President and Mrs. Clinton—that is, the judge had worked with and admired Hillary Clinton and had spent a night in the White House. The court further noted that “President and Mrs. Clinton have been reported to have expressed continued support for Tucker since his indictment by the grand jury”⁷⁴ and attended a fund-raising luncheon for him. In the court’s view, reassignment was necessary because of the “risk of a perception of judicial bias or partiality”⁷⁵ given the “high profile”⁷⁶ of the OIC’s work and the widely reported connections. A request to rehear the case en banc was rejected, but prompted a strong dissent, which described the majority’s standard—“a friend of a friend creates an impermissible appearance of bias—as without precedential support and unworkable.”⁷⁷ Another Eighth Circuit decision during the same period acknowledged the *Tucker* ruling but found it was not controlling because the court in *Tucker* based its decision on its authority under 28 U.S.C. § 2106 rather than section 455(a).⁷⁸

B. Applications of Section 455(a)

Although recusal motions generally require a fact-specific analysis, judges can benefit from knowing how courts of appeals have evaluated such motions under different circumstances. While there are literally hundreds of cases to choose from, many fall into several broad categories. The next sections canvas the case law and discuss the circumstances in which courts of appeals most often deem recusal necessary or not.

1. Recusal usually unnecessary

The Tenth Circuit listed seven areas that are frequently alleged as a basis for recusal but ordinarily do not warrant it:

- (1) Rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters;
- (2) the mere fact

74. *Id.* at 1323.

75. *Id.* at 1324.

76. *Id.* at 1325.

77. *United States v. Tucker*, 82 F.3d 1423, 1424 (8th Cir. 1996).

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

that a judge has previously expressed an opinion on a point of law or has expressed a dedication to upholding the law or a determination to impose severe punishment within the limits of the law upon those found guilty of a particular offense; (3) prior rulings in the proceeding, or another proceeding, solely because they were adverse; (4) mere familiarity with the defendant(s), or the type of charge, or kind of defense presented; (5) baseless personal attacks on or suits against the judge by a party; (6) reporters' personal opinions or characterizations appearing in the media, media notoriety, and reports in the media purporting to be factual, such as quotes attributed to the judge or others, but which are in fact false or materially inaccurate or misleading; and (7) threats or other attempts to intimidate the judge.⁷⁹

The case law confirms that the other circuits likewise tend to reject claims for recusal based on these circumstances. The next section explains the rationale for rejecting these factors as a basis for recusal and notes exceptions where recusal is warranted.

a. *Judge's adverse rulings or expression of opinion.* A judge's rulings and expressions of opinion generally fail to justify recusal.⁸⁰ It has long been understood that, absent extreme cases, the circumstances suggesting or creating the appearance of partiality cannot derive from the trial itself—naturally, judges hold and express attitudes about the litigants and issues that they have formed during the trial. As the Supreme Court succinctly put it in *United States v. Grinnell Corp.*,⁸¹ a case predating the 1974 amendment to section 455: “The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source . . . other than what the judge learned from his participation in the case.”⁸² The Court ruled against recusal in *Grinnell* because “[a]ny adverse attitudes that [the judge] evinced toward the defendants were based on his study of the

79. *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995).

80. *See, e.g., Byrne v. Nezhat*, 261 F.3d 1075, 1103 (11th Cir. 2001) (“adverse rulings alone do not provide a party with a basis for holding that the court’s impartiality is in doubt”).

81. 384 U.S. 563 (1966).

82. *Id.* at 583.

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depositions and briefs which the parties had requested him to make.”⁸³

In *Liteky v. United States*,⁸⁴ the Supreme Court applied this rule, commonly called the “extrajudicial source” doctrine, to the amended section 455(a), but clarified that the doctrine has exceptions. Just prior to his second criminal trial, the defendant in *Liteky* moved to disqualify the judge on the ground that, during an earlier criminal trial, the judge displayed “impatience, disregard for the defense and animosity”⁸⁵ toward the defendant. He cited various comments by the judge, including admonitions of defense witnesses and counsel as well as certain trial rulings. The Court rejected the contention that recusal was in order.

First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved. . . . Second, opinions 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.⁸⁶

Consistent with *Liteky*, courts of appeals rarely reverse refusals to recuse when the alleged partiality did not derive from an extrajudicial source. For example, the Tenth Circuit upheld a refusal to recuse even though the trial judge opined pretrial that “the obvious thing that’s going to happen . . . is that she’s going to get convicted”⁸⁷ The court of appeals believed the judge merely expressed a view of what was likely to happen derived from what he had observed in the case: “Nothing in the remark indicates that the judge

83. *Id.*

84. 510 U.S. 540 (1994).

85. *Id.* at 542.

86. *Id.* at 555 (citation omitted).

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

was unable or unwilling to carry out his responsibilities impartially.”⁸⁸

Likewise, the Seventh Circuit upheld a refusal to recuse by a trial judge who stated that “any predisposition this court has in this matter is a result of things that have taken place in this very courtroom.”⁸⁹ Even the acknowledgment of a predisposition was not “remotely sufficient evidence of the required ‘deep-seated and unequivocal antagonism that would render fair judgment impossible.’”⁹⁰

So, too, the Seventh Circuit found recusal unnecessary where the judge called the motion for his disqualification by a lawyer–litigant “offensive,” claimed it “impugned” his integrity, and directed the party to testify under oath about the judge’s alleged bias because, the judge claimed, the motion reflected unethical behavior. The judge was reacting, “albeit strongly,” to a motion brought on the eve of trial: “[W]e do not believe that the Judge’s comments . . . reflect a bias or prejudice gained from outside the courtroom”⁹¹

Recusal was also unwarranted where, during a status hearing with the petitioner, the judge “expressed skepticism about the likelihood that a Rule 60(b) motion filed fourteen years after entry of an order would be granted.”⁹² The Seventh Circuit held that “[t]hat comment, standing alone, is not enough to prove an improper motive.”⁹³ The judge had also told the petitioner “he harbored no animosity towards her and would therefore consider the merits of her claim.”⁹⁴

88. *Id.* at 1416. *See also* *United States v. Martin*, 278 F.3d 988 (9th Cir. 2002) (holding that district court didn’t abuse discretion in denying motion to recuse where, during sentencing hearing, judge became frustrated with defendant and counsel, and made remarks concerning defendant’s credibility—“the . . . comments . . . may have been testy, but they do not justify a recusal”).

89. *In re* *Huntington Commons Assocs.*, 21 F.3d 157, 158 (7th Cir. 1994).

90. *Id.* at 159 (quoting *Liteky*).

91. *Hook v. McDade*, 89 F.3d 350, 356 (7th Cir. 1996).

92. *In re* *Mann*, 229 F.3d 657, 658 (7th Cir. 2000).

93. *Id.* at 659.

94. *Id.* at 658.

The Ninth Circuit found that the district judge did not abuse his discretion in denying a motion to recuse based on his criticism of the government's initial failure to charge the defendant with carrying a weapon during the commission of a robbery. At a status conference, the judge had commented that the government's omission of the gun count was "absurd" and "asinine," and told counsel to "[s]hare that with your head of [the] criminal [division]."⁹⁵ The Ninth Circuit found that the district judge's comments did not rise to the level required for recusal under section 455(a), stating that "[a] judge's views on legal issues may not serve as the basis for motions to disqualify."⁹⁶

It is not uncommon for a judge, at sentencing, to express outrage at the defendant's conduct or at the defendant himself, and/or an urge to see the defendant severely punished. Ordinarily, none of this is ground for recusal.⁹⁷

Although decided before *Liteky*, *United States v. Barry*⁹⁸ nicely illustrates the relevant principle. At sentencing, the trial judge claimed that jurors who voted to acquit the defendant on several charges "will have to answer to themselves and to their fellow citizens."⁹⁹ The court of appeals acknowledged that "this statement may indicate that the court thought appellant was guilty of more counts than he was convicted of" but "there is no indication that the court reached this conclusion based on anything other than its participation in the case."¹⁰⁰

A rare exception, where the court of appeals reversed a refusal to recuse even though the alleged bias did not derive from an extrajudicial source, is instructive. During a sentencing hearing fol-

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

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

97. *See, e.g.*, *United States v. Pearson*, 203 F.3d 1243, 1277–78 (10th Cir. 2000) (recusal not required where during sentencing a district judge made remarks about defendant's character); *United States v. Kimball*, 73 F.3d 269, 273 (10th Cir. 1995) (recusal not necessary despite judge's "unfortunate comment" that he wanted defendant to "die in prison").

98. 938 F.2d 1327 (D.C. Cir. 1991).

99. *Id.* at 1341.

100. *Id.*

lowing a conviction for massive securities fraud, the trial judge ruminated about the amount of restitution he might award: “My object in this case from day one has always been to get back to the public that which was taken from it as a result of the fraudulent activities of this defendant and others.”¹⁰¹ The Third Circuit held that the remark reflected a mindset requiring recusal:

[T]his is a case where the district judge, in stark, plain and unambiguous language, told the parties that his goal in the criminal case, from the beginning, was something other than what it should have been and, indeed, was improper. . . . It is difficult to imagine a starker example of when opinions formed during the course of judicial proceedings display a high degree of antagonism against a criminal defendant. After all, the best way to effectuate the district judge’s goal would have been to ensure that the government got as free a road as possible towards a conviction, which then would give the judge the requisite leverage to order a large amount of restitution.¹⁰²

The court noted the trial judge’s reputation for fairness, and acknowledged the perils of focusing on one sentence out of volumes of transcripts. However, “in determining whether a judge had the duty to disqualify him or herself, our focus must be on the reaction of the reasonable observer. If there is an appearance of partiality, that ends the matter.”¹⁰³

In another notable departure, *United States v. Microsoft Corp.*,¹⁰⁴ the court of appeals granted Microsoft’s request to disqualify the trial judge because of the cumulative effect of the judge’s comments on the merits of the case in a series of secret interviews with reporters throughout the course of the trial. The court emphasized that “all of these remarks and others might not have given rise to a violation of the Canons or of § 455(a) had he uttered them from the bench . . . It is an altogether different matter when the statements are made outside the courtroom, in private meetings un-

101. *United States v. Antar*, 53 F.3d 568, 573 (3d Cir. 1995).

102. *Id.* at 576.

103. *Id.*

104. 253 F.3d 34 (D.C. Cir. 2001) (also discussed *infra*, text accompanying notes 152–61).

known to the parties, in anticipation that ultimately the Judge's remarks would be reported."¹⁰⁵

While it is rare for attitudes formed during judicial proceedings to give rise to recusal, it does not follow that a judge's opinion derived from an extrajudicial source automatically requires recusal. The Court in *Liteky* stated that such an opinion is neither a necessary nor a sufficient condition for "bias or prejudice" recusal.¹⁰⁶ The Court observed that "some opinions acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will *not* suffice" to warrant recusal.¹⁰⁶

b. *Rumor, suspicion, or innuendo.* As the First Circuit put it:

[W]hen considering disqualification, the district court is *not* to use the standard of "Caesar's wife," the standard of mere suspicion. That is because the disqualification decision must reflect *not only* the need to secure public confidence through proceedings that appear impartial, *but also* the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.¹⁰⁷

Numerous cases follow the admonition to reject recusal where the alleged basis for it requires suspicion or speculation beyond what the reasonable person would indulge. The Second Circuit upheld a refusal to recuse where the defendant alleged that the judge, a personal acquaintance, had grown unfriendly to him because of the defendant's public opposition to the Gulf War. "A disinterested observer could not reasonably question [the judge's] impartiality based upon his alleged failure to return the plaintiff's greetings."¹⁰⁸

Likewise, where a defendant moved for an Asian judge to recuse himself because the defendant had been publicly critical of a prominent Asian, the Second Circuit opined that "it is intolerable for a litigant, without any factual basis, to suggest that a judge can-

105. *Id.* at 115.

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

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

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

not be impartial because of his or her race and political background.”¹⁰⁹

c. *Familiarity with parties or events.* Judges often cannot avoid some acquaintance with the underlying parties or events that give rise to litigation. Such acquaintance, by itself, will generally not require recusal. The Second Circuit upheld a refusal to recuse where the judge had a social relationship with a shareholder in a company victimized by the defendants. The judge’s relationship with the shareholder “ended seven or eight years prior to sentencing[;] . . . he had no specific knowledge of the contested facts[;] and . . . the . . . allegations [regarding the judge’s friend’s restaurant] were not outcome-determinative in these proceedings”¹¹⁰ The Second Circuit also upheld a refusal to recuse where the defendant had a remote (but adversarial) business relationship with the judge’s husband. The Second Circuit stated that “it requires too much speculation to convert [the husband’s] alleged past frustrated dealings with [defendant] into any interest, financial or otherwise, in the outcome of [defendant’s] unrelated criminal trial.”¹¹¹

In some cases, the judge’s familiarity with aspects of a case comes from having presided over related cases. Here, too, absent unusual circumstances, recusal is unnecessary. The case of *Town of Norfolk v. United States Army Corps of Engineers*¹¹² is illustrative. A district judge had overseen compliance with a city plan to clean up the Boston Harbor. In a subsequent case about locating a landfill pursuant to the Clean Water Act, a party moved for the judge’s recusal, and the judge refused. The First Circuit upheld the refusal, noting that “a judge is sometimes required to act against the backdrop of official positions he took in other related cases. A judge cannot be replaced every time a case presents an issue with which

109. *Macdraw, Inc. v. CIT Group Equip. Fin., Inc.*, 157 F.3d 956, 963 (2d Cir. 1998).

110. *United States v. Lovaglia*, 954 F.2d 811, 817 (2d Cir. 1992).

111. *United States v. Morrison*, 153 F.3d 34, 47–49 (2d Cir. 1998).

112. 968 F.2d 1438 (1st Cir. 1992).

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the judge's prior official decisions and positions may have a connection."¹¹³

d. *Personal attacks on the judge*. Upholding a refusal to recuse where the litigant had verbally attacked the judge in public, the First Circuit noted that “[a] party cannot force disqualification by attacking the judge and then claiming that these attacks must have caused the judge to be biased against [her].”¹¹⁴ Indeed, where a party argued that the judge's ongoing hostility toward him required recusal, the Third Circuit held that the party's own public hostility toward the judge (including writing a letter to a Supreme Court justice urging punishment of the judge) counseled *against* recusal, “lest we encourage tactics designed to force recusal.”¹¹⁵

In upholding a refusal to recuse where the plaintiff had sent a letter to the Senate Judiciary Committee opposing the judge's nomination to the bench, the Ninth Circuit's succinct response captures why such circumstances generally do not require recusal: “Such a letter is probative of [the plaintiff's] dislike for [the judge], not the other way around.”¹¹⁶

These cases reflect a more general principle articulated by the Seventh Circuit in a case where a lawyer showed the judge a letter written by the opposing lawyer praising the judge, then moved for recusal on the ground that the praise could influence the judge: “[I]t is improper for a lawyer or litigant . . . to *create* the ground on which he seeks the recusal of the judge assigned to his case. That is arrant judge-shopping.”¹¹⁷

113. *Id.* at 1462.

114. *FDIC v. Sweeney*, 136 F.3d 216, 219 (1st Cir. 1998) (quoting 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3542).

115. *United States v. Bertoli*, 40 F.3d 1384, 1414 (3d Cir. 1994). *See also* *United States v. Bayless*, 201 F.3d 116, 129 (2d Cir. 2000) (The judge did not commit clear error in denying recusal because of media and political attacks on him. To read section 455 to allow such recusal “would create a moral hazard by encouraging litigants or other interested parties to maneuver to obtain a judge's disqualification.”).

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

117. *Sullivan v. Conway*, 157 F.3d 1092, 1096 (7th Cir. 1998). *Accord* *United*

e. *Threats or lawsuits against the judge.* Threats against judges or their families can be made solely to spur recusal, and, as previously discussed, such judge-shopping is impermissible. Therefore, this kind of threat generally does not constitute a basis for recusal. One exceptional case in which the court of appeals reversed a refusal to recuse in the face of a threat to the judge is instructive. The Tenth Circuit held that a trial judge should have recused himself because he “learned of the alleged threat from the FBI, and there is nothing in the record to suggest the threat was a ruse by the defendant in an effort to obtain a different judge.”¹¹⁸ Moreover, the trial court had expedited sentencing in order to “get [defendant] into the federal penitentiary system immediately, where he can be monitored more closely.”¹¹⁹ Under the circumstances, the court’s impartiality could reasonably be questioned. However, in dicta, the Tenth Circuit clarified that threats against a judge will rarely be ground for recusal:

[I]f a death threat is communicated directly to the judge by a defendant, it may normally be presumed that one of the defendant’s motivations is to obtain a recusal, particularly if he thereafter affirmatively seeks a recusal. . . . [I]f a judge concludes that recusal is at least one of the defendant’s objectives (whether or not the threat is taken seriously), then section 455 will not mandate recusal because that statute is not intended to be used as a forum shopping statute. . . . Similarly, if a defendant were to make multiple threats to successive judges or even to multiple judges on the same court, there might be some reason to suspect that the threats were intended as a recusal device.¹²⁰

States v. Owens, 902 F.2d 1154, 1156 (4th Cir. 1990) (“Parties cannot be allowed to create the basis for recusal by their own deliberate actions. To hold otherwise would encourage inappropriate ‘judge shopping.’”). *See also In re Mann*, 229 F.3d 657, 658 (7th Cir. 2000) (“‘Judge-shopping’ is not a practice that should be encouraged”).

118. *United States v. Greenspan*, 26 F.3d 1001, 1006 (10th Cir. 1994).

119. *Id.* at 1005.

120. *Id.* at 1006.

Part One: The Recusal Statutes

For the same reason, the filing of a collateral lawsuit or other adversarial legal action against the judge will generally not require recusal.¹²¹

2. Recusal more likely

Most of the cases in which courts of appeals found that a trial judge should have recused himself or herself fall into one of six categories: close personal or professional relationship to attorneys or others; public comments or outside activities; ex parte contacts; involvement pertaining to a guilty plea; the judge took personal offense; and miscellaneous.

a. *Close personal or professional relationship to attorneys or others.* A judge's friendship with one of the attorneys, or acquaintance with witnesses or even parties, does not ordinarily require recusal. However, there are cases where the extent of intimacy, or other circumstances, renders recusal necessary.

The Eleventh Circuit held that a trial judge improperly failed to recuse himself when, among other things, a close personal friend was a key defense witness.¹²² The judge had expressed concern on the record that he might "bend over backwards to prove he lacked favoritism" towards the witness, and that a guilty verdict might "jeopardize his wife's friendship" with the witness's wife.¹²³ "The judge expressed profound doubts about the propriety of continuing . . . on the case; . . . such doubts should have been resolved in favor of disqualification."¹²⁴ In another case, the Eleventh Circuit held that the trial judge should have recused himself where his law clerk's father—who himself had been the judge's law clerk—was a partner in the law firm representing one of the parties. Also, the law clerk had held a hearing with counsel in the judge's absence. In

121. See *Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1355–56 (3d Cir. 1990) (recusal not necessary where party's spouse filed complaint against judge with Judicial Inquiry Board); *United States v. Studley*, 783 F.2d 934, 940 (9th Cir. 1986); *United States v. Grismore*, 564 F.2d 929, 933 (10th Cir. 1977); *United States v. Whitesel*, 543 F.2d 1176, 1181 (6th Cir. 1976).

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

123. *Id.* at 738.

124. *Id.* at 745.

addition, as a matter of course, the judge credited his law clerk in his written opinions.¹²⁵ Nevertheless, the court found failure to recuse harmless error in this case.¹²⁶

The First Circuit held that refusal to recuse was “probably” improper where, during pendency of the action, the judge was represented in an unrelated matter by a partner in a firm that was involved in the case before the judge.¹²⁷ Because of the procedural posture of the case, the court did not make a final resolution on the merits, but remarked:

Most observers would agree that a judge should not hear a case argued by an attorney who, at the same time, is representing the judge in a personal matter. Although the appearance of partiality is attenuated when the lawyer appearing before the judge is a member of the same law firm as the judge’s personal counsel, but not the same individual, many of the same cautionary factors are still in play. . . . This principle would seem to have particular force where, as here, the law firm is small and the judge’s lawyer is a name partner.¹²⁸

The Fifth Circuit reversed a failure to recuse in a criminal case where there was a publicized history of “bad blood” between the defendant and a close personal friend of the judge.¹²⁹ While noting that friendship between the judge and a person with an interest in the case need not be disqualifying, here the judge’s friend and the defendant “were embroiled in a series of vindictive legal actions resulting in a great deal of publicity,” some of which involved the judge’s spouse.¹³⁰ The Eighth Circuit required recusal in a case in which both the district judge and the defendant, who did not have

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

126. *Parker*, 855 F.2d at 1527. *See also infra* note 281.

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

128. *Id.* at 1261 n.4 (citation omitted).

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

130. *Id.* at 157.

a connection with each other, had an association with President and Mrs. Clinton.¹³¹

The Seventh Circuit stated that a judge should have recused himself where he and the prosecuting attorney were close friends and planned to vacation together immediately after the trial.¹³² The court noted that “friendships among judges and lawyers are common” and “a judge need not disqualify himself just because a friend—even a close friend—appears as a lawyer.”¹³³ However, here the extent of intimacy was “unusual” and an objective observer might reasonably doubt the judge’s impartiality when “he was such a close friend of the prosecutor that the families of both were just about to take a joint vacation.”¹³⁴

The Sixth Circuit reversed a failure to recuse in a sex discrimination suit where, pretrial, the judge stated that he personally knew one of the people accused of discrimination and “he is an honorable man and I know he would never intentionally discriminate against anybody.”¹³⁵ The court noted that “[o]nce the district court expressed his ardent sentiments . . . the objective appearance of impartiality vanished.”¹³⁶

The Seventh Circuit reversed a refusal to recuse where the judge’s son, a third-year law student, had assisted the government in the prosecution of a defendant in a case arising from the same circumstances as that of the present defendant. Although the cases were formally separate proceedings, “they are both component parts of one large prosecution of the continuing criminal enterprise. . . . Outside observers have no way of knowing how much information the judge’s son acquired about that broader prosecution while working on the . . . case.”¹³⁷ The court emphasized that a

131. *United States v. Tucker*, 78 F.3d 1313 (8th Cir. 1996). *See supra* text accompanying notes 72–78.

132. *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985).

133. *Id.* at 1537.

134. *Id.* at 1538. Nevertheless, the court chose not to reverse because the defendant’s recusal motion was inexcusably untimely.

135. *Roberts v. Bailar*, 625 F.2d 125, 127 (6th Cir. 1980).

136. *Id.* at 129.

137. *In re Hatcher*, 150 F.3d 631, 638 (7th Cir. 1998).

judge whose son is an assistant U.S. attorney need not recuse himself from all cases in which the United States is a party, or even whenever the son prosecuted a case bearing some relationship to the case before the judge. “This is instead the rare case where the earlier proceedings were so close to the case now before the judge that recusal under § 455(a) was the only permissible option.”¹³⁸

While connection to the case by someone close to the judge should raise a red flag, certain professional relationships confront judges frequently and generally do not require recusal. As the First Circuit explained:

It is common knowledge in the profession that former law clerks practice regularly before judges for whom they once clerked. Courts often have prophylactic rules that forbid a former law clerk from appearing in that court for a year or more after the clerkship So, too, appointees to the bench have sometimes had a former active connection with a political party. But many judges also sit, usually after a self-imposed cooling off period, on cases involving former clients (assuming always no current financial ties and that the judge did not work on the same or a related matter while in practice). Former affiliations with a party may persuade a judge not to sit; but they are rarely a basis for compelled recusal.¹³⁹

Where the judge’s law clerk has a possible conflict of interest, the Eleventh Circuit has noted that “it is the clerk, not the judge who must be disqualified.”¹⁴⁰ In this case, involving medical malpractice, the plaintiff had moved for recusal because the judge’s law clerk used to work for the law firm representing some of the defendants. The court of appeals held that recusal wasn’t required under section 455(a) since the judge had isolated the law clerk from the case and assigned the matter to another law clerk.¹⁴¹

138. *Id.*

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

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

141. *Id.* at 1100. The court reasoned that since “precedent approves the isolation of a law clerk who has accepted future employment with counsel appearing before the court (*see e.g.*, *Hunt*, 783 F.2d at 1015–16) it follows that isolating a

b. *Public comments or outside activities.* A trial judge's outside professional activities may create an appearance of partiality. In *United States v. Cooley*,¹⁴² the Tenth Circuit reversed a refusal to recuse where the defendants were abortion protesters and the trial judge had appeared on national television and stated that "these people are breaking the law."¹⁴³ The court of appeals stated:

Two messages were conveyed by the judge's appearance on national television in the midst of these events. One message consisted of the words actually spoken. . . . The other was the judge's expressive conduct in deliberately making the choice to appear in such a forum at a sensitive time to deliver strong views on matters which were likely to be ongoing before him. Together, these messages unmistakably conveyed an uncommon interest and degree of personal involvement in the subject matter. It was an unusual thing for a judge to do, and it unavoidably created the appearance that the judge had become an active participant in bringing law and order to bear on the protesters, rather than remaining as a detached adjudicator.¹⁴⁴

In *In re Boston's Children First*,¹⁴⁵ the First Circuit held that a judge's comments to the media about a pending case challenging an elementary school student assignment process on grounds of racial discrimination required recusal. Seeking to correct misinterpretations in press accounts unfavorably comparing her action in the pending matter with a previous case, the judge had told a newspaper reporter in a phone interview, the content of which was later published, that the pending case "is more complex."¹⁴⁶ The plaintiffs moved for recusal; the judge denied the motion. The court of appeals held that recusal was necessary and granted the petitioners' writ of mandamus pursuant to section 455(a). Although it found the media contact "less inflammatory than that in *Cooley*," it saw

law clerk should also be acceptable when the clerk's former employer appears before the court." *Id.* at 1102.

142. 1 F.3d 985 (10th Cir. 1993).

143. *Id.* at 990.

144. *Id.* at 995.

145. 244 F.3d 164 (1st Cir. 2001).

146. *Id.* at 166.

“the same factors at work.”¹⁴⁷ First, because the school assignment program was a matter of significant local concern, the public attention and rarity of such public statements by a judge made it “more likely that a reasonable person [would] interpret such statements as evidence of bias.”¹⁴⁸ Second, like *Cooley*, the “‘appearance of partiality’ at issue here . . . stems from the real possibility that a judge’s statements may be misinterpreted because of the ambiguity of those statements.”¹⁴⁹ Finally, a judge’s defense of her own orders, before the resolution of appeal, could also create the appearance of partiality.¹⁵⁰ The court noted that its holding was “based on the particular events” of a “highly idiosyncratic case.”¹⁵¹

In granting a disqualification request in *United States v. Microsoft*,¹⁵² the D.C. Circuit noted that other courts of appeals had found violations of section 455(a) “for judicial commentary on pending cases that seems mild in comparison to what we are confronting in this case.”¹⁵³ The district judge had given “secret interviews to select reporters” throughout the course of the *Microsoft* trial, requiring “that the fact and content of the interviews remain secret until he issued the Final Judgment.”¹⁵⁴ The interviews began to appear in press accounts immediately after the final judgment

147. *Id.* at 169.

148. *Id.* at 170.

149. *Id.*

150. *Id.* Canon 3A(6) does not bar comment on final, completed cases so long as judges refrain from revealing the deliberation process and don’t place in question their impartiality in similar future cases. See Compendium of Selected Opinions § 3.9-1(d) (2001).

151. *Boston’s Children*, 244 F.3d at 171. After receiving a petition for rehearing en banc from the district judge, the appeals panel sought the opinions of the other three nonpanelist active judges, who disagreed that the judge’s comment required mandatory recusal under section 455(a). They agreed with the panel, though, that her comment on a pending case was “at the very least particularly unwise.” *Id.* This difference of view among the active judges indicated “the continuing need for a case-by-case determination of such issues,” the panel acknowledged. *Id.*

152. 253 F.3d 34 (D.C. Cir. 2001).

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

154. *Id.* at 108.

was entered. Some interviews were conducted after the final judgment was entered. Because the full extent of the judge's actions did not become apparent until the case was on appeal, the D.C. Circuit decided to adjudicate Microsoft's disqualification request even though the published interviews had not been admitted into evidence and no evidentiary hearing had been held on them. The D.C. Circuit held that the judge "breached his ethical duty under Canon 3A(6) each time he spoke to a reporter about the merits of the case."¹⁵⁵ The court noted that the judge's comments did not fall into one of "three narrowly drawn exceptions" under the canon because the judge did not discuss "purely procedural matters" but actually "disclosed his views on the factual and legal matters at the heart of the case."¹⁵⁶ The fact that the judge "may have intended to 'educate' the public about the case or to rebut 'public misperceptions'" was not an excuse for his actions, and his "insistence on secrecy . . . made matters worse" because it prevented the parties from raising objections or seeking disqualification before the judge issued a final judgment.¹⁵⁷ The D.C. Circuit observed that it had not "gone so far as to hold that every violation of Canon 3A(6) . . . inevitably destroys the appearance of impartiality and thus violates § 455(a)."¹⁵⁸ However, it believed "the line ha[d] been crossed" in this case and the judge's comments would cause "a reasonable, informed observer to question" the judge's impartiality.¹⁵⁹ Because Microsoft "neither alleged nor demonstrated that [the judge's conduct] rose to the level of actual bias or prejudice," the court found "no reason to presume that everything the District Judge did [was] suspect."¹⁶⁰ It concluded that there was no reason to set aside the findings of fact and conclusions of law and that the appropriate

155. *Id.* at 112. Canon 3A(6) forbids federal judges to comment publicly "on the merits of a pending or impending action" and applies to cases pending before any court—state or federal, trial or appellate.

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

157. *Id.*

158. *Id.* at 114.

159. *Id.* at 115.

160. *Id.* at 116.

remedy was disqualification of the judge “retroactive only to the date he entered the order breaking up Microsoft.”¹⁶¹

The Third Circuit reversed a refusal to recuse where the trial judge in a mass tort asbestos case attended a scientific conference on the dangers of asbestos. The conference was funded in part by \$50,000 from the plaintiffs’ settlement fund. The request to use these funds for this purpose was approved by the judge.¹⁶²

We are convinced that a reasonable person might question [the judge’s] ability to remain impartial. To put it succinctly, he attended a predominantly pro-plaintiff conference on a key merits issue; the conference was indirectly sponsored by the plaintiffs . . . and his expenses were largely defrayed by the conference sponsors. . . . Moreover, he was, in his own words, exposed to a Hollywood-style “pre-screening” of the plaintiffs’ case¹⁶³

The court declined to address whether any of these facts alone compelled disqualification, because “together they create an appearance of partiality that mandates disqualification.”¹⁶⁴

Similarly, the Fourth Circuit reversed a refusal to recuse where, while a jury trial on damages was pending against an automobile company, the judge gave a speech at an Auto Torts Seminar that expressed hostility toward defendants and defense counsel in such cases.¹⁶⁵

There are somewhat similar cases that went the other way, however. In *United States v. Pitera*,¹⁶⁶ the judge gave a videotaped lecture to a government drug enforcement task force seven months before the narcotics prosecution in question, but after the case had already been assigned to her. In the lecture, the judge urged the assembled agents and prosecutors to take certain steps to increase prospects for conviction in narcotics cases. The Second Circuit nevertheless upheld the refusal to recuse because the judge’s lec-

161. *Microsoft*, 253 F.3d at 116.

162. *In re School Asbestos Litig.*, 977 F.2d 764, 779 (3d Cir. 1992).

163. *Id.* at 781–82.

164. *Id.* at 782.

165. *Hathcock v. Navistar Int’l Transp. Corp.*, 53 F.3d 36 (4th Cir. 1995).

166. 5 F.3d 624 (2d Cir. 1993).

ture “included several emphatic criticisms of prosecutors that would lead a reasonable person not to question, but to have confidence in the [j]udge’s impartiality.”¹⁶⁷ In addition, the judge participated in various programs for criminal defense lawyers, and she “commendably lectures to a variety of trial practice seminars.”¹⁶⁸

The Second Circuit also upheld a refusal to recuse in a case involving a trial judge’s attendance at an expense-paid environmental seminar funded indirectly by Texaco. After the judge attended the seminar, a lawsuit against Texaco that he had previously dismissed was remanded to him.¹⁶⁹ The court of appeals agreed with the district judge that his presence at the seminar did not warrant recusal under section 455(a) because Texaco provided only a minor part of the funding to one of two nonprofit organizations that conducted the seminar and the organizations had no connection to the case. Also, there was no showing that any aspect of the seminar touched on issues material to any claims or defense in the litigation.

In *United States v. Barry*,¹⁷⁰ the judge, after sentencing the defendant, addressed a forum at Harvard Law School in which he spoke of the overwhelming evidence of the defendant’s guilt. When the sentence was vacated on unrelated grounds and the case remanded for resentencing, the defendant moved for recusal, claiming the judge’s remarks at Harvard created an appearance of partiality. The court found, however, that because the judge’s remarks were “based on his own observations during the performance of his judicial duties,” recusal was not required.¹⁷¹

c. *Ex parte contacts*. Trial courts should be wary of *ex parte* contacts, which can result in reversals. *Ex parte* contacts contributed to the D.C. Circuit’s decision to remand a case to a different trial judge.¹⁷² “[C]oncerned by the district judge’s acceptance of *ex*

167. *Id.* at 626.

168. *Id.* at 627.

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

170. 961 F.2d 260 (D.C. Cir. 1992).

171. *Id.* at 263.

172. *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995) (*see supra* text accompanying notes 22–23) (the contacts included argumentative letters and a redacted exhibit). *See also* *United States v. Microsoft Corp.*, 253 F.3d

parte submissions,” the court thought that “the appropriate course would have been simply to refuse to accept any *ex parte* communications.”¹⁷³

In a Sixth Circuit case, the appellant alleged that the trial judge had sent his law clerk to gather evidence and therefore should have recused himself. The court observed that while “not every *ex parte* communication to the trial court requires reversal,”¹⁷⁴ the allegation here was sufficiently serious as to require a remand to determine its truth.

Where the trial judge met *ex parte* with a panel of experts and prohibited counsel from discovering the contents of the meeting, the Seventh Circuit reversed a refusal to recuse.¹⁷⁵ However, the Sixth Circuit upheld a refusal to recuse in a similar situation involving various *ex parte* communications because the judge “explained to Plaintiffs’ counsel the ministerial nature of these *ex parte* discussions before they took place” and “personally extended to Plaintiffs’ counsel an invitation to attend *all* of these meetings.”¹⁷⁶ Counsel chose not to attend, and “failed to register any objection to the meetings at that time”¹⁷⁷

d. *Involvement pertaining to guilty plea.* In *Halliday v. United States*,¹⁷⁸ the First Circuit implied that recusal is sometimes appropriate when a judge faces a motion under 28 U.S.C. § 2255 to vacate a conviction when he presided over the trial or imposed the sentence.¹⁷⁹ In a post-conviction motion, the defendant argued that

34, 113 (D.C. Cir. 2001) (holding that the judge’s secret interviews with reporters during the course of the trial violated Code of Conduct Canon 3A(4), which prohibits “*ex parte* communications on the merits, or procedures affecting the merits, of a pending . . . proceeding”).

173. *Microsoft*, 56 F.3d at 1464.

174. *Price Bros. v. Philadelphia Gear Corp.*, 629 F.2d 444, 446 (6th Cir. 1980). When the case returned to the Sixth Circuit, the court found harmless error. *Price Bros. v. Philadelphia Gear Corp.*, 649 F.2d 416 (6th Cir. 1981).

175. *Edgar v. K.L.*, 93 F.3d 256 (7th Cir. 1996).

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

177. *Id.*

178. 380 F.2d 270 (1st Cir. 1967).

179. *Id.*

the judge improperly conducted the Rule 11 plea agreement hearing. Since the section 2255 challenge would have forced the same judge to evaluate his own actions, the First Circuit found it preferable (but not required) for a different judge to conduct the section 2255 evidentiary hearing. In subsequent cases, the First Circuit clarified that *Halliday* is limited to cases where the section 2255 motion accuses the sentencing judge of violating Rule 11.¹⁸⁰

Where a judge's conduct during plea negotiations violated Rule 11, and a defendant subsequently pled not guilty and was convicted, the Fifth Circuit held that the defendant was not entitled to a new trial but was entitled to resentencing before a new judge.¹⁸¹ The Eighth Circuit concurred that when a case is remanded after a court of appeals finds a Rule 11 violation, the judge need not recuse himself from the subsequent trial, though recusal might be in order for sentencing if the defendant is convicted.¹⁸²

Similarly, the Third Circuit required resentencing before a new judge where the trial judge had communicated to defense counsel his preference that the defendant plead guilty and indicated that the defendant would receive a lighter sentence if he did.¹⁸³ After the defendant went to trial and was convicted, the Third Circuit vacated the sentence because a reasonable person might conclude that "the judge's attitude as to sentence was based at least to some degree on the fact that the case had to be tried, an exercise which the judge seemed anxious to avoid."¹⁸⁴

e. *Judge took personal offense.* In assorted cases, recusal has been deemed necessary where trial judges took unusual actions, or made comments, that indicated they took personal offense. In *In re Johnson*,¹⁸⁵ a bankruptcy trustee had been held in contempt because the trial judge thought she had misrepresented the judge to another judge in order to obtain a favorable court order. At the contempt

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

181. *United States v. Adams*, 634 F.2d 830, 835–43 (5th Cir. 1981).

182. *In re Larson*, 43 F.2d 410, 416 (8th Cir. 1994).

183. *United States v. Furst*, 886 F.2d 558 (3d Cir. 1989).

184. *Id.* at 583.

185. 921 F.2d 585 (5th Cir. 1991).

proceedings, the judge declared that he was “prejudiced in this matter,” had “all but made up his mind,” was “not in the least inclined to be neutral,” and he would serve as “complaining witness, prosecutor, judge, jury, and executioner”¹⁸⁶ The Fifth Circuit held that the judge clearly “considered [the party’s] actions to be a personal affront to his authority” such that a reasonable person would doubt his impartiality.¹⁸⁷

Trial judges occasionally appear insulted when a litigant challenges their rulings. The Third Circuit reversed a refusal to recuse where the judge had responded to the petitioners’ mandamus motion for disqualification by writing a lengthy letter. The judge, “in responding to the mandamus petition . . . has exhibited a personal interest in the litigation.”¹⁸⁸ The Fifth Circuit reversed a conviction where the judge remarked in court that the defendant had “broken faith” with him by raising a certain issue on appeal following his earlier trial.¹⁸⁹

f. *Miscellaneous*. Both the Fourth and Seventh Circuits have held recusal necessary where the judge was called on to review (in a habeas motion) a ruling that he himself participated in while a state court judge.¹⁹⁰ The Fifth Circuit found reversible error when a judge denied a recusal motion in a criminal case after the defendant’s attorney had testified against the judge in proceedings before a special investigating committee of the circuit judicial council.¹⁹¹

A judge subject to criminal investigation should consider recusing from criminal cases, though it is not required.¹⁹² In *United States v. Cerceda*,¹⁹³ an evenly divided en banc court affirmed by operation of law the district court’s holding that a judge who was

186. *Id.* at 587.

187. *Id.*

188. *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 165 (3d Cir. 1993).

189. *United States v. Holland*, 655 F.2d 44 (5th Cir. 1981).

190. *Russell v. Lane*, 890 F.2d 947 (7th Cir. 1989); *Rice v. McKenzie*, 581 F.2d 1114 (4th Cir. 1978).

191. *United States v. Anderson*, 160 F.3d 231, 233 (5th Cir. 1998).

192. The Judicial Conference has urged each circuit judicial council to adopt a policy on the subject.

193. 172 F.3d 806 (11th Cir. 1999).

the subject of a federal grand jury investigation had violated section 455(a) by failing to recuse himself from presiding at defendants' trials and sentencing hearings. The court reversed the district court's order granting new trials and sentencing hearings, however, based on a consideration of the three-factor test in *Liljeberg v. Health Services Acquisition Corp.*¹⁹⁴

Courts of appeals have approached the question of whether a judge's stock or note ownership in an entity that has been the "victim" of a crime requires disqualification under section 455(a) on a case-by-case basis, reaching different results.¹⁹⁵

V. Section 455(e): Waiver of Recusal

Pursuant to 28 U.S.C. § 455(e), waiver of a ground for disqualification based on subsection 455(a) "may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification"; waiver of disqualification under subsection 455(b) is not permissible.¹⁹⁶

Some courts of appeals have recognized waivers pursuant to section 455(e).¹⁹⁷ The Eleventh Circuit has noted, however, that "[w]hile it is . . . permissible for a judge to accept a waiver of recusal, we believe this option should be limited to marginal cases

194. 486 U.S. 847 (1988).

195. See, e.g., *United States v. Nobel*, 696 F.2d 231, 235-36 (3d Cir. 1982) (recusal required); *United States v. Farrington*, 2001 U.S. App. LEXIS 24978 (7th Cir. Nov. 16, 2001) (recusal not required); *United States v. Aragon*, No. 99-50341, 2000 U.S. App. LEXIS 15423 (9th Cir. June 29, 2000) (recusal not required under either section 455(a) or section 455(b)(4)); *United States v. Sellers*, 566 F.2d 884, 887 (4th Cir. 1977) (recusal not required); *United States v. Ravich*, 421 F.2d 1196 (2d Cir. 1970) (recusal not required). See also Andrew L. Wright, Comment, *Invested in the Outcome: When the Judge Owns Stock in the Victim of a Crime*, 1998 U. Chi. Legal F. 481 (1998).

196. 28 U.S.C. § 455(e) (1988).

197. See, e.g., *United States v. Rogers*, 119 F.3d 1377, 1382 (9th Cir. 1997) (The defendant "expressly approved of the district judge's continued service in this case. [His] election to proceed after this disclosure constitutes an effective waiver under § 455(e)."); *In re Cargill*, 66 F.3d 1256, 1261 (1st Cir. 1995); *United States v. Nobel*, 696 F.2d 231, 236-37 (3d Cir. 1982).

and should be exercised with the utmost restraint.”¹⁹⁸ Finding that the defendant did not validly waive his recusal claim even though he was apprised of the potential disqualifying circumstance and did not seek recusal, the Eleventh Circuit held that, as a general rule, “a federal judge should reach his own determination [on recusal], without calling upon counsel to express their views. . . . The too frequent practice of advising counsel of a possible conflict, and asking counsel to indicate their approval of a judge’s remaining in a particular case is fraught with potential coercive elements which make this practice undesirable.”¹⁹⁹

Failure to comply with the procedural requirements for disclosure under section 455(e) for waiver of disqualification can result in reversal. In *Barksdale v. Emerick*,²⁰⁰ the trial court, rejecting a recusal motion, issued the following order: “The Court having disclosed to counsel that one of its law clerks was related to a Defendant party herein at the July 8, 1986 status conference and counsel having voiced no objections Plaintiff’s belated Motion to Disqualify is DENIED.”²⁰¹ Quoting section 455(e), the Sixth Circuit reversed, noting that “[t]here is no disclosure ‘on the record’ and therefore no properly obtained ‘waiver.’”²⁰² The court went on to say that section 455(e)’s disclosure and waiver requirements “must be strictly construed.”²⁰³

VI. Section 455(f): Divestiture Can Overcome Disqualification

The conflicts enumerated in section 455(b) require automatic recusal—even if the judge believes he or she is capable of impartial

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

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

200. 853 F.2d 1359 (6th Cir. 1988).

201. *Id.* at 1361.

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

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

judgment; even if he or she believes that a reasonable person would not question his or her impartiality; and even if the parties are willing to waive any objections. Section 455(f), however, provides an opportunity for the judge to “cure” certain section 455(b) conflicts.

Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for disqualification.²⁰⁴

A number of courts of appeals have upheld and applauded the use of this subsection to prevent recusal.²⁰⁵ In *Kidder, Peabody & Co. v. Maxus Energy Corp.*,²⁰⁶ the judge sold stock as soon as he learned that the corporation in which he owned stock held a large percentage of the stock of one of the parties. The Second Circuit noted that his curative action pursuant to section 455(f) prevented

204. 28 U.S.C. § 455(f) (1988).

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

206. 925 F.2d 556 (2d Cir. 1991).

the waste of “three years of the litigants’ time and resources and substantial judicial efforts.”²⁰⁷

Some courts, however, have limited the “divestiture cure” to the terms of this subsection. The Sixth Circuit held that recusal was required in a case where the trial judge’s daughter was employed by the law firm representing a party before the judge, even though the daughter resigned from the law firm.²⁰⁸ The Sixth Circuit observed that section 455(f) refers to the judge himself, his or her spouse, or a minor child residing with the judge. This “suggests that Congress intended to exclude the types of cure not permitted by this provision, for Congress had the opportunity to enact a broader amendment than it devised with section 455(f).”²⁰⁹

VII. Assigning Recusal Motion to a Different Judge

A judge wishing to remove any doubt about his or her objectivity may be tempted to have another judge decide the recusal question; a litigant may ask the court to do so. The question arises whether it is necessary or proper for a judge to transfer a recusal motion to another judge. Section 144 requires the judge to transfer the motion once he or she has determined that the affidavit is legally sufficient.²¹⁰ Section 455 does not have the same requirement.

The First Circuit recently observed that “[a]lthough a trial judge faced with a section 455(a) recusal motion may, in her discretion, leave the motion to a different judge, no reported case or accepted principle of law compels her to do so”²¹¹ The weight of authority indicates that it is perfectly proper, indeed the norm, for the challenged judge to rule on a recusal motion pursuant to section 455.²¹²

207. *Id.* at 561.

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

209. *Id.* at 1147.

210. *See, e.g.*, *United States v. Azhocar*, 581 F.2d 735, 738 (9th Cir. 1978).

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

212. *See, e.g.*, *Schurz Communications, Inc. v. FCC*, 982 F.2d 1057, 1059

VIII. Bias or Prejudice: Section 144

On its terms, section 144 makes a district judge's recusal mandatory upon a timely and sufficient affidavit accompanied by a certificate from counsel that the affidavit is made in good faith.

Section 144 reads as follows:

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

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.²¹³

Unlike section 455(a), which can be brought by motion but also requires judges to recuse *sua sponte* where appropriate, section 144 is triggered *only* by the submission of an affidavit and motion for recusal. Absent this trigger, there is no basis for recusal under section 144, and no appeal based on section 144 will be heard.²¹⁴

A. Review of Affidavit

In an early case, the Supreme Court held that the challenged judge must determine only the sufficiency of the affidavit, not the truth of

(7th Cir. 1992) (opinion of Posner, J., in chambers); *United States v. Balistreri*, 779 F.2d 1191, 1202–03 (7th Cir. 1985).

213. 28 U.S.C. § 144 (1949). Originally enacted as section 21 of the Judicial Code of 1911, the statute was recodified as section 144 in 1948 without significant change.

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

the allegations.²¹⁵ In more recent cases, many circuits have reiterated this principle.²¹⁶

In *Ronwin v. State Bar of Arizona*,²¹⁷ the Ninth Circuit took a different approach. While acknowledging that “a judge is generally required to accept the truth of the factual assertions in an Affidavit of Bias filed pursuant to 28 U.S.C. § 144,”²¹⁸ the court made an exception because the allegation of bias “relates to facts that were peculiarly within the judge’s knowledge.”²¹⁹ The party had accused the judge of various improper ex parte communications, but the Ninth Circuit held that recusal was unnecessary in part because the judge knew the allegations were false.

The *Ronwin* decision is contrary to the prevailing rule that facts in a section 144 affidavit must be accepted as true. On occasion, this rule produces an odd result. For example, in *United States v. Rankin*,²²⁰ the defendant alleged that in a previous trial the judge had chased the defendant around the courtroom and assaulted him.

215. *Berger v. United States*, 255 U.S. 22 (1921).

216. See *In re Martinez-Catala*, 129 F.3d 213, 218 (1st Cir. 1997) (“Section 144 is unusual because it requires that the district judge accept the affidavit as true even though it may contain averments that are false and may be known to be so to the judge.”); *United States v. Sykes*, 7 F.3d 1331, 1339 (7th Cir. 1993) (“In passing on the legal sufficiency of the affidavit, the court must assume the truth of its factual assertions even if it ‘knows them to be false.’”) (quoting *United States v. Balistreri*, 779 F.2d 1191, 1199 (7th Cir. 1985)); *Souder v. Owens-Corning Fiberglas Corp.*, 939 F.2d 647, 653 (8th Cir. 1991) (“In reviewing [section 144] affidavits the court must not pass on the factual merit of any allegation but must restrict its analysis to the legal sufficiency of the affidavit.”); *Henderson v. Department of Pub. Safety & Corr.*, 901 F.2d 1288, 1296 (5th Cir. 1990); *Weatherhead v. Globe Int’l, Inc.*, 832 F.2d 1226, 1227 (10th Cir. 1987); *Albert v. United States Dist. Ct.*, 283 F.2d 61, 62 (6th Cir. 1960) (in assessing a section 144 motion, judge “must accept the facts alleged in the affidavit as true, as they may not be controverted”). See also *United States v. Rankin*, 870 F.2d 109, 110 (3d Cir. 1989) (noting that trial court felt “bound by statute and Supreme Court precedent to accept Rankin’s factual allegations as true”).

217. 686 F.2d 692 (9th Cir. 1981), *rev’d on other grounds*, *Hoover v. Ronwin*, 466 U.S. 558 (1984).

218. *Id.* at 701.

219. *Id.*

220. 870 F.2d 109 (3d Cir. 1989).

While denying the bizarre accusation, the trial judge nevertheless recused himself from the second trial on the ground that section 144 bound him to accept the allegations as true.²²¹ In an earlier unrelated case, the Third Circuit had held a refusal to recuse improper, even though “[p]robably the district court is right that there is no basis for the allegations”²²² that the judge made improper statements (e.g., “If I had anything to do with it you would have gone to the electric chair.”). The court of appeals expressed “sympathy with district judges confronted with what they know to be groundless charges of personal bias” but held that section 144 requires acceptance of factual allegations as true.²²³

It does not follow, however, that a section 144 affidavit will always suffice to effect a transfer of the case to another judge. Rather, as the First Circuit explained, “courts have responded to the draconian procedure—automatic transfer based solely on one side’s affidavit—by insisting on a firm showing in the affidavit that the judge does have a personal bias or prejudice to a party.”²²⁴ The Seventh Circuit concurs: “[T]he facts averred must be sufficiently definite and particular to convince a reasonable person that bias exists; simple conclusions, opinions, or rumors are insufficient. . . . Because the statute ‘is heavily weighed in favor of recusal,’ its requirements are to be strictly construed to prevent abuse.”²²⁵ Likewise, the Eleventh Circuit has said that the allegations in a section 144 affidavit must be “material and stated with particularity” and be such that “they would convince a reasonable person that a bias exists.”²²⁶ Indeed, virtually every circuit has adopted some version of the “convince a reasonable person” test.²²⁷

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

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

223. *Id.*

224. *Martinez-Catala*, 129 F.3d at 218.

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

226. *United States v. Alabama*, 828 F.2d 1532, 1540 (11th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988). *See also* *Brokaw v. Mercer County*, 235 F.3d 1000,

The Tenth Circuit has gone further, holding that “the affidavits filed in support of recusal are strictly construed against the affiant and there is a substantial burden on the moving party to demonstrate that the judge is not impartial.”²²⁸

Even if the case is transferred, the First Circuit has observed that “the possibility remains, although not developed in the statute, that the transferee judge might hold a hearing, conclude that the affidavit was false and transfer the action back to the original judge.”²²⁹

In sum, the court reviewing a section 144 motion must assume the *factual* allegations in the movant’s affidavit are true, but must recuse itself only if those allegations clearly suffice to establish a disqualifying bias. In addition to meeting this substantive requirement of a “sufficient” affidavit, section 144 motions must meet several procedural requirements, as discussed in the cases below.

B. Applications of Section 144

For several reasons, recent case law involves far more extensive discussion and application of section 455 than section 144. Litigants more often move for recusal pursuant to section 455 rather than file affidavits pursuant to section 144. This is largely because section 144 requires the more difficult showing of “actual” bias, whereas section 455 requires a mere “appearance” of bias. Section 455 subsumes section 144—where there is actual bias, there will generally be an appearance of bias as well. Also, many of the conditions that might constitute actual bias under section 144 are

1025 (7th Cir. 2000), discussed *supra* note 15.

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

228. *United States v. Burger*, 964 F.2d 1065, 1070 (10th Cir. 1992). *See also* *Weatherhead v. Globe Int’l, Inc.*, 832 F.2d 1226, 1227 (10th Cir. 1987) (same).

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

treated separately in section 455(b), which explicitly addresses various conflicts of interest.²³⁰

On appeal, litigants often invoke both sections, and courts sometimes treat them simultaneously—but in the overwhelming majority of cases the analysis focuses on section 455. Indeed, unless a timely section 144 affidavit is filed, there is no reason for the court of appeals to discuss section 144.

Of the cases dealing primarily with section 144, a sizable percentage involves a judge's alleged antipathy toward counsel. On its terms, section 144 requires bias against the party. Accordingly, a judge's antipathy toward counsel is generally insufficient ground for disqualification.²³¹ However, courts have held that “under specific circumstances bias against an attorney can reasonably be imputed to a party.”²³² As the Seventh Circuit explained, “the party seeking recusal on that theory must allege facts suggesting that the alleged bias against counsel might extend to the party.”²³³ The allegations to that effect cannot be “merely conclusory.”²³⁴

Conversely, the Seventh Circuit rejected the contention that a lawyer's praise of the judge required recusal. In *Sullivan v. Conway*,²³⁵ the lawyer had written a letter to his client maintaining that, as a result of removal of the case to federal court, “we have a much better judge.” By mistake, the letter ended up in the hands of opposing counsel, who showed it to the judge and petitioned for recusal. The Seventh Circuit rejected the contention that the affida-

230. *See id.* (“section 455 is the more modern and complete recusal statute”).

231. *See, e.g.,* *United States v. Sykes*, 7 F.3d 1331, 1339 (7th Cir. 1993); *Rhodes v. McDannel*, 945 F.2d 117, 120 (6th Cir. 1991); *Souder v. Owens-Corning Fiberglas Corp.*, 939 F.2d 647, 653 (8th Cir. 1991); *In re Cooper & Lynn*, 821 F.2d 833, 838 (1st Cir. 1987). The ABA added bias against counsel as a basis for disqualification in the 1990 Model Code of Judicial Conduct.

232. *Souder*, 939 F.2d at 653. *Accord* *Sykes*, 7 F.3d at 1339; *United States v. Jacobs*, 855 F.2d 652, 656 n.2 (9th Cir. 1988); *In re Beard*, 811 F.2d 818, 830 (4th Cir. 1987); *United States v. Ritter*, 540 F.2d 459, 462 (10th Cir. 1976); *Davis v. Board of Sch. Comm'rs*, 517 F.2d 1044, 1050–51 (5th Cir. 1975).

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

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

235. 157 F.3d 1092, 1095 (7th Cir. 1998).

vit evinced alleged bias sufficient to require referral of the matter to another judge:

We can imagine, though only with great difficulty, a case in which public praise of a judge by a lawyer was so fulsome as to call into question the judge's psychological fortitude to rule against his encomiast. But here there was no public praise . . . and the praise would not have come to [the judge's] attention, and so would never have threatened to turn his head, had not the lawyer wishing to disqualify him brought it to his attention.²³⁶

The “extrajudicial source” doctrine applies to section 144 (indeed it was initially developed under section 144) as well as to section 455(a). Thus a section 144 affidavit must show “that the bias is personal rather than judicial, and that it stems from an extrajudicial source—some source other than what the judge has learned through participation in the case.”²³⁷

Apart from meeting the substantive standard, section 144 sets forth several procedural requirements, and courts demand “strict compliance.”²³⁸ Specifically, section 144 affidavits must be timely, signed by the party, and accompanied by a certificate of good faith from counsel. Only one affidavit may be filed in a given case.

Section 144 says that a motion for recusal “shall be filed not less than ten days before the beginning of the term [session] at which the proceeding is to be heard.” With the abolition of terms of court in 1963, this specific provision no longer applies. However, courts have held that a section 144 motion must be filed with reasonable promptness after the party learns of the facts that may call into question the judge's impartiality. Numerous cases have involved rejection of section 144 motions because of untimely affidavits.²³⁹

236. *Id.* at 1096.

237. *United States v. Balistreri*, 779 F.2d 1191, 1199 (7th Cir. 1985); *Liberty Lobby, Inc. v. Dow Jones Co.*, 838 F.2d 1287, 1301 (D.C. Cir. 1988) (citing cases).

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

239. *See, e.g., Green v. Dorrell*, 969 F.2d 915, 919 (10th Cir. 1992); *United States v. Young*, 907 F.2d 867, 868 (8th Cir. 1990); *Easley v. University of Mich. Bd. of Regents*, 853 F.2d 1351, 1357 (6th Cir. 1988).

Although less common, failure to comply with the other procedural requirements can also result in rejection of a section 144 motion.²⁴⁰ The question arises whether counsel's certificate of good faith must assert that counsel believes the allegations to be true or whether counsel merely believes that his or her client is acting in good faith. The statute provides that a party's affidavit "shall be accompanied by a certificate of counsel of record stating that it is made in good faith." The word "it" seems to refer back to plaintiff's affidavit, and thus to require that counsel vouch for the good faith of the plaintiff's belief—not counsel's own belief—that the facts are true. However, the two circuits that have addressed the question directly have held otherwise. The First Circuit held a section 144 motion inadequate in part because counsel's certificate of good faith asserted only that the party acted in good faith.²⁴¹ The court noted that

[o]ne may well question the value of counsel's opinion of what is in his client's mind, and we certainly must disagree . . . that it is a client's "right" to have counsel's certification when counsel believes the affidavit's recitation to be false. If a certificate is to serve the purpose of shielding a court which cannot test the truth of claimed facts, it should at least carry the assertion that counsel believes the facts alleged to be accurate and correct.²⁴²

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

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

242. *Id.* at 385. *Accord* *Brotherhood of Locomotive Firemen v. Bangor &*

IX. Disqualification of Appellate Judges: 28 U.S.C. § 47

A little-used recusal statute, 28 U.S.C. § 47, provides that “no judge shall hear or determine an appeal from the decision of a case or issue tried by him.”²⁴³ One reason the statute has barely surfaced in the case law is that, on those occasions where it suggests a basis of recusal, the same result would also be reached by reference to section 455(a).

In *Russell v. Lane*²⁴⁴ the trial judge in a habeas case reviewed a decision of a state appellate court in which the judge had been a member of the panel. The court found that this created an appearance of impropriety in violation of section 455(a). In reaching that decision, however, the court cited the relevance of 28 U.S.C. § 47, noting that it “is an express ground for recusal . . . in modern American law for a judge to sit on the appeal from his own case.”²⁴⁵

A somewhat more extended discussion of section 47 is found in an opinion by Judge James Craven, Jr., of the U.S. Court of Appeals for the Fourth Circuit, explaining his recusal from a school desegregation case.²⁴⁶ As a district judge years earlier, he heard and decided a case involving the same parties. Although the instant case was a separate lawsuit, it raised the identical “ultimate question.” Citing the Supreme Court’s treatment of the predecessor statute to 28 U.S.C. § 47, Judge Craven held that the statute must be “strictly construed” to prevent judges from, in effect, sitting in appellate judgment of their own earlier decisions.²⁴⁷

Aroostook R.R., 380 F.2d 570, 577–78 & n. 17 (D.C. Cir.), *cert. denied*, 389 U.S. 327 (1967). *But cf.* *United States v. Sykes*, 7 F.3d 1331, 1339 (7th Cir. 1993) (certificate must “stat[e] that the affidavit is made in good faith”).

243. 28 U.S.C. § 47 (1994).

244. 890 F.2d 947 (7th Cir. 1989).

245. *Id.* at 948.

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

247. *Id.* at 136. *See* *Rexford v. Brunswick-Balke-Collender Co.*, 228 U.S. 339 (1913); *Moran v. Dillingham*, 174 U.S. 153 (1899).

Part One: The Recusal Statutes

In *Rexford v. Brunswick-Balke-Collender Co.*,²⁴⁸ the Supreme Court said that it makes no difference whether “the question may be easy of solution or that the parties may consent to the judge’s participation” because “the sole [statutory] criterion” is whether the case on appeal “involve[s] a question which the judge has tried or heard” in the proceedings below.²⁴⁹ In *Cramp & Sons Ship & Engine Building Co. v. International Curtiss Marine Turbine Co.*,²⁵⁰ the U.S. Supreme Court vacated an appellate decision notwithstanding the parties’ consent to the trial judge sitting on the appeal, holding that the appellate panel was “not organized in conformity to law.”²⁵¹

The Third Circuit, however, rejected without explanation the contention that a district judge, sitting by designation on the Third Circuit panel (and the author of the court opinion), should be recused pursuant to 28 U.S.C. § 47.²⁵² In his capacity as trial judge, he had accepted the defendant’s conditional plea of guilt. On appeal, the defendant argued that his guilty plea should be vacated because the indictment against him resulted from prosecutorial vindictiveness. At oral argument, the judge informed counsel of his involvement in the case. Counsel did not object, and recusal was waived. In a footnote, the Third Circuit, after “[h]aving independently considered this matter, . . . conclude[d] that there is no basis for recusal under 28 U.S.C. § 47”²⁵³ The court’s reasoning may have been based on the nature of the defendant’s appeal, which did not claim any impropriety in the plea agreement or challenge any action taken by the judge. Rather, the defendant objected to the bringing of the indictment in the first place.

248. 228 U.S. 339 (1913).

249. *Id.* at 344.

250. 228 U.S. 645 (1913).

251. *Id.* at 652.

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

253. *Id.* at 801 n.1.

X. Judge's Authority After Deciding to Recuse

Many courts of appeals have held that after recusal a judge may take no nonministerial actions with respect to the case.²⁵⁴ For example, in *El Fenix de Puerto Rico v. The M/Y Johanny*,²⁵⁵ on motion from one party the trial judge recused himself under section 455(a). However, when the other party moved for reconsideration, the court listened to arguments and entered a reconsideration order vacating the recusal order. The First Circuit found this action improper: “[A] trial judge who has recused himself ‘should take no other action in the case except the necessary ministerial acts to have the case transferred to another judge.’”²⁵⁶

Similarly, in *United States v. Feldman*,²⁵⁷ during the pendency of a criminal defendant's appeal, a merger was effected that made the judge a stockholder in an institution to which the defendant had been ordered to pay restitution. On remand, the trial judge wished to sentence the defendant while reassigning to a different judge only the restitution aspect of the sentence. The Ninth Circuit rejected that effort.²⁵⁸

In *United States v. O'Keefe*,²⁵⁹ the judge granted a party's motion for a new trial, then disqualified himself from further involvement. After the case was transferred to a new judge, the government

254. The Third, Fourth, and Fifth Circuits concur with the First and Ninth Circuits that a judge can take no nonministerial actions after announcing his or her intentions to recuse. See *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 457 (5th Cir. 1996) (holding that judge erred in vacating refusal order after recusing herself); *Moody v. Simmons*, 858 F.2d 137, 143–44 (3d Cir. 1988) (after recusal, judge is limited to “the ‘housekeeping’ duties necessary to transfer a case to another judge”); *Arnold v. Eastern Air Lines Inc.*, 712 F.2d 899, 904 (4th Cir. 1983) (“Patently a judge who is disqualified from acting must not be able to affect the determination of any cause from which he is barred.”).

255. 36 F.3d 136 (1st Cir. 1994).

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

257. 983 F.2d 144 (9th Cir. 1992).

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

259. 128 F.3d 885 (5th Cir. 1997), *cert. denied*, 523 U.S. 1078 (1998).

moved for reconsideration of the order granting a new trial. The new judge transferred the case back to the original judge to rule on the motion for reconsideration, which the judge did. The Fifth Circuit ruled that this was improper, rejecting the contention “that an exception from the bright-line rule for recusals . . . should be created for motions for reconsideration because a [new] judge cannot reconsider what that judge has not considered previously.”²⁶⁰ The court noted that new judges must move on motions for reconsideration in the case of a judge’s death or illness and other circumstances. The court “recognize[d] that our ruling today may put one district court judge in the somewhat uncomfortable position of having to pass judgment on the discretionary rulings of another judge,”²⁶¹ but found this circumstance outweighed by “the values underlying 28 U.S.C. § 455,”²⁶² which require that a judge who has recused himself or herself take no further action.

The Second Circuit, however, has refused to apply a pure bright-line approach. In *Pashaian v. Eccelston Properties, Ltd.*,²⁶³ although the trial judge concluded that recusal in the face of an alleged conflict of interest was not legally required, he recused himself as a matter of prudence to avoid any possibility of appellate reversal after prolonged proceedings. He chose, however, to make recusal effective only after he ruled on a pending motion for preliminary injunction. On appeal, the Second Circuit found that recusal was indeed unnecessary and then addressed the contention that, nevertheless, “once he decided to recuse himself as a matter of discretion, such recusal had to be total and immediate.”²⁶⁴ As a result, ruling on the motion for preliminary injunction would have been clearly improper. The court held that the trial court’s willing-

260. *Id.* at 891.

261. *Id.* at 891–92 n.6.

262. *Id.* at 892 n.6. *See also* *United States v. Will*, 449 U.S. 200, 212 (1980) (“In federal courts generally, when an individual judge is disqualified . . . by reason of § 455, the disqualified judge simply steps aside and allows the normal administrative processes of the court to assign the case to another judge not disqualified.”).

263. 88 F.3d 77 (2d Cir. 1996).

264. *Id.* at 84.

ness to rule on the preliminary injunction motion prior to recusal was “a practical and appropriate resolution of the situation. . . . We note also the potential for mischief in imposing an inflexible rule . . . and are accordingly loathe to articulate a rule that would frustrate or obviate the careful exercise of judicial discretion by district judges in responding to recusal motions in unusual circumstances”²⁶⁵ The unusual circumstances included the fact that plaintiffs sought enforcement of a judgment ensuing from litigation that had occurred years earlier, with the motion for recusal surfacing just prior to the scheduled ruling on the proposed injunction.

Pashaian may be reconciled with the other cases on the ground that the delayed recusal was entirely prudential, not legally obligatory. In any event, the safest course for a trial judge is to take no nonministerial action after recusal.

A few litigants have objected to a recused judge transferring the case to another judge. This claim is generally rejected.²⁶⁶ An exception was *McCuin v. Texas Power & Light Co.*,²⁶⁷ where the Fifth Circuit said that permitting a disqualified judge to assign the case “would violate the congressional command that the disqualified judge be removed from all participation in the case” and might also “create suspicion that the disqualified judge will select a successor whose views are consonant with his.”²⁶⁸

265. *Id.* at 84–85.

266. See *United States v. Moody*, 977 F.2d 1420, 1424 (11th Cir. 1992) (“Judge Tjoflat’s assignment of Judge Alaimo was a purely ministerial act, without any implications concerning the merits of the case.”); *In re Aetna Cas. & Sur. Co.*, 919 F.2d 1136, 1145 (6th Cir. 1990) (“even a judge who has recused himself ought to be permitted to perform the duties necessary to transfer the case to another judge”); *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1024–25 (9th Cir. 1982) (“[W]e refuse to construe the word ‘proceeding’ to include the performance of ministerial duties such as assigning a case to another judge.”).

267. 714 F.2d 1255 (5th Cir. 1983).

268. *Id.* at 1261.

PART TWO

Miscellaneous Issues

I. Timeliness of Motion

While section 144 explicitly requires a “timely” affidavit, section 455 has no equivalent provision. All the circuits that have considered the question, however, agree that a party may not hold back “a recusal application as a fall-back position in the event of adverse rulings on pending matters.”²⁶⁹ Most circuits require that a motion for disqualification be brought “at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim.”²⁷⁰ “[A] party having information that raises a possible

269. *In re IBM Corp.*, 45 F.3d 641, 643 (2d Cir. 1995); *Polaroid Corp. v. Eastman Kodak Co.*, 867 F.2d 1415, 1418–21 (Fed Cir. 1989). *But see* *United States v. Tucker*, 78 F.3d 1313 (8th Cir. 1996) *and* *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (issue first raised on appeal). The circuits that have considered the question have held that the timeliness requirement applies to section 455(b) as well, even though recusal under that subsection cannot be waived. *See* *Summers v. Singletary*, 119 F.3d 917, 921 (11th Cir. 1997) (“The policy considerations supporting a timeliness requirement are the same in each section: to conserve judicial resources and prevent a litigant from waiting until an adverse decision has been handed down before moving to disqualify the judge.”); *In re Kansas Pub. Employees Ret. Sys.*, 85 F.3d 1353, 1363 (8th Cir. 1996) (“While it is true that a § 455(b)(1) objection cannot be waived, it is still subject to the timeliness requirement of our cases.”).

270. *See, e.g.*, *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994); *Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 333 (2d Cir. 1987). *Accord* *United States v. Vadner*, 160 F.3d 263, 264 (5th Cir. 1998); *United States v. Sanford*, 157 F.3d 987, 988 (5th Cir. 1998); *Pontarelli v. Stone*, 978 F.2d 773 (1st Cir. 1992); *United States v. Barnes*, 909 F.2d 1059, 1071 (7th Cir. 1990); *United States v. Barrett*, 111 F.3d 947, 951–52 (D.C. Cir. 1997) (citing cases); *In re National Union Fire Ins. Co.*, 839 F.2d 1226, 1232 (7th Cir. 1988) (“Counsel

ground for disqualification cannot wait until after an unfavorable judgment before bringing the information to the court's attention."²⁷¹

The Ninth Circuit requires "reasonable promptness after the ground for such a motion is ascertained."²⁷² The Second Circuit uses a four-factor analysis for determining the timeliness of a motion: 1) whether the movant has participated in a substantial manner in trial or pretrial proceedings; 2) whether granting the motion would waste judicial resources; 3) whether the motion was made after entry of judgment; and 4) whether the movant can show good cause for delay.²⁷³

The Fifth Circuit has noted that "[t]he most egregious delay—the closest thing to per se untimeliness—occurs when a party already knows the facts purportedly showing an appearance of impropriety but waits until after an adverse decision has been made by the judge before raising the issue of recusal."²⁷⁴

who perceive a problem under § 455(a) must not tarry, for delay imposes heavy costs on other litigants and the judicial system.").

271. *Nordbrock v. United States*, No. 00-15911, 2001 U.S. App. LEXIS 1109, at *3 (9th Cir. Jan. 24, 2001) (citing *United States v. Rogers*, 119 F.3d 1377, 1380 (9th Cir. 1997)).

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

273. *Apple*, 829 F.2d at 334.

274. *Vadner*, 160 F.3d at 264. *Accord* *Rabushka v. Crane Co.*, 122 F.3d 559, 566 (8th Cir. 1997), *cert. denied*, 523 U.S. 1040 (1998); *United States v. Rogers*, 119 F.3d 1377, 1382 (9th Cir. 1997); *United States v. Barrett*, 111 F.3d 947, 952 (D.C. Cir. 1997); *United States v. Stenzel*, 49 F.3d 658, 661 (10th Cir. 1995); *United States v. Owens*, 902 F.2d 1154, 1156 (4th Cir. 1990). *See also* *United States v. Bayless*, 201 F.3d 116, 127 (2d Cir. 2000) (Stating that untimeliness can "constitute the basis for finding an implied waiver. But the distinction is a critical one, because while waiver—whether express or implied—will preclude appellate [review], untimeliness need not do so." Assuming the defendant's failure to move for recusal until after the trial judge had ruled against her was a forfeiture and not an implied waiver, the court of appeals could review the claim only for plain error, and it held that the judge's decision not to recuse himself sua sponte was not plain error.).

II. Recusal in Bench Trials

The question arises whether the standard for recusal differs in a bench trial, where the judge's role is even more pivotal than in a jury trial. In *Alexander v. Primerica Holdings, Inc.*²⁷⁵ the court of appeals noted the following: "We cannot overlook the fact that this is a non-jury case, and that [the judge] will be deciding each and every substantive issue at trial."²⁷⁶ "When the judge is the actual trier of fact, the need to preserve the appearance of impartiality is especially pronounced."²⁷⁷

*Price Brothers v. Philadelphia Gear Corp.*²⁷⁸ involved an alleged ex parte communication. The Sixth Circuit held that "*where a suit is to be tried without a jury*, sending a law clerk to gather evidence is so destructive of the appearance of impartiality required of a presiding judge" that a remand was necessary to determine the truth of the allegation.²⁷⁹

It does not follow, of course, that recusal is unnecessary in jury trials. As the Third Circuit said in a different case: "[S]ection 455 properly makes no distinction between jury and nonjury trials. The district judge in a jury trial must still make numerous pretrial rulings, including crucial summary judgment rulings, and will doubtless be called on to make numerous rulings on the qualification of witnesses and on evidentiary matters, not to mention post-trial motions."²⁸⁰

The D.C. Circuit Court of Appeals stated that "recusal might well be prudent when a perjury bench trial involves testimony from a proceeding over which the same judge presided," but "section 455(a) does not require it."²⁸¹

275. 10 F.3d 155 (3d Cir. 1993).

276. *Id.* at 163.

277. *Id.* at 166.

278. 629 F.2d 444 (discussed *supra* text accompanying note 174).

279. *Id.* at 446 (emphasis added). On remand, the Sixth Circuit found harmless error. *Price Bros. v. Philadelphia Gear Corp.*, 649 F.2d 416 (6th Cir. 1981).

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

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

III. Standing

The issue of whether a party has standing to challenge a refusal to recuse when the judge's alleged partiality would be in that party's favor arose in *Pashaian v. Eccelston Properties*.²⁸² In that case, even though any alleged bias would have been in their favor, certain defendants moved for recusal because their attorney's law partner was married to the judge's sister-in-law. The judge ordered a preliminary injunction in favor of the plaintiff before recusing himself; the defendant challenged the judge's failure to recuse earlier. The Second Circuit raised the standing issue sua sponte, holding that a party

has standing to challenge the judge's refusal to recuse even if the alleged bias would be in the moving party's favor. Such a party might legitimately be concerned that the judge will "bend over backwards" to avoid any appearance of partiality, thereby inadvertently favoring the opposing party. The possibility of this compensatory bias by an interested judge is sufficiently immediate to constitute the "personal injury" necessary to confer standing under Article III.²⁸³

IV. Efforts to Investigate

*United States v. Morrison*²⁸⁴ addressed the question of whether a trial judge, asked to recuse herself based on conflict of interest, could investigate the matter. When the defendant sought recusal based on an alleged adverse business relationship between himself and the judge's husband and a friend of the judge's, the judge asked her husband and friend to review the materials submitted in the defendant's motion. Both the judge's husband and friend stated that the allegations were false, and denied any relationship with the defendant. Accordingly, the court declined to recuse itself. The Second Circuit noted that "it was not irregular for [the judge] to as-

282. 88 F.3d 77 (2d Cir. 1996) (discussed *supra* text accompanying notes 51–52, 263–65).

283. *Id.* at 83.

284. 153 F.3d 34 (2d Cir. 1998).

certain her husband's and friend's possible involvement with the defendant simply by asking them, in a reasonable effort to confirm that [defendant's] incredible claims were indeed not factual."²⁸⁵

In a variation on this theme, the Sixth Circuit clarified that a litigant has no obligation to investigate possible bases for recusal.²⁸⁶ After a trial judge learned of a conflict, he transferred the case to another judge. Faced with deciding whether a prior dispositive ruling by the first judge should be allowed to stand, the second judge noted that the recusal motion had been filed after the judge's adverse ruling, and stated that "the Court refuses to reward [the movant] or encourage this trend."²⁸⁷ She further observed that "litigants have a duty to investigate and inform the court of any perceived biases before the court and the parties invest time and expense in a case."²⁸⁸ The Sixth Circuit rejected the analysis, stating that:

We believe instead that litigants (and, of course, their attorneys) should assume the impartiality of the presiding judge, rather than pore through the judge's private affairs and financial matters. Further, judges have an ethical duty to "disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification." *Porter v. Singletary*, 49 F.3d 1483, 1489 (11th Cir. 1995). . . . [The judge] possibly did not consider the matter sufficiently relevant to merit disclosure, but his nondisclosure did not vest in [the parties] a duty to investigate him.²⁸⁹

285. *Id.* at 48 n.4.

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

287. *Id.* at 742.

288. *Id.*

289. *Id.* In an ongoing class action suit alleging widespread securities violations, the plaintiffs sought to present evidence in the form of expert testimony by law professors explaining why the judge should recuse himself. *In re Initial Pub. Offering Sec. Litig.*, 174 F. Supp. 2d 61 (S.D.N.Y. 2001) (the court held that where the facts are undisputed, expert opinion on a recusal motion is not acceptable). See also *United States v. Eyerman*, 660 F. Supp. 775, 781 (S.D.N.Y. 1987).

V. Rule of Necessity

The Supreme Court, in *United States v. Will*,²⁹⁰ held that the adoption of section 455 was not intended to abridge the rule of necessity.²⁹¹ This rule, which has roots in the common law dating back to the fifteenth century, holds that “where all are disqualified, none are disqualified.”²⁹²

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

Various courts of appeals have employed the rule of necessity to reject recusal.²⁹³

290. 449 U.S. 200 (1980).

291. *Id.* at 217.

292. *Pilla v. American Bar Ass’n*, 542 F.2d 56, 59 (8th Cir. 1976).

293. *See, e.g., Williams v. United States*, 240 F.3d 1019, 1025–26 (Fed. Cir. 2001); *Tapia-Ortiz v. Winter*, 185 F.3d 8, 10 (2d Cir. 1999); *Bartley v. United States*, 123 F.3d 466, 467 n.1 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 723 (1998); *Jefferson County v. Acker*, 92 F.3d 1561, 1583 (11th Cir. 1996) (en banc), *vacated and remanded on other grounds*, 520 U.S. 1262 (1997), *aff’d*, 137 F.3d 1314 (11th Cir. 1998) (en banc), *rev’d on other grounds*, 119 S. Ct. 2069 (1999); *Duplantier v. United States*, 606 F.2d 654, 662 (5th Cir. 1979). *See also In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 170 F. Supp. 2d 1356 (J.P.M.L. 2001) (rule of necessity precluded disqualification under section 455(a) of four of seven members of the Judicial Panel on Multidistrict Litigation who held stock interests, because there was no statutory provision for substitute members and disqualification would result in fewer than the statutorily prescribed number of members to render a decision).

VI. Substitution of Counsel

A proposed substitution or addition of counsel by one of the parties may create a conflict of interest requiring disqualification of the judge under section 455(b). The Eleventh Circuit held that, in such a case, the court may deny the request for new counsel, even apart from evidence or suspicion that it is made to spark recusal, if it would cause undue delay. However, a showing of “overriding need” for the new counsel “would trump both time delay and the loss of prior judicial activity.”²⁹⁴

Where the defendants retained the judge’s brother-in-law six years after the complaint was filed, the Fifth Circuit remanded for a determination of whether the primary motive in his hiring had been to disqualify the judge. The court held that “a lawyer may not enter a case for the primary purpose of forcing the presiding judge’s recusal.”²⁹⁵ Otherwise, it observed, “a litigant could in effect veto the allotment and obtain a new judge by the simple expedient of finding one of the judge’s relatives who is willing to act as counsel

...²⁹⁶

294. *Robinson v. Boeing Co.*, 79 F.3d 1053, 1056 (11th Cir. 1996).

295. *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1265 (5th Cir. 1983).

296. *Id.* at 1264.

PART THREE

Appellate Issues

Recusal issues discussed generally confront trial judges in the first instance, but they can also arise on appeal. In addition, courts of appeals may face several issues that will not arise at trial.

I. Standard of Review

Every court of appeals except the Seventh Circuit generally uses an “abuse of discretion” standard for reviewing a trial court’s decision about recusal.²⁹⁷ The Seventh Circuit employs de novo review.²⁹⁸

A party’s motion must be timely. A few courts of appeals are willing to entertain an argument about recusal that was not raised in a timely manner, but apply a “plain error” standard.²⁹⁹

297. See, e.g., *United States v. Wilkerson*, 208 F.3d 794, 797 (9th Cir. 2000). In *Southern Pacific Communications Co. v. AT&T*, 740 F.2d 980, 984 (D.C. Cir. 1984), the D.C. Circuit used a somewhat stricter standard in reviewing a judge’s factual findings that gave rise to Southern Pacific’s claim that it was denied a fair trial because of the judge’s legal and policy bias. Southern Pacific asked the court to remand the case for a new trial, or in the alternative, to abandon the “clearly erroneous” standard when reviewing the district court’s factual findings. Although the court declined to abandon the standard, it “reviewed the District Court’s findings against the record with particular, even painstaking, care” in view of the judicial misconduct allegations. *But see* *United States v. Microsoft Corp.*, 253 F.3d 34, 117 (D.C. Cir. 2001) (rejecting greater scrutiny of judge’s fact findings because, absent evidence of actual bias, Fed. R. Civ. P. 52(a) “mandates clearly erroneous review of all district court factfindings”).

298. See *United States v. Balistreri*, 779 F.2d 1191, 1203 (7th Cir. 1985). See also *Sac & Fox Nation v. Cuomo*, 193 F.3d 1162, 1168 (10th Cir. 1999) (applying de novo standard where district judge “did not create a record or document her decision not to recuse”).

299. See, e.g., *United States v. Pearson*, 203 F.3d 1243, 1276 (10th Cir. 2000); *United States v. Arache*, 946 F.2d 129 (1st Cir. 1991); *Osei-Afriyie v. Medical*

II. Harmless Error

Section 455 tells judges when recusal is required but does not spell out the appropriate remedy for a failure to recuse. In *Liljeberg v. Health Services Acquisition Corp.*,³⁰⁰ the U.S. Supreme Court held that Federal Rule of Civil Procedure 60(b), authorizing relief from a final judgment, is an appropriate remedy for a trial court's improper failure to recuse. The Court cautioned that Rule 60(b)(6) relief is "neither categorically available nor categorically unavailable for all § 455(a) violations."³⁰¹ Rather, "there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance."³⁰²

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

[I]t is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. We must continuously bear in mind that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'"³⁰³

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

College of Pa., 937 F.2d 876, 886 (3d Cir. 1991) (applying plain error standard to a motion based on section 455(b)). See also *United States v. Gray*, 105 F.3d 956, 968 (5th Cir. 1997) (applying plain error standard "for the sake of argument").

300. 486 U.S. 847 (1988).

301. *Id.* at 864.

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

303. *Id.* at 864 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955) (citation omitted)).

In *Harris v. Champion*,³⁰⁴ a judge in a habeas case failed to recuse himself even though his uncle had been a judge in some of the state cases challenged on appeal. The Tenth Circuit found that recusal was required under both section 455(a) (appearance of impropriety) and section 455(b)(5)(i) (when person within third-degree of relationship is a party). However, “this case presents the very unusual situation that [the judge] did not act alone, but rather as one member of a three-judge panel that ruled unanimously”³⁰⁵ In part for that reason, the court opted not to vacate the rulings.

In *Doddy v. Oxy USA, Inc.*,³⁰⁶ the judge recused herself based on inaccurate information, then vacated her recusal order when she realized the mistake. The Fifth Circuit held that it was error to vacate the recusal order. However, the error was harmless because the

recusal was sua sponte, and based on incomplete and incorrect information. . . . [N]one of the parties ever moved to have the judge step aside, and none has suggested any actual bias or prejudice. . . . [T]here is no risk of undermining the public’s confidence in the judicial process. Indeed, overturning the many decisions [the judge] made after vacating her recusal order—simply because she recused herself too hastily and in error—would be wasteful and unnecessary.³⁰⁷

The Fifth Circuit also found harmless error in an improper failure to recuse in *United States v. Jordan*.³⁰⁸ The court found that the defendant’s well-known, extremely antagonistic relationship with a close personal friend of the judge created an appearance of impropriety under section 455(a). The court upheld the defendant’s conviction but vacated the sentence and remanded the case for resentencing by a different judge. The “[a]ppellant never contends that she suffered any harm during trial because of any alleged bias or prejudice.”³⁰⁹ Under the circumstances, the court found that

304. 15 F.3d 1538 (10th Cir. 1994).

305. *Id.* at 1572.

306. 101 F.3d 448 (5th Cir. 1996).

307. *Id.* at 459.

308. 49 F.3d 152 (5th Cir. 1995).

309. *Id.* at 158.

upholding the conviction would not be unjust to the appellant and would not undermine the public's confidence in the judicial process.

Faced with a mandamus action seeking mistrial in the midst of complex mass tort litigation, the First Circuit noted that while the *Liljeberg* analysis was in the context of a Rule 60(b) motion, “we believe it should apply as well to present circumstances, where ‘mistrial’ . . . would threaten to undo matters of considerable importance previously decided.”³¹⁰ Thus, even assuming arguendo that recusal was improperly denied, the court nevertheless would deny the requested relief because it would mean retrying complex and costly litigation and reopening settlement agreements.³¹¹ Moreover, no future injustice would result because there were no allegations of actual bias infecting any findings or rulings, and no rulings had been made that “are incurable or could have preclusive effect in some other action.”³¹² Finally, because the alleged appearance of impropriety (brothers of the judge's law clerks were among the attorneys in the case) was not egregious, the court did “not believe . . . that the relevant public's confidence in the judiciary would be seriously undermined were no mistrial declared.”³¹³

III. Interlocutory Review

Often, a challenge to a judge's refusal to recuse occurs on appeal. All courts of appeals permit a party to seek interlocutory review via mandamus, reasoning that, at least in some cases, the damage to public confidence in the justice system (or perhaps to the litigants) would not be undone by post-judgment appeal.³¹⁴

310. *In re Allied-Signal Inc.*, 891 F.2d 967, 973 (1st Cir. 1989) (Breyer, J.).

311. *Id.* at 973.

312. *Id.*

313. *Id.*

314. See, e.g., *In re United States*, 666 F.2d 690, 694 (1st Cir. 1981); *In re IBM Corp.*, 618 F.2d 923, 926–27 (2d Cir. 1980); *In re School Asbestos Litig.*, 977 F.2d 764, 774–78 (3d Cir. 1992); *In re Rogers*, 537 F.2d 1196, 1197 n.1 (4th Cir. 1976) (per curiam); *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958, 961 n.4 (5th Cir. 1980); *In re Aetna Cas. & Sur. Co.*, 919 F.2d 1136, 1139–43 (6th Cir. 1990); *SCA Servs. v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977) (per curiam);

The Third and Seventh Circuits have said that while petitioning for a writ of mandamus is a proper means for appellate review of a district court's refusal to recuse pursuant to section 455(a), it is unavailable for a challenge under section 144.³¹⁵ The reasoning is that section 144, dealing with actual bias, protects litigants, but section 455, dealing with circumstances in which a judge's impartiality might reasonably be questioned, also protects public confidence in the judiciary. "While review after final judgment can (at a cost) cure the harm to a litigant, it cannot cure the additional, separable harm to public confidence that section 455 is designed to prevent."³¹⁶

Most circuits apply their usual standard for mandamus—whatever that might be—often placing a heavy burden on the movant.³¹⁷ However, the First Circuit has adopted a separate criterion for entertaining a mandamus motion seeking recusal: "[w]hen the issue of partiality has been broadly publicized, and the claim of bias cannot be labelled as frivolous"³¹⁸ The court has also stated that the standard for granting mandamus should be relaxed "in a criminal case in which the government seeks the judge's recusal, for a defendant's verdict will terminate the case, thereby rendering the usual remedy, end-of-case appeal, illusory."³¹⁹ Where the government seeks recusal in a criminal case, "the ordinary abuse-of-discretion standard rather than the more exacting standard usually applicable to petitions for mandamus" should be used.³²⁰

Liddell v. Board of Educ., 677 F.2d 626, 643 (8th Cir. 1982); *In re Cement Anti-trust Litig.*, 673 F.2d 1020, 1025 (9th Cir. 1982); *Bell v. Chandler*, 569 F.2d 556, 559 (10th Cir. 1978).

315. See *School Asbestos Litig.*, 977 F.2d at 774–78; *SCA Servs.*, 557 F.2d at 117.

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

317. See, e.g., *In re Larson*, 43 F.3d 410, 412 (8th Cir. 1994) (petitioner must establish "clear and indisputable right" to recusal).

318. *In re United States*, 158 F.3d 26, 30 (1st Cir. 1998) (internal quotation marks omitted).

319. *Id.* at 30.

320. *Id.* at 31.

In the Seventh Circuit, mandamus is the *only* means to challenge a refusal to recuse pursuant to section 455(a), although post-final-judgment appeal is available to challenge refusals to recuse under section 144 and section 455(b).³²¹ The Seventh Circuit's rationale in requiring a party to petition for writ of mandamus to preserve a recusal challenge is that the injury the court seeks to prevent "is not an injury to an individual party, but rather to the judicial system as a whole."³²²

IV. Reviewability of Recusal

The previous section applies to a judge's refusal to recuse. The courts of appeals are split as to whether a judge's decision to recuse is reviewable.

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

[W]e fail to conceive of any interest which the plaintiffs have as litigants for review of [the judge's] recusal order. The effect of his decision to step aside is merely to have the case reassigned to another judge of the district court. The order does not strip plaintiffs of a fair forum in which they can pursue their claim. . . . [T]hey have no protectable interest in the continued exercise of jurisdiction by a particular judge.³²³

The court held that the order to recuse is not a final order and, because a party lacks a claim of right to the original judge, the collateral order doctrine does not apply.³²⁴ The Eighth and Ninth Cir-

321. See, e.g., *United States v. Farrington*, 2001 U.S. App. LEXIS 24978, at *5 (7th Cir. Nov. 16, 2001); *United States v. Ruzzano*, 247 F.3d 688, 694 (7th Cir. 2001); *In re Hatcher*, 150 F.3d 631, 637 (7th Cir. 1998); *United States v. Horton*, 98 F.3d 313, 316 (7th Cir. 1996); *United States v. Balistrieri*, 779 F.2d 1191, 1205 (7th Cir. 1985). Cf. *United States v. Boyd*, 208 F.3d 638, 650 (7th Cir. 2000) (Ripple, J., dissenting) (urging Seventh Circuit to join the rest of courts of appeals in permitting appellate review of failure to recuse under section 455(a)).

322. *Ruzzano*, 247 F.3d at 695.

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

324. *Id.* at 479–80.

cuits have taken the same position.³²⁵ However, the Ninth Circuit has said that it would allow a party to seek a writ of mandamus to review a decision to recuse in “exceptional situations in which the costs of familiarizing a new judge, in terms of delay, will prove to be very great” and the litigation is “greatly disrupted.”³²⁶

Both the Fourth and Sixth Circuits have been willing to review orders by judges recusing themselves, at least in some circumstances.³²⁷

V. Mootness

A claim for disqualification, like any other claim, cannot be adjudicated absent a live dispute between the parties. In *Pontarelli v. Stone*,³²⁸ after all the parties had settled the merits of the underlying disputes, one of the attorneys appealed the denial of attorneys’ fees. However, the focus of the attorney’s claim was that the judge should have recused himself pursuant to section 455(a). The First Circuit found the issue moot:

[B]efore an appellate court can make a ruling on the appropriateness of disqualification by a district judge . . . the underlying dispute as to which the district court ruling is relevant must still remain a live controversy. . . . If a trial judge has wrongly failed to disqualify him or herself, the remedy to correct this situation is for the appellate court to reverse the decision of the case on the merits and to order a new trial before a different judge.³²⁹

325. See, e.g., *United States v. Jaramillo*, 745 F.2d 1245 (9th Cir. 1984); *Liddell v. Board of Educ.*, 677 F.2d 626, 644 (8th Cir. 1982); *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1022–24 (9th Cir. 1982).

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

327. See *In re Virginia Elec. & Power Co.*, 539 F.2d 357 (4th Cir. 1976) (decision to recuse reviewable by mandamus, and as collateral order pursuant to 28 U.S.C. § 1292(b), where it raises an important legal issue that would otherwise escape review); *Kelley v. Metropolitan County Bd.*, 479 F.2d 810, 811 n.1 (6th Cir. 1973) (decision to recuse reviewable, apparently immediately, though court did not clarify).

328. 978 F.2d 773 (1st Cir. 1992).

329. *Id.* at 775.

Where, as here, the underlying case has settled, and no party challenges the settlement, the issue of disqualification is moot. The court noted that counsel was not without recourse to state his objection to the judge's failure to recuse himself; 28 U.S.C. § 372(c) outlines means of protesting judicial misconduct.

In other circumstances, too, courts of appeals have spared resources by finding a recusal issue moot.³³⁰

VI. Guilty Plea

The courts of appeals differ about whether a defendant who pleads guilty waives a challenge to the trial judge's nonrecusal. In *United States v. Chantal*,³³¹ a defendant was charged with and pled guilty to various drug-related offenses. At the sentencing hearing, the trial judge made unflattering comments about the defendant. It turned out that the defendant had engaged in further drug-related activity—while free on bond pending sentencing—that later resulted in a second indictment. The defendant moved for the court to recuse itself with respect to the new charge, but the court refused. Subsequently the defendant pled guilty to that charge as well. On appeal, when the defendant challenged the trial court's refusal to recuse itself with respect to the second indictment, the government argued that a plea of guilty waives all but jurisdictional defenses and therefore waived the defendant's section 455(a) challenge. The First Circuit disagreed:

Considering the laudable congressional aim that § 455(a) would assure not only an impartial court but the appearance of one, the

330. See, e.g., *In re Starr*, 152 F.3d 741, 751 n.23 (8th Cir. 1998) (holding that party moving for recusal lacked standing to bring underlying action); *United States v. Kraus*, 137 F.3d 447, 452 (7th Cir. 1998) (violation of Rule 11 required remand to a different judge anyway); *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110, 1121 (6th Cir. 1994) (trial court's judgment reversed on substantive grounds unrelated to recusal); *United States v. Ahmed*, 980 F.2d 161, 163 (2d Cir. 1992) (trial judge had already directed the clerk of court to reassign the case to a different judge); *Mallory v. Eyrich*, 922 F.2d 1273, 1282 (6th Cir. 1991) (trial judge had already withdrawn from case).

331. 902 F.2d 1018 (1st Cir. 1990).

idea that a plea of guilty would wipe out the attainment of adjudication by that kind of court is simply contrary to fundamental fairness. . . . [I]t is plain that Congress would never have thought its purpose to assure actions by judges who are not only impartial but appear to be, could be . . . eradicated by a plea engendered by the immediate prospect of a trial/decision by a biased judge.³³²

The Fifth and Tenth Circuits have taken the opposite approach, holding that an unconditional guilty plea waives appeal of a section 455(a) disqualification motion.³³³ These courts have reasoned that since section 455(e) permits waiver of disqualification when a judge is faced with an appearance of impropriety under section 455(a) but makes full disclosure, waiver may also be found when a party enters a guilty plea without specifically preserving the issue for appeal.³³⁴

As previously mentioned, because in the Seventh Circuit the route to appeal a refusal to recuse pursuant to section 455(a) is an immediate application for writ of mandamus, a party who fails to seek mandamus waives its right to raise the issue in a post-judgment appeal.³³⁵ However, the Seventh Circuit has also held that “denial of a motion for mandatory recusal under section 144 need not be appealed immediately, and is not waived when the defendant pleads guilty”³³⁶

VII. Jurisdiction

Courts of appeals have found in some circumstances that they have jurisdiction to review a refusal to recuse, for example, on a habeas

332. *Id.* at 1021. *Accord* *United States v. Brinkworth*, 68 F.3d 633, 638 (2d Cir. 1995) (endorsing the reasoning and conclusion of the First Circuit).

333. *United States v. Hoctel*, 154 F.3d 506, 507 (5th Cir. 1998); *United States v. Gipson*, 835 F.2d 1323 (10th Cir. 1988).

334. *Hoctel*, 154 F.3d at 508 (citing *Gipson*, 835 F.2d at 1325).

335. *See, e.g., United States v. Horton*, 98 F.3d 313, 316. *See supra* text accompanying notes 321–22.

336. *Id.* at 316 (citing *United States v. Troxell*, 887 F.2d 830, 833 (7th Cir. 1989)).

petition, even though they lack jurisdiction to review the underlying merits of the trial court's decision on the issue in the case.³³⁷

Under 28 U.S.C. § 1447(d), “an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise.” Yet the Fifth Circuit held that it had jurisdiction to determine whether the district court abused its discretion in denying a motion to recuse. The court reasoned that because a trial judge who has recused himself from a case may take no further action (except transferring the case to another federal judge), if the judge should have recused himself then any orders entered after denying the motion to recuse were improper.³³⁸ Therefore, reviewing the refusal to recuse would not really be reviewing the order of remand, even though a finding that recusal was required would lead to vacating the remand order. “[W]e would be performing an essentially ministerial task of vacating an order that the district court had no authority to enter into for reasons unrelated to the order of remand itself.”³³⁹

337. See *Trevino v. Johnson*, 168 F.3d 173 (5th Cir. 1999); *Russell v. Lane*, 890 F.2d 947 (7th Cir. 1989); *Rice v. McKenzie*, 581 F.2d 1114, 1118 (4th Cir. 1978).

338. *Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1027–28 (5th Cir. 1998).

339. *Id.* at 1028.

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