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# Judicial Recusals

HAROLD S. LEVY\*

## I. Introduction

With due deference to the weighty issues of professional ethics which we are gathered here to discuss, I want to share with you a story about the ethical plight a certain old lawyer found himself upon his death.

The old lawyer was met at the gates of heaven by Saint Peter. "Sir," exclaimed St. Peter, "we have been awaiting your arrival. Follow me. God himself would like to welcome you." The pearly gates were flung open and the lawyer and St. Peter walked down a golden roadway to the glittering castle of the Almighty.

"This is indeed a great occasion," said God, "you are most honored among men."

The lawyer knew all that but thought it appropriate to display some degree of humility before God. So he asked, "Why am I so special?"—hoping to hear a more detailed description of his virtues.

"Why," said God, "you are the oldest human being to come to us since Methuselah."

"But I was only 82 when I died," said the lawyer.

"That can't be," said St. Peter. "You are 484 years old. We added up your time sheets."

It is not my purpose here to palaver about the time sheets prepared by law firms representing large corporate clients, no matter how appealing that topic may be. Rather, I wish to address another way a large corporate client can be "done in" by someone other than its adversary in a litigation, namely by the judiciary. I am not speaking about the rendition of adverse decisions on the merits. I refer instead to the refusal by judges to

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render any decision at all as a result of either extraordinarily strict ethical standards carved into our statutory framework or of overly broad interpretations of what can fairly be called "non-mandatory" disqualification circumstances.

The impact of recusals on the large corporation is both obvious and subtle. Obviously, recusals limit the pool of judges available to hear a case. The stricter the ethical standards the more recusals and the smaller pool of judges. More subtly, some recusals affect the type of judge left in the pool. For example, recusal standards which penalize intelligent investors, or which are stricter for judges who formerly engaged in private practice than for judges formerly engaged in government service, may well eliminate the types of jurists most able to comprehend the position of the large corporation.

The two principal areas I wish to cover are, first, the mandatory disqualification situations, focusing on the situation where the judge has a so-called "financial interest" and, second, non-mandatory situations, especially where the judge had previously worked at a law firm which performed occasional or unrelated legal work for a corporation now appearing as a party in a litigation before that judge. In addition, I will attempt to put the present recusal standards in historical perspective, and in light of what has gone before, I think you will see that the present standards regarding judicial recusals have evolved as a Hegelian dialect; Congress and bar associations have attempted to balance the right of a litigant to have access to the full judicial system against the need to preserve fairness and the appearance of fairness, tipping the scales first one way and then the other.

## II. Mandatory Recusals

The focus of my remarks will be on the federal judiciary. Since the federal statute is patterned on the American Bar Association's Code of Judicial Conduct,<sup>1</sup> which also serves as the basis for state pronouncements on the subject, certain of my remarks may be applicable on the state level as well.

Disqualification of federal judges is governed by 28 U.S.C. §

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1. ABA CODE OF JUDICIAL CONDUCT (1972) [hereinafter referred to as the ABA Code].

455.<sup>2</sup> Subsection (a) requires generally that “[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”<sup>3</sup> If left to this bare statement, the law might allow considerable flexibility, surely sufficient to permit a judge to sit in “gray area” cases where the parties knowingly consented to waive any ethical question. However, the statute does not stop there. Subsection (b) of § 455 makes disqualification mandatory where certain broad circumstances are applicable to the judge.<sup>4</sup>

Of particular concern to the large corporation is the automatic disqualification where the judge possesses some “financial interest” in the subject matter in issue or in one of the parties.<sup>5</sup> Section 455(d)(4) defines financial interest in a fatally preclusive manner: “ ‘[F]inancial interest’ means ownership of a legal or equitable interest, *however small*, or a relationship as director, advisor, or other active participant in the affairs of a party. . . .”<sup>6</sup> To the extent this restriction prohibits a judge from hearing a case where he or a member of his family has a legal or beneficial interest in so much as a single share of stock in a widely-held corporation, there will be a great many jurists who must recuse themselves from any case in which that corporation is a party. In the case of a company such as American Telephone & Telegraph, with over 700 million shares outstanding, held by several million shareholders, there is the very real possibility that the company will be denied access to as full, balanced and representative a range of judges as is available to other smaller litigants.

Not only can the financial interest stricture result in the same few judges hearing all of a company’s appeals, to either the advantage or disadvantage of the company, but it can also work a particular hardship in the “big case,” which presents signifi-

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2. 28 U.S.C. § 455 (1976 & Supp. III 1979).

3. *Id.* § 455(a) (Supp. III 1979).

4. *Id.* § 455(b). The 1974 House Committee report on the amendments to 28 U.S.C. § 455 state that their purpose is to make “the statutory grounds for disqualification of a judge in a particular case conform generally with the recently adopted canon of the Code of Judicial Conduct. . . .” H.R. REP. No. 1453, 93d Cong., 2d Sess. [hereinafter cited as H.R. REP.], reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6351.

5. 28 U.S.C. § 455(b)(4) (1976).

6. *Id.* § 455(d)(4) (emphasis added).

cant legal issues or has far-reaching consequences appropriate for hearing or rehearing en banc. It may well be that en banc consideration will be effectively denied for no other reason than that the judges on the original three judge panel are the only circuit judges not disqualified to hear the case. For example, in one recent federal appeal, AT&T's motion for rehearing with a suggestion for rehearing en banc was denied when a majority of the circuit judges in regular active service did not vote for rehearing en banc.<sup>7</sup> A note at the bottom of the order disclosed that six of that circuit's ten judges had recused themselves, leaving the en banc review application to only one judge in addition to the original panel.

Particularly discouraging is the fact that we are not always aware of the recusals which take place behind the closed doors of the courts of appeal and, thus, do not know the full impact of these strict ethical rules. A circuit court tells you only the three judge panel you are going to get, but does not normally tell you the panel you were going to get until Judge X, who had been scheduled to sit on the panel, recused himself, upon hearing that a trust, in which his wife had a beneficial interest, held two shares of AT&T stock.

Of course, strict ethical standards can also serve as an excuse for a judge to avoid complex and protracted cases. There is a story told involving an action brought by a Bell Company for breach of a patent licensing agreement in a state chancery court. The defendant in that case asserted a vigorous defense which challenged the validity of AT&T's patents and counterclaimed on several exotic and intricate antitrust theories. The issues quickly became much more complicated than the chancery judge could or wished to handle, and it became increasingly clear with every court appearance that the judge wanted out. Then one day the judge appeared in court with a broad smile on his face. He told the parties he had something important to read into the record. He announced that he discovered that he owned 100 shares of Western Electric stock. The Bell System lawyers looked at each other in shock as they were firmly convinced that AT&T owned fully 100% of the shares of Western Electric, and

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7. *Essential Communications Syss., Inc. v. American Tel. Co.*, No. 78-2521 (3d Cir. Nov. 23, 1979) (order denying rehearing and rehearing en banc).

had for some time. As gently as possible, the Bell System lawyers urged the judge to look at his stock certificates. The judge begrudgingly agreed, but stated that, as far as he was concerned, he must recuse himself. Unfortunately for that poor chancery judge, his interest turned out to be in Western Union stock.

Although this particular anecdote involved a state chancery judge, it would blink reality to ignore blithely the fact that docket congestion, understaffing, and the Speedy Trial Act<sup>8</sup> commitments give federal district judges very real incentives to avoid getting saddled with complex and protracted civil litigation.

Given the severe impact strict judicial ethics rules can have on the large corporation, one would think there should be some meaningful exceptions to the rule of disqualification for financial interest "however small." There is an exception clause to this "however small" statutory language, which is found in section 455(d)(4),<sup>9</sup> but it does not appear to cover, for example, ownership of stock by a judge or member of his immediate family. Disqualification is the rule, except for these very specific exceptions enumerated in section 455.<sup>10</sup> Under subsection (e) there can be no waiver of a disqualification based on a financial interest.<sup>11</sup> Moreover, it is highly doubtful that ignorance of a financial interest could serve as an excuse. Subsection (c) of § 455 forewarns a judge to "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 mi-

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8. 18 U.S.C. §§ 3161-74 (1976).

9. 28 U.S.C. § 455(d)(4) (1976).

10. *Id.* § 455(d)(4) provides that a judge need not disqualify himself in the following circumstances:

(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 education, 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.

11. *Id.* § 455(e) (Supp. III 1979).

nor children residing in his household.”<sup>12</sup>

One can fairly ask the question whether a simple interest in the stock of a large, publicly-held corporate party should be sufficient to mandate recusal. The Fifth Circuit, in *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*,<sup>13</sup> held that the judge’s wife’s ownership of 100 shares of Humble stock was an “infinitesimal” portion of the thirty-six million shares outstanding, and thus, could not warrant by any stretch of the imagination a finding that this constituted a “financial interest.”<sup>14</sup> Unfortunately, however, this decision is of little precedential value today since it was decided in 1968 under a prior statute.

### A. *Historical Perspective on Recusal Standards*

At the time of the 1968 decision in *Kinnear-Weed* the statute read in general terms:

Any justice or judge of the United States shall disqualify himself in any case in which he has a *substantial* interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, *in his opinion*, for him to sit on the trial, appeal, or other proceeding therein.<sup>15</sup>

The key differences between the previous and current versions of section 455 are obvious. The prior statute required the finding of a “substantial” interest whereas the current version mandates disqualification if there is a financial interest “however small.” Further, the prior statute, through the phrase “in his opinion,” left the ultimate disqualification decision to the subjective determination of the judge, whereas the current version attempts to set up a more objective standard.

In reporting in 1974 on the amended language, which was

12. *Id.* § 455(c) (1976).

13. 403 F.2d 437, 440, *reh’g denied*, 441 F.2d 631 (5th Cir. 1968), *cert. denied*, 404 U.S. 941 (1971).

14. *Id.* at 440. *But cf.* *United States v. U.S. Steel*, No. 79-709 (W.D. Pa. Jan. 22, 1982), discussed in *Nat’l L.J.*, March 8, 1982, at 9, col. 2 (where Judge Maurice B. Cohill, Jr., a Marathon Oil Co. shareholder, in administering a consent decree involving U.S. Steel Co., recused himself because U.S. Steel’s recent takeover of Marathon Oil made him a U.S. Steel shareholder).

15. Act of June 25, 1948, ch. 646, § 455, 62 Stat. 908 (1948) (current version of 28 U.S.C. § 455 (1976 & Supp. III 1979)) (emphasis added).

enacted as the current section 455, the House Committee on the Judiciary specifically addressed the question of stock ownership by a judge.<sup>16</sup> While the report made clear that the amendments were designed to end subjective speculation which had arisen under the former statute, debate still exists. The report stated:

Questions were inevitably raised as to whether 100 shares of 1,000,000 outstanding shares in a party corporation was "substantial," whether the \$1,000 value of such shares out of the judge's total investments of \$400,000 was "substantial;" or whether substantiality must be judged in the light of the particular party's financial situation. Moreover, the statute made the judge himself the sole decider of the substantiality of interest or of the relationships which would be improper and lead to disqualification.<sup>17</sup>

The report's bottom line statement on the stock ownership question was most remarkable: "A judge is free to invest. He should invest in companies which are not likely to become litigants in his court. If that should happen, then he must disqualify himself."<sup>18</sup>

This statement appears to be either disingenuous or naive; whichever its character, it makes no sense in the real world. How can a judge anywhere in the federal court system be "free to invest" in the largest corporations of America when those companies are repeatedly present in every circuit, if not district, in the country? Contrary to the committee report's language, strict application of this statute means that a judge or his family is definitely not free to invest in any of the so-called "blue chip" securities that are traditionally considered among the best investments. If he cannot invest in his local companies and he cannot invest in national companies, in what can he invest? I suppose real estate on the other side of the country is a possibility. This and other similar quality investments appear to remain the only alternatives open to the judiciary.

One thing that does appear clear from the committee report is that both the judge's right to invest and the corporation's right to access to the full judicial system have been subordinated to the establishment of a Procrustean disqualification test. The

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16. H.R. REP., *supra* note 4, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6351.

17. *Id.* at 6352.

18. *Id.* at 6357.



committee report states:

Under subsection (d)(4), a financial interest is defined as any legal or equitable interest, "however small." Thus, uncertainty and ambiguity about what is a "substantial" interest is avoided. Moreover, decisions of the Supreme Court . . . support the proposition that the judge's direct economic or financial interest, even though relatively small, in the outcome of the case, may well be inconsistent with due process.<sup>19</sup>

The Supreme Court cases are not dispositive of the stock ownership question from an intellectual point of view. *Tumey v. Ohio*<sup>20</sup> stands for the proposition that a defendant in a criminal case involving his liberty or property cannot be tried before a judge having a direct, personal, or substantial interest in convicting him. That case involved an Ohio law under which the judge did not receive any fee for his services unless he found a defendant guilty. On less blatant facts, the rule is not quite as strong as the House Committee apparently believed, even in criminal cases like *Tumey*. For example, one case holds that a judge need not disqualify himself from the trial of an accused bank robber where the judge owns stock in the bank which was robbed.<sup>21</sup> Indeed, a judge need not disqualify himself even where, in addition to a stock interest held by a judge and his family, the judge's brother was chairman of the board of directors and chief executive officer of the robbed bank and its holding company.<sup>22</sup> The *Commonwealth Coatings*<sup>23</sup> case involved interpretation of the United States Arbitration Act<sup>24</sup> as requiring an arbitrator to disclose that he was an occasional engineering consultant for one of the parties to the arbitration.

In the history of judicial recusals, statutory provisions have only temporarily "settled" the issue, and sometimes have not

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19. *Id.* at 6356 (citations omitted). The Supreme Court decisions referred to in the quotation are: *Tumey v. Ohio*, 273 U.S. 510 (1927); and *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), *reh'g denied*, 393 U.S. 1112 (1969).

20. 273 U.S. 510 (1927).

21. *United States v. Ravich*, 421 F.2d 1196, 1205-06 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970).

22. *United States v. Sellers*, 566 F.2d 884, 886-87 (4th Cir. 1977).

23. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), *reh'g denied*, 393 U.S. 1112 (1969).

24. 9 U.S.C. §§ 1-14 (1976).

“settled” anything at all. Prior to the approval of the present ABA Code in August, 1972, and the conforming statutory amendments of 1974, the prior statute involved in *Kinnear-Weed* had left disqualification to the subjective judgment of the judge.<sup>25</sup> The proper exercise of a judge’s discretion was clouded, however, by a somewhat different standard in force among bar associations. Canon Thirteen of the old Canons of Judicial Ethics provided that “a judge should not act in a controversy where a near relative is a party.”<sup>26</sup> Canon Twenty-nine provided that “a judge should abstain from performing or taking part in any judicial act in which his personal interests are involved.”<sup>27</sup> The 1974 House Committee report noted the problems created by the differing statutory and professional standards.<sup>28</sup>

The method adopted to solve the problem for the judge was not limited to creating a uniform standard. It also involved reducing his discretion. This reduction works to the detriment of a large corporate party’s right of access to the judicial system.

It is interesting to note, however, that this is not the first time there has been an attempt to establish an “objective” test. The “subjective” test established by the prior version of section 455 had been in effect only since 1948. The initial version of section 455, adopted in 1911, reads as follows:

Whenever it appears that the judge of any district court is in any

25. Act of June 25, 1948, ch. 646, § 455, 62 Stat. 908 (1948) (current version at 28 U.S.C. § 455 (1976 & Supp. III 1979)). See *supra* text accompanying note 15.

26. CANONS OF JUDICIAL ETHICS Canon 13 (1937) (amended 1972), see *supra* note 1.

27. *Id.* at Canon 29.

28. H.R. REP., *supra* note 4, reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 6352.

These statutory and ethical provisions proved to be not only indefinite and ambiguous, but also, in certain situations, conflicting. The uncertainty of who was a “near relative” or of when the judge was “so related” caused problems in application of both the statutory and the ethical standards. While the Canon required disqualification for involvement of “his personal interest,” the statute required such action only when it was “a substantial interest. . . .”

The existence of dual standards, statutory and ethical, couched in uncertain language has had the effect of forcing a judge to decide either the legal issue or the ethical issue at his peril. He was occasionally subjected to a criticism by others who necessarily had the benefit of hind sight. The effect of the existing situation is not only to place the judge on the horns of a dilemma but, in some circumstances, to weaken public confidence in the judicial system.

*Id.*

way *concerned in interest* in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, *in his opinion*, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are provided in section fourteen.<sup>29</sup>

To be sure, the “in any way concerned in interest” language had been considerably more strict than the “substantial interest” test of the 1948 revision. This is a conclusion shared by the Fifth Circuit, which in *Kinnear-Weed* declined to follow cases under the 1911 version that ordered disqualification on the basis of small stock interests in publicly held companies.<sup>30</sup> Thus, today we see a return to that “old time religion” and a rejection of the reformations of 1948.

### III. Non-mandatory Recusals

In light of the express congressional intent to replace the “subjective” test with a strict, objective one, and in light of the commanding tone of section 455(a) that a judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned,”<sup>31</sup> there may be some doubt whether there is such a thing as non-mandatory disqualification. Obviously, there must be some flexibility to deal with the inevitable “gray area.”

In the first place, in cases other than those falling within the specific proscriptions of subsection (b),<sup>32</sup> there is much room for interpretation in considering when a judge’s “impartiality might reasonably be questioned.” In the second place, section 455 recognizes that some conflicts are not so substantial as to require automatic disqualification, but can be waived by the parties to

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29. Act of March 3, 1911, ch. 231, § 20, 36 Stat. 1090 (current version at 28 U.S.C. § 455 (1976 & Supp. III 1979)) (emphasis added).

30. *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 403 F.2d 440. One of the earlier cases referred to is *In re Honolulu Consol. Oil Co.*, 243 F.2d 348 (9th Cir. 1917), which applied the test of “in any way concerned in interest.”

31. 28 U.S.C. § 455(a) (Supp. III 1979) (emphasis added).

32. *Id.* § 455(b) (1976).

the litigation:

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.<sup>33</sup>

One area that is not fully addressed by the statute is where one of the parties to the litigation had been and perhaps still is represented by the judge's former firm. Section 455 is clear that a judge must recuse himself if he or "a lawyer with whom he previously practiced" rendered legal services in connection with the specific matter in controversy or had been a material witness concerning it.<sup>34</sup> The statute, however, is silent on the other possibilities, such as the infinite variety of situations involving the judge himself or one of his former colleagues having represented one of the parties in connection with unrelated matters.

In considering these possibilities, consider also the distinction the statute draws between a judge who in his former life practiced with a law firm and one who had practiced with a government agency. Under section 455(b)(2) a judge is automatically disqualified if his law partner rendered legal services in connection with the pending matter.<sup>35</sup> But under subsection (b)(3), a judge who had been in prior government service need not disqualify himself where an associate participated as counsel, advisor, or material witness in the matter in controversy.<sup>36</sup> This distinction also can be found in the ABA Code, but there, unlike the statute, a commentary states that a judge "should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association."<sup>37</sup>

This differing treatment of private practice and government service, despite the fact that the information flow between lawyers in government service and in law firms must be presumed to be the same, calls into question whether there really are, or

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33. *Id.* § 455(e) (Supp. III 1979).

34. *Id.* § 455(b)(2) (1976).

35. *Id.*

36. *Id.* § 455(b)(3).

37. ABA CODE OF JUDICIAL CONDUCT Canon 3, comment (c)(1)(b) (1972).

can be, any black and white rules in this area, or whether fair standards must not be more flexible and geared to a case by case approach. It may also be the case that this area of judicial recusals, where a party was or is represented by the judge's old firm, converges with the law on conflicts of interest generally. A possible test would be whether the representation of the party by the judge's old firm was of a nature that confidences relevant to the matter in controversy could have been imparted to the firm and, thus, inferentially at least, to the judge.

Most important to all the "non-mandatory" recusal situations, be it the prior representation situation or some other, is that a judge must carefully weigh his conflict with a corresponding implied duty to perform his function and hear a case. If the parties to a litigation are willing to waive recusal, they should be allowed to do so, and we should not countenance a situation where a judge acts unilaterally to his calendar, or to avoid what may appear to be a protracted or complicated litigation.

#### IV. Conclusion

Ethical codes are of course essential to our judiciary's proper functioning and to the right of parties to a hearing before an impartial tribunal. Care must be taken, however, to fashion these codes so that the right of access to the courts is not impaired. The right to be heard is one of the most fundamental requisites of due process.<sup>38</sup> This latter right should not be so strictly construed as to be satisfied if there is a judge available, but should be construed to prevent one class of litigants, such as large corporations, from being deprived of access to large numbers of jurists who may be best qualified to hear their cases.

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38. *Schroeder v. City of New York*, 371 U.S. 208, 212 (1962).