Judicial Ethics—Recusal of Judges—The Need for Reform

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JUDICIAL ETHICS—RECUSAL OF JUDGES—THE NEED FOR REFORM

I. Introduction

The due process clause of the fourteenth amendment guarantees to every litigant the right to a fair and impartial trial.\textsuperscript{1} To insure this constitutional guarantee, a litigant is entitled to a new trial if the record shows the judge did not conduct the first trial in a fair and impartial manner.\textsuperscript{2} However, since a new trial costs the litigants much more time and money and since the judge’s bias may not be apparent from the trial record, such a remedy is not always sufficient. Therefore, most jurisdictions have enacted statutory procedures disqualifying a judge from presiding in a case when there is reason to fear he is interested in the outcome or is otherwise biased.\textsuperscript{3}

As early as Coke’s time, the common law maxim \textit{nemo debet esse judex impropria causa}—a man may not be a judge in his own cause—unequivocally negated the power of a judge to hear and decide a case in which he was interested.\textsuperscript{4} Early common law disqualified a judge for only one type of interest—direct pecuniary interest,\textsuperscript{5} but the English courts later extended the principle to include cases in which the judge had a proprietary interest or even a remote pecuniary interest.\textsuperscript{6} Dictum in the 1865 case of The Queen

\begin{footnotesize}
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\item U.S. Const. amend. XVI; In re Murchison, 349 U.S. 133 (1955); Tumey v. Ohio, 273 U.S. 510 (1927).
\item “Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness.” In re Linahan, 138 F.2d 650, 651 (2d Cir. 1943).
\item Note, \textit{Disqualification of a Federal District Judge for Bias—The Standard Under Section 144}, 57 Minn. L. Rev. 749 (1973) [hereinafter cited as \textit{Disqualification for Bias}].
\item In fact, the maxim that a judge may not be a judge in his own cause had such force according to Lord Coke that even an act of Parliament could not vest power in a man to try his own case, “for when an act of parliament is against common right and reason, or repugment, or impossible to be performed, the common law will control it, and adjudge such an act to be void.” Dr. Bonham’s Case, 8 Co. Rep. 113 6, 77 Eng. Rep. 646 (K.B. 1609). See Forest Coal Co. v. Doolittle, 54 W. Va. 210, 46 S.E. 238 (1903).
\item Frank, \textit{Disqualification of Judges}, 56 Yale L.J. 605, 609 (1947) [hereinafter cited as Frank].
\item Dimes v. Proprietors of the Grand Junction Canal, 3 H.L. Cas. 759, 10 Eng. Rep. 301 (1852).
\end{enumerate}
\end{footnotesize}
v. Rand prophesied the modern English rule which requires disqualification when judges are substantially interested in a case, whether pecuniary or not.®

While the early American common law adopted the existing English common law grounds for disqualification—pecuniary interest, relationship to a party, and previous involvement as counsel in the case—most American courts have refused to recognize a common law right to disqualification for bias itself. Accordingly, the common law has been modified by statute on both the state*

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7 L.R. 1 Q.B. 229 (1866). This dictum was the first suggestion that a judge would be disqualified because of bias itself, whatever its source, rather than because of certain circumstances that had been recognized as causing bias. The court indicated there would be disqualification “wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias . . . .” Id. at 233.

8 The Queen v. Meyer, 1 Q.B.D. 173 (1875); Frome United Breweries Co. v. Justices of Bath, [1926] A.C. 586; Cottle v. Cottle, [1939] 2 All E.R. 535 (Prob. Div.). The existing standard for disqualification is “whether or not a reasonable man, in all the circumstances might suppose that there was an improper interference with the course of justice if the challenged judge sat.” Id. at 537.


10 State v. Beard, 84 W. Va. 312, 99 S.E. 452 (1919); Jones v. State, 61 Ark. 88, 32 S.W. 81 (1895); Clyma v. Kennedy, 64 Conn. 310, 29 A. 539 (1894).

and federal levels to enable litigants to disqualify biased judges not covered by earlier law.

II. WEST VIRGINIA

West Virginia, like the majority of states, adopted the early common law grounds for disqualification and codified them. Although the West Virginia statute expanded the common law grounds slightly, the procedure for disqualifying a judge is limited to the hardened rules and specific categories established by common law. In fact, even the West Virginia court seems to be confused as to whether the statute or common law controls. Due to the narrow application of the statute by the courts and the ambiguous definitions of terms included in the statute, many decisions dealing with disqualification have been based on the common law even though the statute may have been applicable to the facts.

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1 In 1792, the first statute governing disqualification was enacted. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278. It provided that a federal district judge was disqualified when he was interested in the litigation or had been counsel for either party. In 1911, section 455 of the Judicial Code expanded these grounds to include pre-existing relationship or connection with a party and prior participation in the case as a material witness. And in 1911, section twenty-one was added to the disqualification statute which was reenacted as section 144 in 1948. So, today, disqualification in the federal courts is governed by two statutes. 28 U.S.C. § 455, § 144 (1970).


3 W. Va. Code Ann. § 51-2-8 (1966) provides in its pertinent part:

[When such a judge [circuit, criminal or intermediate] is a party to a suit, or is interested in the result thereof otherwise than as a resident or taxpayer of the district or county, or is related to either of the parties, as a father, father-in-law, son, son-in-law, brother, brother-in-law, nephew, uncle, first cousin, or guardian, or if, at the time of the institution of the suit, or at any time before its final determination, he, his wife, or any party or parties related to him in the degree hereinbefore specified, is a stockholder, or officer, in any stock company or corporation which is a necessary party to the proceedings, or if he is a material witness for either party, he shall not take cognizance thereof unless all parties to the suit consent thereto in writing . . . .

4 West Virginia disqualifies a judge that has an indirect pecuniary interest because he is a stockholder or related to a stockholder of a corporation involved in a proceeding. Id.


In none of these cases did the court refer to the statute even though it was, or could have been applicable. Instead, the court relied upon the common law rules
The present West Virginia law fails to provide a flexible, general ground for disqualification of a judge for bias or prejudice. Without such a standard, a litigant may be powerless to disqualify a judge, even though actually biased, because the exact type of facts required by the statute does not exist. As a result, the litigant cannot invoke the statute to obtain recusal of a judge by a writ of prohibition. Therefore, the present statute is not a sufficient safeguard for a fair and impartial trial. The exclusive, narrow grounds for disqualification and the complete lack of a general disqualification for bias provision require a modification of the present West Virginia law. Because the courts will not institute this reform, legislative action is necessary.

III. Recusal of Judges in the Federal Courts

The first statute providing for disqualification of federal judges, enacted in 1792, provided two grounds for disqualification that were already contained in the common law—when the judge was interested in the litigation or had previously been counsel for either party in the case. In 1911 this section was reenacted as section 455 of the Judicial Code, and the grounds were expanded to include prior participation in the case as a material witness and pre-existing relationship or connection with a party. However, the

adopted by West Virginia.

17 "In the absence of express statutory provision, prejudice or bias on the part of the judge which is not based on interest is not assignable as a ground for disqualification . . . ." State v. Beard, 84 W. Va. 312, 316, 99 S.E. 452, 453 (1919).

18 In Woodcock v. Barrick, 79 W. Va. 449, 91 S.E. 396 (1917), the court recognized the fact that a judge may be biased in a case where the judge's own attorney may be a party in a case before him, but since these specific facts aren't included in the statute or common law, the court could not issue a writ of prohibition disqualifying the judge from the case.

19 In fact, the court has positively stated, that "the Constitution and the legislature" do not want the courts to add other grounds for disqualification. 84 W. Va. at 316, 99 S.E. at 453.

20 Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278. This statute applied only to federal district judges until reenacted in 1911.

21 Interest in section 455, construed as the early English common law, must be direct financial interest. Spencer v. Lapsley, 61 U.S. (20 How.) 264, 266 (1857).

22 28 U.S.C. § 455 (1970), formerly ch. 231, § 20, 36 Stat. 1090 (1911), provides: 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.
statute made it discretionary with the challenged judge to determine whether he would disqualify himself under those grounds. Section 455 also lacked a general provision for disqualification for bias or prejudice.

Congress, recognizing the need to adopt a flexible, general procedure for disqualifying judges for bias or prejudice, added section twenty-one to the Judicial Code of 1911. The statute, re-drafted in 1948 as section 144 and still in effect today, permits a litigant to disqualify a federal district court judge by filing an affidavit alleging facts from which bias or prejudice may reasonably be inferred. Section 144 was enacted as an answer to major criticisms of section 455, the discretionary power given a trial judge to determine whether he would disqualify himself under those grounds.

The statute, as enacted in 1911, applies to district courts, courts of appeals, and the Supreme Court.

Coltrane v. Templeton, 106 F. 370 (4th Cir. 1901). See Frank, supra note 5, at 609.

Act of March 3, 1911, ch. 231, § 21, 36 Stat. 1090 provided:
Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.

28 U.S.C. § 144 (1970). When the Statute was reenacted in 1948 as section 144, one of the few changes made as to add “sufficient” to the word “affidavit.”

Representative Cullop of Indiana, chief sponsor of section twenty-one (now section 144), stated during the House debates:
Now it sometimes happens in the trial of such cases that courts do abuse their discretion, and under the section here [section 455] it is left solely discretionary with such judge. It must appear that in his opinion a cause does exist . . . .

I]t ought not to be left to his discretion; and I submit that if he is a conscientious man, he does not want it left to him. It ought to be taken away from him, and taken away from him by the law.


This amendment seeks to remove from the court that criticism; that parties may have relief from judges in whom they have not confidence in
judge to review a challenge to his impartiality, the restrictive
grounds available for disqualification, and the lack of a competent
general standard. However, section 455 does include a broad re-
requirement that a judge disqualify himself if in his opinion his
participation would be "improper."

The statutory requirement of an affidavit stating the facts and
reasons for the belief that a "personal bias or prejudice" exists is
too indefinite regarding the grounds that are in fact sufficient to
require recusal under section 144. Interpretations in the federal
courts of these grounds restricted the meaning of the statute and
impeded its apparent goals. While initially, in Berger v. United
States, the Supreme Court held that section 21, later section 144,
empowered the trial judge to determine only the legal sufficiency
of the affidavit, not the truth or falsity of the charges, in deciding
whether recusal was appropriate, subsequent judicial decisions

their impartiality and freedom from prejudice, so that others may be
called to bear and determine the case and avoid the criticisms that now
exists on the part of litigants in courts in many instances.

Id. at 2627.

See Note, Disqualification of Judges, 86 Harv. L. Rev. 736 (1973)
[hereinafter referred to as Disqualification]; Putnam, Recusation, 9 Cornell L.Q.
1, 10 (1923).

28 28 U.S.C. § 455 (1970). However, the statute fails to define what is "impro-
per," and the experience of federal judges who have disqualified themselves pro-
vides little help, because they rarely state their reasons for disqualifications.

It is important to note here that some West Virginia courts recognize this right
of a judge to disqualify himself if in his judgment it would be improper for him to
preside; it is not a statutory right. State v. Beard, 84 W. Va. 312, 99 S.E. 452 (1919).
See also Woodcock v. Barrick, 79 W. Va. 449, 91 S.E. 396 (1917). While adoption
of a statute such as section 144 would help alleviate many of the problems concern-
ing disqualification of judges in West Virginia, it, too, has its shortcomings as is
apparent from its failure to correct the problems of section 455.

29 Ex parte American Steel Barrel Co. and Seaman, 230 U.S. 35, 43-44 (1913);
Ex parte Fairbank Co., 194 F. 978, 985 (N.D. Ala. 1912).

31 But the clear Berger decision [see note 32 infra and accompanying text],
the clear statute, and its clear legislative history have not been followed in practice,
and the federal trial practice still does not provide a litigant with the automatic
change of venue to which he is apparently entitled upon filing an affidavit in good
faith." Frank, supra note 5, at 629. See also Disqualification for Bias, supra note 3,
In Parrish, the court returned to the standards for determining the legal sufficiency
of the recusal affidavit provided under section 144, as determined by the Supreme
Court in Berger v. United States, 255 U.S. 22 (1921).
required a higher burden of proof as to bias. The lower federal courts further disregarded the statute's purposes and the Berger decision by restrictive interpretations of the personal bias or prejudice that the affiant is required to prove to gain recusal. They have construed recusable bias so narrowly as to require the affiant to show the judge dislikes him as a person. In fact, many courts have held that neither bias against the affiant's cause nor identifiable prejudgments on the merits are sufficient to obtain recusal. Even more limiting are the holdings requiring the bias to have developed during the present case, not during previous litigation, for it to be a ground for the recusal of a federal judge. In United States v. Grinell, the Supreme Court went so far as to confine the scope of recusable bias to only that bias which the affiant can connect to events occurring outside the courtroom. The federal

the following standard:

Upon the making and filing by a party of an affidavit under the provisions of section 21 [predecessor of section 144], of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency.

Id. at 32.

"[T]he test of the affidavit's legal sufficiency should be whether the facts alleged could reasonably lead to the belief that the affidavit says exists in the minds of the plaintiffs." Parrish v. Board of Comm'rs of Alabama State Bar, 505 F.2d 12, 20 (5th Cir. 1974).

It is true that some post-Berger cases have adopted a different test, one that would virtually require that the facts—taken, of course, as true—are sufficient to demonstrate a personal bias or prejudice in fact on the part of the trial judge for or against one of the parties." Id. at 20. Some cases so holding are: Keoue v. Hughes, 265 F. 572 (1st Cir. 1920); U.S. v. Gilboy, 182 F. Supp. 384 (M.D. Pa. 1958). See also Disqualification for Bias, supra note 3.

E.g., Craven v. United States, 22 F.2d 605 (1st Cir. 1927); United States v. Parker, 23 F. Supp. 880 (D.N.J. 1938); Johnson v. United States, 35 F.2d 355 (W.D. Wash. 1929).

E.g., Hogdon v. United States, 365 F.2d 679 (8th Cir.), cert. denied, 385 U.S. 1029 (1968); Henry v. Speer, 201 F. 869 (5th Cir. 1913); Cole v. Loew's Inc., 76 F. Supp. 872, 876 (S.D. Cal. 1948), rev'd on other grounds, 185 F.2d 641 (9th Cir.), cert. denied, 340 U.S. 954 (1951); Saunders v. Piggly Wiggly Corp., 1 F.2d 582, 584 (W.D. Tenn. 1924).


courts under section 144 have limited recusible conduct to personal dislike of the affiant that arises from an extrajudicial source and, therefore, have made it applicable only to the narrowest of circumstances.

Federal courts have also construed the requirement of a sufficient affidavit to demand an affirmative showing of actual bias before recusal would be granted. But the language of section 144 made possible the disqualification of a judge on the basis of facts that would indicate the possible presence of bias. "A minority of courts have construed the sufficient affidavit requirement liberally and disqualified a judge when the affidavit revealed appearance of bias on his part even though the judge may be impartial." The bias-in-fact standard used by a majority of the courts requires that the affiant prove bias by a preponderance of the evidence. Thus, the facts alleged in the affidavit, necessarily accepted as true, must satisfy the same minimum level required for proof of a fact. Such a standard approaches a trial on the merits of the bias issue and is not appropriate for the question of recusal.

_Pfizer Inc. v. Lord_ illustrates the shortcomings of section 144 and its adherence to the bias-in-fact standard. In that case, the defendants in a multi-district antitrust suit filed an affidavit under section 144 requesting the district court judge to recuse himself because of eight alleged incidents of bias. Some of those were: persuading the United States Department of Justice not to settle the case, suggesting that if it did settle the action, it would be permitting the defendants to "buy a monopoly," soliciting law

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39 *Disqualification for Bias*, supra note 3, at 759. Actually, West Virginia requires this on a petition for writ of prohibition. Fahey v. Brennan, 137 W. Va. 37, 70 S.E.2d 438 (1952). While the court stated the allegations of the petitioner must be taken as true, it further explained the reason was because the judge did not answer the allegations. The court stated, "[W]e simply say that when confronted with charges well pleaded in formal pleadings, which he [the judge] has not answered, so as to raise a factual issue bearing on his qualification or disqualification, the charges must be taken as true . . .." *Id.* at 47, 70 S.E.2d at 443.

40 *Federal Courts*, supra note 9, at 1447.

41 *Disqualification for Bias*, supra note 3, at 769. See *Parrish v. Board of Comm'rs of the Ala. State Bar*, 505 F.2d 12 (5th Cir. 1974); *Whitaker v. McLean*, 118 F.2d 596 (D.C. Cir. 1941).

42 456 F.2d 532 (8th Cir.), _cert. denied_, 406 U.S. 976 (1972).
suits against the defendants, accusing defendants’ counsel of instructing his client to manufacture and “doctor” evidence, and suggesting openly during the interrogation of a deposition witness that he was evasive and lying. Yet the court, consistent with the restrictive interpretations of section 144 by other courts, found that defendants failed to establish “personal bias” or “bias in fact” and, therefore, denied the motion because the affidavit was “insufficient” under the statute. The facts alleged in petitioners’ affidavit, however, were sufficient to gain recusal under section 144 as interpreted originally by Berger and under an appearance-of-bias standard.

Section 144 of the Judicial Code, through restrictive judicial interpretation, has become inappropriate as a general standard for disqualification on the grounds of bias and prejudice. The adherence to a bias-in-fact requirement for recusal, the restrictive interpretation of bias itself, and the discretionary power left in the judge against whom the bias is asserted limits its usefulness and creates confusion.

IV. ABA Code of Judicial Conduct

Because the authority of the judiciary depends on public confidence in the impartiality and well-reasoned foundation of judicial decisions, any competent standard for the disqualification of judges for bias must provide for disqualification whenever the public may reasonably question the judge’s impartiality. The court’s decision in Pfizer clearly illustrates that the present federal statutory standards have failed to do this by allowing too much discretion and by failing to set forth a general standard for disqualification.

4 Although the court found the judge’s adverse comments regarding petitioners’ deposition witness “inappropriate, perhaps even unfair to the witness” and the fact that “Judge Lord had misconceived his role vis-a-vis the settlements,” the court found such an exercise of discretion to be non-personal and, therefore, non-prejudicial, even though the actions of the judge discouraging fair settlements would “contravene the public interest.” The court concluded that “the facts contained in the affidavit falls short of showing the bias and prejudice necessary to recuse.” Id. at 539-44.

4 Justice Frankfurter, recognizing that the authority of the judiciary rests ultimately on public acceptability of judicial decision-making, indicated that authority is undermined when judicial decisions are identified with the prejudice of the decision makers. He stated, “The court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.” Baker v. Carr, 369 U.S. 186, 267 (1962) (dissenting opinion).
tion that can be followed. The ABA Code of Judicial Conduct remedies many of the problems inherent in section 144 and, therefore, would be a better, although not an ideal, model for a disqualification statute.

The ABA Code of Judicial Conduct specifically deals with disqualification of judges. It provides three separate grounds for disqualification—financial or corporate interest, a case in which the judge was a material witness or lawyer, and relationship to a party. But these grounds are specifically stated to be nonexclusive. This is necessary to allow the court to expand these per

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45 Under an appearance-of-bias standard, or even the Berger standard for bias, the facts of Pfizer would have been sufficient to obtain recusal. The facts of Pfizer and Berger are very similar, but the court reached opposite decisions because it restrictively interpreted section 144 in Pfizer, but not in Berger.

46 The American Bar Association replaced the ABA Canons of Judicial Ethics in August, 1972, with the ABA Code of Judicial Conduct which consists of seven general canons of ethics accompanied by specific rules of behavior. However, the Code, like the old canons, does not have legal force with federal judges.

47 ABA CODE OF JUDICIAL CONDUCT, CANON 3C provides:

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) 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:

(c) 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;

(d) 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 . . .

48 ABA CODE OF JUDICIAL CONDUCT, CANON 3C(1). In West Virginia only those grounds established by the statute and common law are available for recusal even though the judge may actually be biased. See State v. Beard, 84 W. Va. 312, 99 S.E. 452 (1919); Woodcock v. Barrick, 79 W. Va. 449, 91 S.E. 396 (1917).
se rules for recusing a biased judge. More importantly, the ABA Code establishes a general ground for recusal based on personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts. The general test prescribed for disqualification is whether the judge's impartiality "might reasonably be questioned." According to the drafters, the word "might" indicates that a judge should be disqualified if the "reasonable man," knowing "all the circumstances," would have doubts about the impartiality of the judge. The purpose of such a standard is to guarantee not only that a biased judge would not participate but also that no reasonable person would suspect that a judge is biased. Obviously a neutral and detached judge is essential to a fair trial and required by due process. The appearance test will maintain public confidence in the integrity of the judiciary, provide greater assurance of a fair trial, and, by eliminating subjective speculation concerning the source and nature of a judge's mental state, make the application of the standard easier.

The Code clearly defines the specific categories for disqualification and explicitly requires disqualification for direct financial interests if it could be "substantially affected" by the outcome. With respect to the latter, however, the Code is somewhat uncertain as to when such an interest requires disqualification. While it does not have a specific test for disqualifying a judge for prejudging the case, the Code's general appearance standard justifies such a test. Since prejudgment of the merits of a case creates a greater danger of partiality, whenever a reasonable man could conclude that the judge has already applied the law to the facts of the particular case and reached a conclusion, disqualification would be required.

The Code also specifically requires disqualification whenever the judge has "personal knowledge of disputed evidentiary facts

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49 ABA Code of Judicial Conduct, Canon 3C(1).
50 ABA Code of Judicial Conduct, Reporter's Notes, at 60.
52 The Court indicates that since the strength of the judiciary rests upon public confidence, "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14 (1954)
53 Disqualification for Bias, supra note 3, at 765.
54 ABA Code of Judicial Conduct, Canon 3C (1)(c).
55 Disqualification, supra note 27, at 758.
concerning the proceeding."55 This standard prevents a judge from evaluating the legal significance of facts prior to trial and insures that he will consider the facts as presented at trial or by the record and not as he recalls them. The danger of viewing the facts differently from the record and creating a reasonable apprehension of prejudice has already been recognized by the Supreme Court.57

Although the ABA Code sets forth a much better general standard for disqualification because of bias or prejudice and contains more detailed guidelines than section 144, it nevertheless has shortcomings. The lack of a specific test for disqualification for prejudgment on the merits, the lack of sufficiently defined procedure for implementing the canon, the failure to specify when an indirect financial interest might require recusal, and the discretionary power left in the very judge whose impartiality is questioned to determine the adequacy of the affidavit alleging bias are only some of the unresolved problems.

V. NEW STATUTE FOR DISQUALIFICATION OF JUDGES

There are two important considerations in comprising a general test for the disqualification of judges in West Virginia. First, the litigants must be assured a fair trial with an impartial judge,58 and, second, the public confidence in the integrity of the judicial process must be maintained.59 These interests are best protected by the adoption of an appearance test for disqualification of judges for bias. The original drafters of section 144 and the ABA Judicial Code of Conduct, Canon 3C both recognized the importance of appearances.60

A statute should include a preemptory system of disqualification, similar to section 144, which would, upon the filing of an affidavit alleging bias or prejudice, allow the judge to decide only if the affidavit alleged facts sufficient to indicate the possible pres-

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55 ABA CODE OF JUDICIAL CONDUCT, CANON, 3C(1)(a). Although the facts will be in issue only at the trial level, the provision is applicable to the appellate level when a judge's extrinsic knowledge of facts could influence his judgment on the merits of the issues.
59 "It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decision the respect and confidence of the community." Forest Coal v. Doolittle, 54 W. Va. 210, 227, 46 S.E. 238, 245 (1903).
60 See Federal Courts, supra note 9, at 1447; Disqualification, supra note 27, at 745.
ence of bias, but not allowing him to decide the truth or falsity of those facts. Therefore, if the judge rules that there are sufficient allegations to indicate an appearance of bias, the affidavit is legally sufficient, and the judge cannot proceed any further. However, as provided by the present statute, any rulings made prior to the disqualification merely to advance the cause towards a final hearing and not involving the merits of the case would not be disturbed. If the judge does not disqualify himself in a case in which the affidavit alleges bias or prejudice, a writ of prohibition should lie to force the judge to be disqualified. While some courts have suggested that appellate review is an appropriate remedy, a provision such as prohibition is necessary to save litigants' time and money and remove a major source of frustration and irritation before the trial gets underway.

Opponents of a preemptory system of disqualification for appearance of bias argue that it would result in purposeful delay and "judge shopping." However, a study made during the first six months of 1962 of the California preemptory system for disqualifying judges indicated that the system did not cause serious problems of delay or expense although a few instances of "judge shopping" were notable. Further, a requirement that the affidavit for disqualification be certified by counsel of record as to both his and

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61 W. Va. Code Ann. § 51-2-8 (1966) provides: "that nothing herein contained shall disqualify a judge who comes within the provision of this section to enter a formal order designed merely to advance the cause towards a final hearing and not requiring judicial action involving the merits of the case."

62 The West Virginia court has held that a writ of prohibition is the proper procedure to use to disqualify a judge who has refused to disqualify himself. Osborne v. Chinn, 146 W. Va. 610, 121 S.E.2d 610 (1968).


64 [A] trial is not likely to proceed in a very satisfactory way if an unsettled claim of judicial bias is an ever present source of tension and irritation. Only a final ruling by a disinterested higher court before trial can dispel this unwholesome aura. Thus, if an appellate court refused, when properly petitioned, to prevent a disqualified judge from trying a case, or to say that the challenged judge is not disqualified, this postponement of decision hurts the administration of justice, even though the court reserves the right to pass upon the matter after trial.

Green v. Murphy, 259 F.2d 591, 595 (3d Cir. 1958) (concurring opinion).

65 Federal Courts, supra note 9, at 1437.


67 Cal. Civ. Pro. Code § 170.6 (Supp. 1965). As originally enacted in 1957, it applied only to civil cases. It was extended to criminal cases in 1959.
his client’s good faith and the fact that a litigant who knowingly makes false allegations in an affidavit may be tried for perjury would probably discourage most potential abusers of the system. Further, a time requirement providing that the affidavit be filed before the trial of the case and allowing it after that, but before final judgment, only if good cause be shown for the failure to file the affidavit earlier will prevent an applicant from waiting to see whether the results of the trial will be favorable before filing the affidavit and will also prevent, to a certain degree, the necessity of a different judge’s coming into the litigation already in progress.

The opponents of a system for automatic disqualification upon allegation of bias or prejudice have argued that such a preemptory system would result in a shortage of judges to try cases. Two West Virginia statutes largely negate this argument. The first specifically provides that the attorneys in a case may elect a special judge if the regular judge is disqualified for interest, and the second provides for a suit to be brought in another

49 Section 144 of the Judicial Code requires the affidavit be certified by counsel, which makes him subject to threat of contempt or disbarment proceedings. See Laughlin v. United States, 151 F.2d 281 (D.C. Cir.), cert. denied, 326 U.S. 777 (1945).

The requirement that counsel certify his own good faith, as well as his client’s prevents an attorney from persuading his client that the judge is biased. In re Union Leader Corp., 292 F.2d 381 (1st Cir.), cert. denied, 368 U.S. 927 (1961). See Federal Courts, supra note 9, for a more comprehensive discussion of the certification by counsel of the affidavit for disqualification.

52 The need for a procedural safeguard such as a time requirement was recognized and placed in both the Judicial Code and the West Virginia statute. However, section 144 of the Judicial Code originally provided that an affidavit “be filed not less than ten days before the beginning of the term at which the proceeding is to be heard.” 28 U.S.C. § 144 (1970). This became obsolete when Congress abolished formal terms of court in 1963 and consequently was rendered ineffective without a substitute being added. The courts, however, maintain a deadline in that the affidavit must be filed within a reasonable time and that reasonable time must be prior to final judgment. E.g., Eisler v. United States, 170 F.2d 273 (D.C. Cir. 1948), cert. dismissed, 338 U.S. 883 (1949); Bommarito v. United States, 61 F.2d 355 (8th Cir. 1932). See Federal Courts, supra note 9, at 1444. West Virginia’s statute contains a similar time requirement. W. Va. Code Ann. § 51-2-8 (1966).

72 An example of “good cause,” that would allow an affidavit to be filed after the trial begins, would be the discovery of facts indicating a judge’s bias.

71 Disqualification, supra note 27, at 747.


When, for any cause, the judge of a circuit court, criminal court, or other court of record of limited jurisdiction, shall fail to attend and hold the same . . . or if he is in attendance and cannot properly preside at the trial
court or circuit if the presiding judge is disqualified.\textsuperscript{23}

An important requisite to any effective disqualification statute is that it include a list of specific categories of facts that are most likely to cause bias of prejudice. It is far easier for a judge to disqualify himself, and for the litigant to obtain recusal, when the judge has no discretion at all in deciding whether his action or situation is likely to cause bias. However, it is important that the statute not be limited to those specific categories listed so that new categories may be added by the courts when necessary. Such a list of per se recusal grounds should include the common law grounds of interest, relationship, and prior participation in a case, with the addition of prejudgment of the merits. While prejudgment of the facts at issue or the litigants before the judge must be sufficient to require disqualification under any workable statute, prejudgment of the law should not be and ordinarily has not been.\textsuperscript{24} Merely because a judge thinks a litigant’s legal theory is wrong does not mean he cannot conduct a fair and impartial trial; if his rulings regarding the law are wrong, they can be discovered and overturned by appellate review.

An ideal statute insuring litigants a trial by a fair, impartial, and disinterested judge must contain: (1) a preemptory system for disqualification alleviating the appearance, as well as the existence, of bias; (2) certain specific grounds that indicate bias, including, but not limited to, the common law categories; (3) a provision for disqualification for prejudgment of the merits of the case and the law applicable to the particular facts of the case; and (4) certain procedural safeguards to prevent abuse of such a preemptory system, such as an affidavit alleging facts sufficient to indi-

\textsuperscript{23} W. Va. Code Ann. § 56-1-1(g) (1966) provides: “If a judge of a circuit be interested in a case which, but for such interest, would be proper for the jurisdiction of his court, the action or suit may be brought in any county in an adjoining circuit.”

\textsuperscript{24} “In particular, views relating to legal questions, even strongly held views in favor of law enforcement, do not amount to personal bias.” United States v. Nehas 368 F.Supp. 435, 437 (W.D. Pa. 1973). \textit{But see} Gladstein v. McLaughlin, 230 F.2d 762 (9th Cir. 1955), wherein the court held that a judge may make a statement which, in form, is purely law but is so directly related to the particular facts of the case as to require recusal on the basis that the judge has prejudged the merits of the case.
cate an appearance of bias, certification of that affidavit by counsel, and a time requirement for filing the affidavit with sufficient leeway for discovery of bias after trial begins. Today, when public confidence in the workings of government and the legal system is low, a competent, effective statute providing for disqualification on the basis of the appearance of bias is needed to maintain the

*A model statute for recusal of judges would resemble the ABA Code of Judicial Conduct, Canon 3C, with a few changes. Such a statute might be:

1. Whenever a party to a proceeding in any court of record makes and files an affidavit, under penalty of perjury, alleging facts to be taken as true for purposes of disqualification, whether or not they are in fact true, in which the judge's impartiality might reasonably appear to be questioned, or alleges facts that indicate such party cannot have a fair and impartial trial before such judge, the judge is disqualified from hearing the case and can proceed no further. Facts indicating the appearance of bias requiring recusal include, but are not limited to, the following instances:

   a. The judge has a personal bias or prejudice either against a party, or in favor of any adverse party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
   b. The judge served as a lawyer in the matter in controversy, or a lawyer with whom 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;
   c. The judge knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has any financial interest, except as a taxpayer, 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;
   d. The judge or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:
      i. Is acting as lawyer in the proceeding;
      ii. Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
      iii. Is to the judge's knowledge likely to be a material witness in the proceeding;
   e. The judge applies the law to the particular facts of the case prior to trial, constituting a fixed belief concerning the merits of the case not the law itself.

2. The affidavit must allege facts sufficient to indicate an appearance of impartiality, but the judge before whom the matter is pending shall have no power to determine the truth or falsity of the allegations but must accept those allegations as true. The affidavit must be filed timely, before trial, unless the alleged impartiality was not discovered until after trial, and it shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

3. Disqualification under this section shall not invalidate any order by such judge designed merely to advance the case towards a final hearing and not requiring judicial action involving the merits of the case.
major sanction behind the operation of the judiciary—the public's belief that, through it, disputes can be settled impartially, reasonably, and fairly.

Don R. Sensabaugh, Jr.