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Judicial Roulette: Recusal Motions in Criminal Cases

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Medievals believed that fortune was controlled by a wheel that brought prosperity one day but woe the next. The fate of defendants in criminal cases is shaped by a wheel no less capricious: the random assignment of judges. And while fortune's wheel may be inescapable, a recent Ninth Circuit decision vacating a conviction because the trial judge failed to recuse himself, and a pending recusal application by convicted executive Jamie Olis, remind us that sometimes defendants try to improve their judicial lot through recusal, though with little hope for success.

The Law on Recusal

Federal law addresses recusal primarily in two statutes, 28 U.S.C. §§ 144 and 455. Section 144 requires district court judges to recuse themselves whenever a party files a "timely and sufficient" affidavit that the judge "has a personal bias or prejudice" against that party or favors an adverse party. It allows litigants to file one bias affidavit in a case, and requires that the affidavit be accompanied by counsel's certification that it is made in good faith. The terms of § 144 thus appear to permit litigants to make what amounts to a peremptory challenge against a judge, which some states allow. But the Supreme Court has somewhat blunted § 144's impact by allowing the challenged judge to determine whether the affidavit sufficiently alleges actual bias. *Berger v. U.S.*, 255 U.S. 22 (1921). A judge must, however, assume that the affidavit's factual allegations are true.

By contrast, § 455 applies to all federal judges, has no affidavit requirement, and deals with both actual and apparent bias. Section 455(a) requires recusal in any proceeding in which the judge's impartiality "might reasonably be questioned." Actual partiality need not be shown: "[W]hat matters is not the reality of bias or prejudice but its appearance." *Liteky v. United States*, 510 U.S. 540 (1994). But courts have held that not all doubts about a judge's impartiality warrant recusal. Rather, judges must recuse themselves only if a disinterested, fully informed observer would entertain "significant doubt" that justice would be done absent recusal. *U.S. v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992).

In contrast, § 455(b) requires recusal in certain circumstances even if a reasonable observer would not question the judge's impartiality. Those circumstances include the judge's having personal bias concerning a party, personal knowledge of disputed facts, or a financial interest in a party or in the subject matter in controversy.

If defendants are not entitled to recusal under these statutes and find themselves appealing a criminal conviction, they have one last source of relief from an apparently partial trial judge: an appeals court's power to vacate the judgment and remand the case to a different judge to preserve the appearance of fairness and justice. Frank Quattrone, for example, argued that the Second Circuit should remand his case to a different judge because his trial judge's impartiality had been questioned (numerous press articles reported that the judge's evidentiary rulings favored the government) and he had expressed a firm belief in Quattrone's guilt. Although the Second Circuit did not "seriously doubt" the trial court's impartiality, it found that the "interest and appearance of justice" would be better served by reassignment because certain comments by the judge could be viewed as "rising beyond mere impatience or annoyance." *U.S. v. Quattrone*, 441 F.3d 153, 192-93 (2d Cir. 2006). After reassignment, the charges against Quatrrone were dismissed under a deferred prosecution agreement. To get this recusal-by-another-name, of course, remand must be required on on some other ground.

Owning Stock and Having a Financial Interest

Given these limitations, recusal motions are rare and rarely granted, but defendants do make them, hoping for a friendlier judge, or at least another trial. Sometimes they succeed. The former CEO of Homestore. com, Inc., Stuart Wolff, persuaded the Ninth Circuit to vacate his conviction and remand for a new trial before a different judge because the lower court judge failed to recuse himself. Wolff was charged with participating in a scheme to inflate Homestore's revenues through round-trip transactions with AOL and other companies. The district judge disclosed that he owned AOL stock, and Wolff moved for recusal, arguing that AOL stock constituted a financial interest in the subject matter in controversy and was therefore subject to mandatory recusal

under § 455(b)(4). Under the local rules of the Central District of California, Wolff's recusal motion was decided by another judge (a procedure not required by § 455), who found recusal unnecessary. The Ninth Circuit disagreed, holding that AOL stock did constitute an interest in the subject matter because Homestore's transactions with AOL were central to the government's case against Wolff, and because AOL had been charged by the government and SEC in part because of those transactions. *U.S. v. Wolff*, 263 Fed. Appx. 612 (9th Cir. 2008).

Courts have generally followed the principle that a judge's owning stock in a corporation that is the victim of the crime prosecuted is not a financial interest warranting recusal. *See U.S. v. Lauersen*, 348 F.3d 329 (2d Cir. 2003); *U.S. v. Rogers*, 119 F.3d 1377 (9th Cir. 1997). In *Wolff*, AOL's shareholders can reasonably be seen as victims because AOL agreed to pay millions in fines and faces costly private lawsuits as a result of the conduct recited in the indictment. The *Wolff* panel, however, distinguished the corporate-victim cases on the ground that AOL itself faced liability and thus, unlike typical corporate victims, such as banks that have been robbed, AOL could be affected by what happened in Wolff's trial. But AOL's dual status as victim and participant is not unusual. In many criminal cases against executives, their corporate employers and other companies they deal with can be viewed as both participants and victims. It remains to be seen if the Ninth Circuit's remand of *Wolff* to a new judge is an aberration — perhaps driven by Wolff's 15-year sentence — or a sign that courts in cases where public corporations are potentially liable will grant recusal more liberally to avoid even a whiff of unfairness.

Friendship and Apparent Bias

Although Wolff's appeal was successful, a recusal challenge by former Dynegy executive Jamie Olis shows how difficult it is to disqualify a judge. Still fighting for a new trial after the Fifth Circuit vacated his 24-year sentence but affirmed his conviction, Olis has filed a habeas petition arguing that the U.S. Attorney who prosecuted him, Michael Shelby, violated his constitutional rights by pressuring Dynegy to stop paying Olis's legal fees. The petition is before District Judge Sim Lake —the same judge who sent Olis to jail for two decades. Olis now alleges that Shelby was Judge Lake's "close personal friend," and that the judge should recuse himself because Olis's petition puts Shelby's character and reputation at issue. *See* Olis's Motion to Recuse Judge Sim Lake under 28 U.S.C. §§ 144 and 455(a) and (b)(1), PACER, No. 03 Cr. 217 (S.D. Tex.).

Olis first moved to recuse Judge Lake under § 455(a). The government opposed, arguing principally that Olis's allegations, which centered on similarities in Lake's and Shelby's backgrounds, and the fact that Judge Lake had made a point to swear Shelby in as U.S. Attorney, did not demonstrate that Shelby had a friendship with Judge Lake that would cause reasonable doubts about his impartiality. In response, Olis added actual-bias challenges under §§ 144 and 455(b), presumably thinking that Judge Lake must take the friendship allegations in Olis's § 144 affidavit as true.

Unfortunately for Olis, courts have held that a judge's relationship with a prosecutor must be close indeed to cause an actual or apparent conflict. The Seventh Circuit, for example, held that a judge had an apparent conflict not because the prosecutor was his close friend, but because he and the prosecutor had made plans before trial to vacation together immediately after sentencing — plans not disclosed to the defendant. *U.S. v. Murphy*, 768 F.2d 1518 (7th Cir. 1985). Olis can fairly argue that the risk of apparent bias in his case is greater than usual because Judge Lake must evaluate not simply whether Olis's rights were violated in a case Shelby prosecuted, but whether Shelby himself engaged in misconduct. But even this argument may not prevail, since Olis is attacking Shelby's conduct as U.S. Attorney. Judge Lake could decide that, because Shelby's personal actions are not at issue, he need not recuse himself — the official-capacity rationale that Justice Scalia relied on to decline to recuse himself in a suit against Vice President Cheney, despite being "well acquainted" with Cheney and having traveled with Cheney on a hunting trip. *Cheney v. U.S. District Court for the District of Columbia*, 541 U.S. 913 (2004) (Memorandum of Justice Scalia).

Even if Olis's recusal motion succeeds, that will probably not encourage attorneys to make similar challenges. Attorneys view recusal as a last-resort request, and one that, by offending a judge, can cause the very bias it seeks to avoid. But courts have stressed that lawyers have a duty, both to their clients and as officers of the court, to challenge even a judge's apparent partiality. If you cannot remove your client from fate's wheel, sometimes you must at least give it another turn.