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# PROFESSIONAL RESPONSIBILITY: COMMENTS ON RECUSAL

A DISCUSSION WITH:
JUDGE DAVID M. EBEL[1]
JUDGE PAUL J. KELLY, JR.[2]
JUDGE CARLOS F. LUCERO[3]
JUDGE JOHN J. PORFILIO[4]
JUDGE DEANELL R. TACHA[5]

## INTRODUCTION

The following edited and condensed version of a conversation between members of the *Denver University Law Review* and five Tenth Circuit Court of Appeal's judges is intended to supplement the preceding survey article on judicial recusal. These members of the judiciary share their thoughts and opinions on the topic of judicial recusal, focusing primarily on the purpose of recusal, the objectives underlying recusal statutes, the potential abuse of the recusal process, the Supreme Court's recent treatment of recusal in *Liteky v. United States*,[6] and circumstances requiring recusal.

In the subsequent discussion, members of the *Denver University Law Review* posed questions to Tenth Circuit judges to better understand the recusal process in this Circuit. The participants wish to emphasize that they are responding to the questions in a general way and that they are in no way intending to prejudge issues that may come before them. In future cases, the judges will analyze these issues on a case by case basis.

## THE DISCUSSION

*Law Review*: 28 U.S.C. § 455(a) provides that "[a]ny . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The Supreme Court recently interpreted § 455(a) in *Liteky v. United States* and held that the alleged bias which forms the basis for the motion to recuse should stem from an extrajudicial source.[7] If the alleged

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3. Judge, United States Court of Appeals for the Tenth Circuit; B.A., Adams State College, 1961; J.D., George Washington University, 1964.

4. Judge, United States Court of Appeals for the Tenth Circuit; B.A., University of Denver, 1956; LL.B., University of Denver College of Law, 1959.

5. Judge, United States Court of Appeals for the Tenth Circuit; B.A., University of Kansas, 1968; J.D., University of Michigan, 1971.

6. 114 S. Ct. 1147 (1994).

7. Extrajudicial refers to "[t]hat which is done, given, or effected outside of the course of

bias originates from an intrajudicial proceeding,[8] the motion will be granted only if the judge displays deep-seated favoritism or antagonism that would make fair judgment impossible. When § 455(a) was amended in 1975 to include an objective standard, Congress intended to promote public confidence in the integrity of the judicial process by broadening the grounds for disqualification.[9] Do you think the imposition of the extrajudicial source doctrine on § 455(a) is inconsistent with this goal because it limits the grounds available for disqualification?

**JUDGE LUCERO:** Congress' intent to establish an objective standard is clearly evidenced in the words "might reasonably be questioned." The Supreme Court's decision in *Liteky* appears to narrow the scope of these words. I am not necessarily critical of that because the statute sweeps with a broad brush.

The distinction between biases stemming from extrajudicial and intrajudicial sources is not particularly significant to me because I am extremely sensitive to any bias whatsoever, and personally would recuse if there is any reasonable possibility or suspicion of an appearance of impropriety.

**JUDGE TACHA:** What the statute requires is the lowest threshold and the litigants' last ditch argument. Recusal is not about statutes, but about ethics and avoiding the appearance of impropriety which is an individual determination of the judge. Most biases stem from extrajudicial sources, but I suppose it could stem from an intrajudicial source in which case I would ask myself whether it looks to others that there is an appearance of impropriety.

*Law Review*: The public's belief in the impartiality of the judicial system is essential to their willingness to abide by judicial decisions and, thus, is possibly the backbone of the American judicial system. Arguably, a narrow interpretation of § 455(a) weakens the public's faith in the judiciary because the appearance of unfairness is as damaging to this faith as an actual bias. Do you agree?

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regular judicial proceedings." BLACK'S LAW DICTIONARY 586 (6th ed. 1990). If the motion to recuse stems from "judicial rulings, routine trial administrative efforts, and ordinary admonishments," then disqualification is not required. *Liteky*, 114 S. Ct. at 1150.

8. Intrajudicial refers to that which is done, given, or effected within the course of judicial proceedings. An example of a motion to recuse originating from a judicial source is found in United States v. Chantal, 902 F.2d 1018 (1st Cir. 1990). In *Chantal*, the criminal defendant's motion to recuse stemmed from the presiding judge's statements at a prior sentencing hearing indicating that the judge had doubts regarding the defendant's ability to rehabilitate himself. *Id.* at 1019-20.

9. H.R. REP. No. 93-1453, 93d Cong., 2d Sess. 5, *reprinted in* 1974 U.S.C.C.A.N. 6351, 6354-55 (describing the intention of the amendment to firther support the public's confidence in the impartiality of the judiciary). The Supreme Court explained:

> The statute was amended . . . to clarify and broaden the grounds for judicial disqualification and to conform with the recently adopted ABA Code of Judicial Conduct. The general language of subsection (a) was designed to promote public confidence in the integrity of the judicial process by replacing the subjective "in his opinion" standard with an objective test.

*Liljeberg v. Health Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988).

**JUDGE LUCERO:** When compared to other institutions, polls show that the public has the highest level of confidence in the judicial system. It is of the utmost importance that this trend continue. It is questionable whether the public would view *Liteky* as a problematic narrowing of the grounds available for motions to recuse.

**JUDGE KELLY:** I agree that the appearance of fairness is extremely important to maintain the public's faith in the judicial system. I am uncomfortable recusing, however, just because some guy points a finger if no factual predicate for the bias exists.

*Law Review*: In close cases do you think doubts should be decided in favor of the party or do you feel a duty to sit?

**JUDGE EBEL:** In a close case, I decide in favor of the party requesting recusal. However, there is a duty to sit and unless the party presented a colorable case for recusal, I would sit. This is not to undermine the importance of the appearance of impartiality, but a reasonable basis for the challenge must exist.

**JUDGE PORFILIO:** This is a tough question because certainly there is a duty to sit. I am concerned with the party, however, because in the final analysis it is the party's belief in the fairness of the tribunal that is of the utmost importance.

**JUDGE KELLY:** There are no close cases. You either are or are not biased.

*Law Review*: Some states have dealt with the recusal issue by enacting provisions that permit the litigant one preemptory disqualification.[10] What do you think of such provisions?

**JUDGE EBEL:** Such provisions are inherently not a good idea because they encourage forum shopping. The litigant ought to have to prove that a bias exists because it is a serious thing to get a judge removed from a case. Even at the trial level the trend is to move away from preemptories.

**JUDGE KELLY:** Not only do preemptive recusal provisions allow for judge-shopping, but they may actually get rid of the best judge for the case.

**JUDGE PORFILIO:** I am also opposed to preemptive disqualification provisions because they allow for considerable manipulation.

*Law Review*: Section 455 requires recusal when there is a bias concerning a party but not when the bias concerns an issue in the case. The drafters of the American Bar Association's Code of Judicial Conduct have suggested that it is

10. For example, in California if a party files an affidavit stating that she believes she cannot have a fair and impartial trial or hearing before the assigned judge, no further act or proof is required and a different judge is assigned. CAL. CIV. PROC. CODE § 170.6 (West 1982 & Supp. 1996).

unavoidable, and even desirable, that a judge have previously developed views on constitutional and legal issues. Do you agree?

**JUDGE LUCERO:** I agree with the drafters that it is unlikely that a judge will not have some view on many issues. However, someone must eventually make the decision. Public policy considerations are less sensitive at the circuit court and Supreme Court levels. A panel of judges can balance out one judge who has, for example, a view on abortion or the death penalty. On the Supreme Court there are nine different views to act as a check and balance procedure. Furthermore, the very nature of the appointment process takes the appointee's background and views into account.

**JUDGE EBEL:** It is unavoidable to develop positions on issues and it would be impractical to expect otherwise, considering that it is the judges' job to publish their views in decisions. If a judge expresses a view outside of an official proceeding, however, and the opinion is direct enough that the party reasonably does not think he or she will receive a fair trial, then recusal is necessary.

**JUDGE PORFILIO:** The issue is whether the belief is so strongly held that the judge cannot view the case with an open mind. If he cannot, then his opinion on the issue should be grounds for recusal.

*Law Review*: Do you think a judge ought to recuse himself or herself if one of the parties is a personal acquaintance?

**JUDGE LUCERO:** It depends on how "personal acquaintance" is defined. Knowing the party's name is not enough to mandate recusal. I am more inclined to recuse if I am acquainted with the party due to a social function rather than a public function.

**JUDGE EBEL:** I agree that if a judge is socially interactive with the person they should ordinarily disqualify themselves. Basically, my test is if there is more than a professional relationship—a personal friendship—then I would recuse.

**JUDGE KELLY:** I agree that it would be impractical to recuse every time you are acquainted with a party. Especially considering that judges get appointed to the bench due to their familiarity with a lot of people and the organized bar.

**JUDGE TACHA:** The test is not whether you know the party as a personal acquaintance, or know them personally—the test is whether you are biased.

*Law Review*: Do you think a judge should automatically recuse when a former law clerk represents a party in the litigation?

**JUDGE EBEL:** If an attorney was formerly my law clerk, I would consider recusal but would not automatically step down. I would analyze how close a relationship we held and the number of years that have passed since the clerkship.

**JUDGE LUCERO:** I also would require a substantial cooling off period—three to four years at a minimum. Not because I would fear favoring the

clerk's position, but because I am afraid I would bend over backwards to avoid the appearance of impropriety and hold the clerk to a higher standard. This would disadvantage the clerk.

**JUDGE TACHA:** I personally do not sit on former law clerk's cases and think it is presumptively not a good idea. I have a five-year time line. After five years I would consider it. I do, however, sit in front of past students.

*Law Review*: Are you concerned that a per se rule against hearing cases involving former law clerks would prevent highly qualified people from applying for clerkships?

**JUDGE EBEL:** A per se rule would be unrealistic, especially in smaller towns where the wheels of justice may stop if certain lawyers are disqualified from trying cases in front of what may be one of the only judges in town.

*Law Review*: When you are deciding whether or not to recuse, or to overturn a denial of a recusal motion at the district level, is society's frustration with the massive flood of litigation or preserving resources a concern?

**JUDGE TACHA:** Most definitely! However, recusal motions are a rare occurrence in the Tenth Circuit because the judges usually recuse themselves before the parties or lawyers are even aware of which judge was assigned to the case. In ten years, I have never had a recusal motion.

**JUDGE PORFILIO:** I am more inclined to rule in favor of saving judicial resources if it appears that the party may have filed the motion to recuse in order to manipulate the court.

*Law Review:* When it is decided on appeal that a motion to recuse should have been granted, do you think the case should always be remanded?

**JUDGE EBEL:** If I decide that the district court judge should have recused himself, I usually remand for a new proceeding unless there was only harmless error.

**JUDGE PORFILIO:** If the recusal denial was erroneous, I agree that remand should follow. But the error can be more technical than substantive, and, therefore, harmless.

*Law Review*: Do you think the statute should specify what action should be taken in the event of a violation?

**JUDGE TACHA:** I do not think that the statute should designate a remedy because every case is different. It would be a waste of judicial resources to mandate a remand when the failure to recuse was harmless.

**JUDGE KELLY:** A common sense approach is best. The judge is in the best position to determine the appropriate remedy and, thus, the statute does not need to stipulate a remedy.

**JUDGE LUCERO:** I agree that the remedy should be decided on a case by case basis because the court has adequate internal mechanisms to deal with this. It is important to keep the independence of the judiciary intact and there

is the danger of a separation of powers problem when Congress begins to legislate in the judicial arena.

## CONCLUSION

The above discussion indicates that the judges we met with are extremely sensitive to any appearance of bias. In fact, they are so concerned with the appearance of impropriety that there are rarely recusal cases attempting to disqualify a Tenth Circuit Court of Appeals member. The judicial process itself helps to reduce the number of recusal motions at the circuit level by notifying the judges of the case assignments before the lawyers or parties are informed of which Court of Appeals panel has been appointed to hear their case. This mechanism gives the judges an opportunity to recuse themselves from the case and for the case to be reassigned before the parties were ever aware that the original judge was assigned to the case. Sorting out the recusal concerns in advance cuts down on motions to recuse later in the judicial process. Thus, the recusal issues that circuit court judges usually hear involve motions to recuse that were denied at the district court level.

It is our hope that this discussion, as well as the survey article on recusal, will benefit the practitioner in their understanding of the recusal process and the manner in which the judges on the Tenth Circuit consider the issue.