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Recusal

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Disqualification and recusal of a judge is governed by Canon 3 of the Code of Judicial Conduct and, in criminal cases, by North Carolina General Statutes (hereinafter G.S.) § 15A-1223. In some exceptional circumstances the due process clause of the federal and state constitutions may be implicated as well.

Canon 3C

Section C of Canon 3 of the Code of Judicial Conduct states that a judge should recuse upon motion of a party, or on the judge's own initiative, whenever "the judge's impartiality may reasonably be questioned." The canon then lists specific instances when recusal is appropriate. The list is not intended to be exhaustive.

The specific instances in which a judge should disqualify, as identified in the canon, are:

1. The judge has a personal bias or prejudice concerning a party.
2. The judge has personal knowledge of disputed evidentiary facts.
3. While in law practice, the judge, or someone with whom the judge practiced, served as a lawyer in the matter in controversy or is a material witness about it.
4. The judge or judge's spouse or minor child has a financial interest in the matter or another interest that could be substantially affected.
5. The judge or judge's spouse, or someone within the third degree of relationship to either of them, or the spouse of such a person, is (a) a party or officer, etc., of a party, (b) a lawyer in the case, (c) known by the judge to have an interest that could be substantially affected, or (d) known by the judge to likely be a material witness.

The canon states that a judge should be informed about the judge's own financial interests and should make a reasonable effort to be informed about financial interests of the judge's spouse and minor children.

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G.S. 15A-1223

G.S. 15A-1223, applicable to all criminal proceedings, allows a judge to recuse on the judge's own motion, requires a judge to be disqualified if the judge is a witness in the case, and requires disqualification upon the motion of the state or of a defendant when a judge is:

- Prejudiced against the moving party or in favor of the other side.
- Closely related to the defendant.
- Otherwise unable to perform the duties of a judge in an impartial manner.

Constitutional Due Process

In limited circumstances a judge's failure to recuse may deny a party's constitutional right to due process. "It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" Caperton v. A.T. Massey Coal Co., No. 08-22, slip op. at 6 (U.S. June 8, 2009) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)). It is an unusual case, however, when due process is implicated, and "only in the most extreme of cases would disqualification on this basis be constitutionally required . . . ." Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822 (1986).

Caperton was one of those most extreme of cases. A West Virginia supreme court justice refused to recuse from an appeal concerning a dispute between coal mining companies even though the president of one of the companies had just spent several millions of dollars waging an independent campaign to have the justice elected. The justice did not recuse, and the West Virginia Supreme Court, of which he was a part, narrowly reversed a $50 million judgment against his supporter's company. The United States Supreme Court found a violation of due process in the justice's refusal to disqualify himself.

As the *Caperton* opinion emphasizes, a due process violation based on a judge's failure to recuse is unusual. For a long time the due process clause was held to require disqualification only when a judge had "a direct, personal, substantial, pecuniary interest" in a case. Tumey v. Ohio, 273 U.S. 510, 523 (1927). Disqualification because of a more remote financial interest, kinship, personal bias, or other similar circumstance was not considered a matter of constitutional due process; instead, it was left to the discretion of state policymakers. In *Tumey*, though, the defendant was held to have been denied due process when the town mayor who heard a liquor violation in his dual role as judge was paid a salary supplement from the fines he imposed. That situation gave the mayor a direct, personal financial interest in the outcome, but the Supreme Court's due process concern arose also from the mayor's motive "to convict and to graduate the fine to help the financial needs of the village." *Tumey*, 273 U.S. at 535.

Later, in *Ward v. Monroeville*, 409 U.S. 57 (1972), the court confirmed that a due process violation could occur even when the judge did not have a personal financial interest, reversing a conviction because the fines assessed by the mayor–judge went to the town coffers although the judge himself did not receive any of the money. Of course, recusal is not really the solution for the due process problems raised in *Tumey* and in *Ward*. The issue is the structure of the court itself, depending on the revenue from fines, and the solution is to not have a court in which a judge has such an interest in the outcome of a case.

In re Murchison, 349 U.S. 133 (1955), extended due process rights to require a judge to recuse in some situations in which there is no financial interest at stake. In *Murchison*, the court held that the judge should have disqualified himself from a trial for perjury and contempt when he

had presided at a previous proceeding at which he examined the defendants and charged them with the perjury and contempt.

Likewise, in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), a due process violation was found when a judge refused to disqualify himself from deciding criminal contempt charges against a defendant who had repeatedly insulted and cursed the judge throughout a three-week trial. An important factor in the court's decision was that the judge sentenced the defendant to eleven to twenty-two years in prison for the contempt, an indication that the judge's personal feeling may have influenced his decision.

The Supreme Court in *Caperton* stressed, repeatedly, that each of these cases was exceptional and that it was only in such extreme circumstances that due process would require a judge to recuse. The court also emphasized that it was applying an objective standard. The test is not whether a judge is actually biased; it is whether, in light of normal human tendencies and weaknesses, there would be an unacceptable risk that the average judge would be tempted "not to hold the balance nice, clear and true." Caperton v. A.T. Massey Coal Co., No. 08-22, slip op. at 15 (U.S. June 8, 2009) (quoting *Tumey*, 273 U.S. at 532).

Due process, then, can require a judge to recuse when, even though there is no evidence of actual bias by that particular judge, the circumstances are such that it is likely an average judge would be tempted to favor one side or the other. However, as discussed above, the Supreme Court stated that due process requires disqualification "only in the most extreme of cases."

The circumstances in which the due process clause thus far has been applied to require disqualification are:

1. Cases in which the judge has a direct, personal, substantial pecuniary interest in the outcome, such as in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), where a state supreme court justice had a pending lawsuit which turned on the same legal issue as the case before him on appeal;
2. Cases before a court which is structured so that the judge will be tempted to impose a fine because the judge or the judge's governmental entity benefits financially from the revenue;
3. Cases in which the judge who is trying a criminal case is responsible for bringing the charges in the first place or, when contempt is involved, otherwise has a strong personal interest in the outcome; and
4. Cases in which one party has made a financial expenditure to the judge's election campaign large enough to have likely affected the outcome of the election, knowing that the party's case would be coming before that judge.

Procedure for Raising Disqualification

For criminal cases, G.S. 15A-1223 provides that a party's motion to disqualify a judge must be submitted in writing, must have supporting affidavits, and must be filed at least five days before the trial unless there is good cause for delay. The failure to follow those rules can be the basis for denying the motion. State v. Poole, 305 N.C. 308 (1982). When the basis for disqualification is not known until after the statutory deadline for filing the motion has passed, the motion should be filed as soon as reasonably possible.

For civil cases, neither Canon 3C nor any statute specifies when or how a party's motion to disqualify a judge should be made. Although there is no statutory deadline for a recusal motion in a civil case, a party may waive any right to object by waiting too long. Delay was a factor in denying the motion for recusal in *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 618 S.E.2d 819 (2005), when a motion for the judge's disqualification was not filed until months after the judge's disclosure of his daughter's summer employment with the opposing law firm. In *State v. Pakulski*, 106 N.C. App. 444, 417 S.E.2d 515 (1992), one of several grounds for rejecting the defendant's appeal on recusal was that the issue had not been raised any time soon after the judge's alleged prejudicial statement ("Why don't you just plead the slimy sons-of-bitches guilty?"); indeed, the issue was only raised after the case was appealed and remanded. *Pakulski* was a criminal case, but the guiding principle would seem applicable to any case: "A defendant cannot choose to wait and seek a trial judge's recusal until after the judge rules unfavorably to the defendant on some other grounds." 106 N.C. App. at 450.

Disclosure and Waiver of Disqualification

Canon 3C allows a judge to disclose a potential reason for disqualification and then continue to hear the matter if the parties and lawyers all agree in writing that the potential reason for disqualification is immaterial or insubstantial. The judge's disclosure and the parties' agreement must be placed in the record.

Who Decides Recusal Motion

The first question facing a judge who has received a recusal motion is whether to hear the motion oneself or refer it to another judge. If the allegations made about the judge's bias or other potential disqualification are made with sufficient support to require findings of fact, the motion to recuse should be referred to another judge. Ponder v. Davis, 233 N.C. 699, 65 S.E.2d 356 (1951). The judge whose impartiality is being questioned then may respond by affidavit or testimony to rebut the allegations.

> We are, however, constrained to observe that when the trial judge found sufficient force in the allegations contained in defendant's motion to proceed to find facts, he should have either disqualified himself or referred the matter to another judge before whom he could have filed affidavits in reply or sought permission to give oral testimony. Obviously it was not proper for this trial judge to find fact so as to rule on his own qualification to preside when the record contained no evidence to support his findings. Bank v. Gillespie, 291 N.C. 303, 311 , 230 S.E.2d 375, 380 (1976) (citing Ponder v. Davis).

In *Ponder*, the court was hearing an election dispute, and the defendants moved to disqualify the judge because he had campaigned for the other candidate. The judge called the motion "scurrilous and untrue" and ordered it stricken from the record. The North Carolina Supreme Court held that he should have referred the motion to recuse to another judge.

In *Bank v. Gillespie*, the defendant Gillespie sought to disqualify the judge on three fronts:

1. There had been an unfriendly termination of the judge's representation of the Gillespie family when the judge was in private practice.

2. The judge had prosecuted Gillespie when the judge was a prosecutor.
3. The judge had money in the plaintiff bank at the time of the trial.

As in *Ponder*, the Supreme Court stated that because the judge's denial of the defendant's motion for disqualification required findings of fact, the judge should have referred the motion to another judge.

If a party's motion to recuse is not supported by sufficient evidence to require findings of fact, or if the allegations would not require recusal even if true, a judge need not refer the recusal motion to another judge. Another way to look at the question is that if the decision on the motion to recuse does not require the judge to offer evidence then it need not be referred to another judge. Cases that demonstrate this include:

> State v. Poole
> 305 N.C. 308, 289 S.E.2d 335 (1982)
> The motion for recusal did not have to be referred to another judge in this criminal case when, right after the judge denied the defendant's motion to substitute counsel, the defendant moved for recusal. He said that the judge was biased because the judge had made remarks against the defendant outside of the defendant's presence. The judge said he had made no such remarks, then denied the motion. There was no need to refer the disqualification issue to another judge because the defendant had produced no evidence to support his allegation: The record showed no remarks made by the judge about the defendant outside of his presence, and the judge had stated he made no such remarks. Circumstances also indicated the recusal motion was the defendant's hasty response to the denial of his motion to substitute counsel.

> State v. Scott
> 343 N.C. 313, 471 S.E.2d 605 (1996)
> No referral to another judge was required when the criminal defendant offered no evidence to support his claim of bias based on the fact that the judge's son worked in the district attorney's office and on the judge's comments in an earlier trial about the credibility of one of defendant's witnesses. Simply being familiar with a case or witnesses from earlier proceedings is not grounds for disqualification, and the defendant had not offered any evidence to support his contention that the judge's experience or his son's employment biased him against the defendant.

Actual versus Perceived Partiality

Canon 3C states that a judge should recuse when "the judge's impartiality may reasonably be questioned." Case law states a judge should be disqualified when "a reasonable man knowing all the circumstances would have doubts about the judge's ability to rule . . . in an impartial manner." McClendon v. Clinard, 38 N.C. App. 353, 356, 247 S.E.2d 783, 785 (1978). In *State v. Fie*, 320 N.C. 626, 628, 359 S.E.2d 774, 776 (1987), the supreme court stated that a judge should recuse in a criminal case not only when the disqualifications in G.S. 15A-1223 exist but whenever the judge's "objectivity may reasonably be questioned." In that case, the court held that the trial judge should have recused because "a perception could be created in the mind of a reasonable person that [the judge] thought the defendants were guilty of the crimes . . . and that it would be difficult for the defendants to receive a fair and impartial trial . . . ." Does that mean a

judge should recuse whenever there might be an appearance of partiality? The answer appears to be no, because of a 2003 revision to the Code of Judicial Conduct and a subsequent North Carolina Supreme Court decision.

In April 2003 the state supreme court amended the Code of Judicial Conduct to eliminate the phrase "appearance of impropriety" from the canons. Before the 2003 amendment Canon 2 stated, as does the Model Code of Judicial Conduct promulgated by the American Bar Association and used by most states, "A judge should avoid impropriety and the appearance of impropriety in all his activities." As rewritten, North Carolina's Canon 2 says only, "A judge should avoid impropriety in all his activities." Canon 3C still states that a judge should disqualify in any proceeding "in which the judge's impartiality may reasonably be questioned," but the elimination of the "appearance of impropriety" language from Canon 2 seems to be a better barometer of the North Carolina Supreme Court's current view of recusal.

Following the April 2003 revision of Canon 2, the court in December 2003 decided *Lange v. Lange*, 357 N.C. 645, 588 S.E.2d 877 (2003). In *Lange*, the plaintiff's motion to disqualify a district judge was referred to a second judge. The second judge found that there was no violation of the Code of Judicial Conduct but decided that the first judge still should recuse because the relationship at issue "would cause a reasonable person to question whether [the judge] could rule impartially." The North Carolina Supreme Court held that conclusion was wrong. Emphasizing that "the burden is upon the party moving for disqualification to demonstrate objectively that grounds for disqualification actually exist," and that such showing "must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially," the supreme court said that the judge should not be disqualified if there was no actual violation of the Code of Judicial Conduct. "Thus, the standard is whether 'grounds for disqualification actually exist.'" *Id*. 357 N.C. at 649 (quoting State v. Scott, 343 N.C. at 325). Another way of saying it, perhaps, is that if there is no actual evidence of bias then a reasonable person would not question the judge's ability to rule impartially.

The *Lange* opinion does not discuss the revision of Canon 2. Still, when the two are considered together, it seems less likely now than before that a judge would be expected to recuse if there is an appearance of partiality but no evidence of an actual personal bias, prejudice, or interest.

As discussed above, however—just to complicate matters—when a claim is made that constitutional due process requires a judge to step down from a case, the test is not whether actual bias exists, it is whether the circumstances are such that, given normal human tendencies and weaknesses, the average judge would be tempted to favor one side or the other. "Due process 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" Caperton v. A.T. Massey Coal Co., No. 08-22, slip op. at 16 (U.S. June 8, 2009) (quoting *In re* Murchison, 349 U.S. at 136

Meaning of Bias or Prejudice

Disqualification of a judge requires a showing of personal bias or prejudice against or in favor of one side. Dunn v. Canoy, 180 N.C. App. 30, 636 S.E.2d 243 (2006); State v. Vega, 40 N.C. App. 326, 253 S.E.2d 94 (1979); Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 374 (1977); *In re* Paul, 28 N.C. App. 610, 222 S.E.2d 479 (1976). Generalized allegations forecasting a likely prejudice based on the history of the case, a judge's prior involvement with the parties, a judge's general view of

the law, or similar considerations are not sufficient to necessitate recusal. "The bias, prejudice or interest which requires a trial judge to be recused from a trial has a reference to the *personal disposition or mental attitude of the trial judge*, either favorable or unfavorable, toward a party to the action before him." State v. Scott, 343 N.C. at 325 (emphasis added). The cases discussed below include numerous examples in which the allegations were not considered sufficient to show a personal bias or prejudice directed toward the party seeking the judge's disqualification.

Disqualification Based on Party Ties

As would seem self-evident, a judge is disqualified from hearing a case when one of the parties has a pending lawsuit against the judge. *In re* Braswell, 358 N.C. 721, 600 S.E.2d 849 (2004). Likewise, a judge may not preside at a session of court in which a traffic charge against the judge is on the docket. *In re* Martin, 302 N.C. 299, 275 S.E.2d 412 (1981). In both of those examples the judge was sanctioned by the North Carolina Supreme Court.

No Disqualification for Prior Involvement with Case

In a number of cases, the appellate courts have stated that a judge is not disqualified from hearing a case just because the judge is aware of evidentiary facts from a previous involvement with the case or because the judge ruled against one of the parties in an earlier phase of the case. Some of the cases explicitly state the value of judicial efficiency in having the same judge preside over subsequent hearings in the same case. Cases addressing a judge's previous involvement with a matter include:

Love v. Pressley
34 N.C. App. 503, 239 S.E.2d 574 (1977)
The judge was not disqualified from hearing a landlord–tenant dispute when the judge had ruled against the defendant in an earlier case involving similar allegations. The entry of findings of fact adverse to the defendant in the previous case was not evidence of a personal bias or prejudice.

In re Faircloth
153 N.C. App. 565, 571 S.E.2d 65 (2002)
The judge was not disqualified from hearing an action for termination of parental rights against the defendant although the judge presided at an earlier trial in which the defendant was found guilty of abuse and neglect. Knowledge of evidentiary facts obtained in an earlier proceeding is not grounds for disqualification.

State v. Vega
40 N.C. App. 326, 253 S.E.2d 94 (1979)
The judge was not disqualified on the ground that he presided at an earlier murder trial for the defendant at which the judge had to declare a mistrial when the victim's mother made an emotional outburst. Although the mistrial was declared because the

outburst might have unduly influenced jurors, there was no evidence that the judge was influenced or was biased against the defendant.

Savani v. Savani
102 N.C. App. 496, 403 S.E.2d 900 (1991)
The judge was not disqualified from hearing a child support case against the defendant even though the judge had earlier ordered transfer of child custody from the defendant to the plaintiff.

State v. McRae
163 N.C. App. 359, 594 S.E.2d 71 (2004)
The judge was not disqualified from presiding over a competency hearing for a defendant in this murder case even though the judge had presided at a previous trial at which the defendant was convicted. That conviction was reversed on appeal because the judge improperly failed to provide to the defendant a competency hearing on the day of trial. The same judge hearing the matter again serves judicial efficiency. There was no showing of personal bias.

State v. Moffitt
185 N.C. App. 308, 648 S.E.2d 272 (2007)
The judge was not disqualified to preside over the resentencing of the defendant after appeal even though the judge was aware of the plea bargain the defendant had rejected at the original trial. Bias or prejudice, as stated above, refers to the personal disposition or mental attitude of the judge toward the party.

State v. Monserrate
125 N.C. App. 22, 479 S.E.2d 494 (1997)
The judge who issued a search warrant was not disqualified to hear a motion to suppress the evidence, but the better practice is for another judge to hear the suppression motion. When issuing a search warrant, a judge is not vouching for the veracity of the affidavit supporting the warrant; the judge is only deciding that the information in the affidavit is sufficient to establish probable cause the informant is telling the truth.

In re LaRue
113 N.C. App. 807, 440 S.E.2d 301 (1994)
The judge was not disqualified from hearing an action for termination of parental rights based on the parents' mental disability, even though the judge had presided over an earlier custody proceeding, had decided that the department of social services should retain custody of the child, and had recommended that social services proceed to termination. The knowledge of evidentiary facts from the previous hearing did not disqualify the judge. The judge's recommendation about proceeding with termination did not demonstrate disqualifying bias because the judge was required by statute to evaluate as part of the custody proceeding whether termination of parental rights should be considered.

Recusal in Contempt Cases

Cases of direct criminal contempt—willful behavior occurring in the court's presence that interrupts the proceedings or impairs the respect due to the court—can present situations in which it is difficult for a judge to remain impartial. If the contempt arises from personal insults spoken to the judge, perhaps containing foul language, it will be a challenge for the judge to not feel a personal repulsion. For that reason, G.S. 5A-15(a), the statute on plenary proceedings for criminal contempt (i.e., when the contempt is not dealt with summarily by the judge but is the subject of a separate hearing following issuance of a show cause order) states, "If the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge." Although the statute does not cover summary proceedings for direct criminal contempt, the same principles should apply. When the events leading up to the summary proceeding show an ongoing conflict between a judge and a defendant that would make it difficult for the judge to put personal feelings aside, the judge should consider recusal.

The provision on recusal in the contempt statute tracks case law on the issue.

> Due process standards require that where the trial judge is so embroiled in a controversy with the defendant that there is a likelihood of bias or an appearance of bias, the judge may be 'unable to hold the balance between vindicating the interests of the court and the interests of the accused,' and should recuse himself from the proceedings. *In re* Nakell, 104 N.C. App. 638, 647, 411 S.E.2d 159, 164 (1991), *disc. review denied*, 330 N.C. 851 (1992) (quoting *In re* Paul, 28 N.C. App. at 618).

In *Nakell*, Judge Lake, who later became a justice and the chief justice, refused to disqualify himself. His decision was upheld on appeal when the trial transcript showed that his responses to the lawyer's persistent interruptions were calm, deliberate, and unemotional. Lake's findings of fact for the contempt likewise demonstrated a professional objectivity. Also, in stark contrast to *Mayberry v. Pennsylvania*, discussed above in the section on constitutional due process, the contempt in *Nakell* was punished by only a $500 fine and ten days' imprisonment, not by an unusually severe sentence like the sentence of eleven to twenty-two years in *Mayberry*.

The United States Supreme Court's recent decision in *Caperton v. A.T. Massey Coal Co.*, No. 08-22, slip op. at 6 (U.S. June 8, 2009), affects the analysis for contempt cases like *Nakell*. The standard for constitutional due process articulated in *Caperton* is not whether a judge should recuse because of actual bias but whether, given normal human tendencies and weaknesses, the average judge would be tempted to favor one side. Thus, even an exemplary judge, when faced with a belligerent defendant, should consider recusal if the direct criminal contempt is so abusive that the average judge would find it difficult to rule in a disinterested way.

Judge Not Disqualified for Efforts to Settle Case

A judge's efforts to get parties to settle a case, even if accompanied by some expression of dissatisfaction at the parties, does not establish a disqualification by itself. Examples of such cases include:

Dunn v. Canoy
180 N.C. App. 30, 636 S.E.2d 243 (2006)
The judge's efforts to persuade the parties to settle in this case was not a basis for disqualification, even when the judge became angry at the failure to settle. For disqualification, there still needs to be a showing of personal bias or prejudice.

State v. Kantsiklis
94 N.C. App. 250, 380 S.E.2d 400 (1989)
The judge was not disqualified from presiding over this criminal trial when the judge expressed anger in chambers about the failure to reach a plea agreement. The judge was expressing frustration at the way in which the jury's time was being wasted while the negotiations dragged on. The incident may have demonstrated impatience but not personal bias or prejudice.

In re Pedestrian Walkway Failure
173 N.C. App. 237, 618 S.E.2d 819 (2005)
The judge's efforts to get the parties to settle this negligence case did not disqualify him from presiding over further proceedings in the case.

Judge Not Disqualified for Views on Law

In *State v. Kennedy*, 110 N.C. App. 302, 429 S.E.2d 449 (1993), the judge was not disqualified from hearing a drunk driving case because the judge's wife had been injured in an accident caused by a drunk driver. The fact that a judge may view one kind of crime as more serious than another is not a basis for disqualification. In this case, no evidence was presented of a personal bias toward the defendant.

Resident Judge Not Disqualified from Case in Which County Is a Party

Case law from *County of Johnston v. City of Wilson*, 136 N.C. App. 775, 525 S.E.2d 826 (2000) directs that a resident superior court judge should not be disqualified from hearing a condemnation case just because the judge's home county is the defendant. The plaintiff suing the county in this case did not provide an affidavit or offer other evidence to support a claim of personal bias.

Senior Resident Not Disqualified to Hear Magistrate Removal

The senior resident superior court judge in *In re* Ezzell, 113 N.C. App. 388, 438 S.E.2d 482 (1994), was not disqualified to hear a removal proceeding for a magistrate even though the judge appointed the magistrate. The magistrate did not offer evidence of personal bias or prejudice.

Judge's Relationship with Lawyers

Canon 3C includes clear rules on a judge's recusal because of a family relationship with a lawyer in the case or previous ties to one of the lawyers while in practice. The case law, therefore, tends to deal with more remote relationships. Examples include:

> Lange v. Lange
> 357 N.C. 645, 588 S.E.2d 877 (2003)
> The judge's joint ownership of mountain vacation property with several others, one of whom was one of the parties' lawyer, was not sufficient basis for disqualification in the absence of any other evidence of bias or prejudice.
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> *In re* Pedestrian Walkway Failure
> 173 N.C. App. 237, 618 S.E.2d 819 (2005)
> The judge was not disqualified by the fact that his daughter, a law student, had a summer clerkship with one of the firms in the case. The daughter was working in a separate part of a large firm; she had no involvement in the case; and when the judge had informed the lawyers in the case about the summer job offer, none had objected.
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> Savani v. Savani
> 102 N.C. App. 496, 403 S.E.2d 900 (1991)
> The judge was not disqualified from hearing a child support case because of an office-sharing arrangement with one of the parties' lawyers when the judge was in private practice. The lawyer in question did not enter the case until after the earlier custody hearing in which the judge had transferred custody of the child and found the child in need of support.

Judge Must Recuse, Not Bar Lawyer

A judge cannot avoid a disqualification by barring a lawyer from cases heard by the judge. In *In re* Bissell, 333 N.C. 766, 429 S.E.2d 731 (1993), it was improper for a judge to bar a lawyer from sessions of court in which she was presiding because the lawyer had initiated an ethics investigation of her. The effect was to hamper the lawyer's practice. The judge should have recused herself, not put the burden on the lawyer to avoid her.

Judge Disqualified for Expressing Opinion about Case

A judge should recuse when the judge previously has expressed, directly or indirectly, an opinion as to the merits of the case, casting doubt on the ability to be impartial. To disqualify a judge the expression must have been such as to indicate that the judge already had formed a firm opinion about the outcome. Some cases that demonstrate this include:

State v. Hill
45 N.C. App. 136, 263 S.E.2d 14 (1980)
The judge should have disqualified himself from this criminal fraud trial when he had heard the defendant testify in an earlier trial of another defendant; had stated after the testimony that the defendant had implicated himself; and had, on his own motion, raised the defendant's bond.

In re Dale
37 N.C. App. 680, 247 S.E.2d 246 (1978)
The judge should have disqualified himself from hearing a disciplinary matter against a lawyer when the judge sent a notice of hearing stating in conclusory language that "you negligently failed to . . . ." The use of such language would have created an impression that the judge already had decided the matter.

State v. Fie
320 N.C. 626, 359 S.E.2d 774 (1987)
The judge should have disqualified himself from defendants' breaking-and-entering trial where he had written to the district attorney to request that the grand jury consider charges against them based on testimony he had heard in another trial. The judge's letter demonstrated his disbelief of witnesses that were likely to be called again in defendants' trial.

McClendon v. Clinard
38 N.C. App. 353, 247 S.E.2d 783 (1978)
The plaintiffs' lawsuit was dismissed when plaintiffs and their counsel failed to appear in court. When plaintiffs moved to set aside the judgment, the judge should have disqualified himself because he had reported the plaintiff's lawyer to the local bar for contact with a member of the jury venire and then had notified a newspaper reporter of the incident and given an interview about it. The judge was properly concerned about the lawyer's contact with the jury venire member, but his subsequent discussions with the press raised questions about his impartiality.

In re LaRue
113 N.C. App. 807, 440 S.E.2d 301 (1994)
The judge was *not* disqualified from hearing an action for termination of parental rights based on the parents' mental disability, even though the judge had presided over an earlier custody proceeding and recommended that social services proceed to termination. The recommendation did not show bias or prejudice against the parents because the judge was required by statute as part of the custody proceeding to evaluate whether termination of parental rights should be considered.

Recusal Related to Election

On March 13, 1998, Judge John B. Lewis Jr., the chair of the Judicial Standards Commission at the time, issued a memorandum expressing the commission view on recusal related to elections. The memo states that a judge should recuse from any trial or appellate proceeding in which the opponent, the opponent's campaign manager or treasurer, or the judge's campaign manager or treasurer appears. For a nontrial proceeding at which one of those individuals appears, the judge should disclose the basis for disqualification and recuse unless the parties and lawyer sign a waiver. If another member of the law firm appears rather than one of the named individuals, the judge need not recuse unless the law firm's appearance would bias or prejudice the judge.

The effect of election support or opposition on recusal was the subject of the United States Supreme Court's June 2009 decision in *Caperton v. A.T. Massey Coal Co.*, discussed above. The court in *Caperton*, emphasizing the unusual and extreme circumstances of the case, found a denial of due process when a state appellate judge failed to disqualify himself from a case involving someone who had bankrolled a $3 million independent campaign for the judge's election. The court said that the factors which should be taken into account in deciding whether campaign financial support requires a judge to disqualify are "the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." No. 08-22, slip op. at 14 (U.S. June 8, 2009). "The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical." No. 08-22, slip op. at 15 (U.S. June 8, 2009).

In *Caperton*, the litigant made only a $1,000 contribution to the judge's campaign committee; the $3 million went to an independent campaign waged outside the judge's control. In considering recusal, thus, it is important to take into account not only direct campaign contributions but other support as well. If the expenditures for or against a judge are out of balance with other contributions, it is known or seems likely at the time of the campaign that the case will come before the judge, and the expenditures are large enough to have made a difference in the outcome, the judge should recuse. The test in this situation is not whether the expenditures create actual bias in the judge but whether, given that level of political support and normal human tendencies and weaknesses, the average judge would be tempted to tip the scales of justice toward one side.

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