U.S. Department of Justice

Executive Office for Immigration Review

Office of the Chief Immigration Judge

Chief Immigration Judge

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March 21, 2005

MEMORANDUM

TO: All Immigration Judges
All Court Administrators
All Judicial Law Clerks
All Immigration Court Staff

FROM: The Office of the Chief Immigration Judge

SUBJECT: Operating Policies and Procedures Memorandum 05-02:
Procedures For Issuing Recusal Orders In Immigration Proceedings

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I. INTRODUCTION

This Operating Policies and Procedures Memorandum ("OPPM") sets forth procedures for immigration judges to follow when issuing recusal orders. It replaces my memorandum entitled "Recusal in Immigration Court Proceedings," dated July 18, 1997.

II. BACKGROUND ON RECUSAL

Recusal is the process under which a judge is excused or disqualifies himself or herself from presiding over a case in which he or she may have an interest or may be unduly prejudiced. This obligation to recuse is not limited to those instances where a party makes a motion; rather,

it also places a burden on a judge to sua sponte identify those circumstances where recusal may be appropriate. Liteky v. U.S., 510 U.S. 540, 548 (1994). Title 28 United States Code § 455[1] codified this doctrine and states in pertinent part:

> § 455. Disqualifications of justice, judge or magistrate.
> (a) Any justice, judge or magistrate judge of the United States[2] shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> (b) He shall also disqualify himself in the following circumstances:
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . . [3]

In the immigration context,[4] the regulations provide for withdrawal and substitution of

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[1] This section of title 28 is not the only section relating to recusals; 28 U.S.C. § 144 also addresses the issue of judicial bias. Section 144, however, is an older section of the code which requires a judge to examine the issue of recusal upon a party's filing of an affidavit. Section 455 is not only broader in scope but is the more commonly used section. Moreover, it does not require a motion by a party to be invoked.

[2] Although this section does not specifically mention immigration judges, this section and its applicable case law offers strong guidance on the recusal issue. Moreover, it mirrors the judicial canons of the American Bar Association's Code of Judicial Conduct (see footnote 3), which do apply to immigration judges. Immigration judges are not required to comply with the American Bar Association's Code, but the Code reflects principles to which immigration judges should "aspire." See Ethics Manual For Members of the Board of Immigration Appeals, Immigration Judges, and Administrative Law Judges Employed by the Executive Office for Immigration Review, p. 4.

[3] This section parallels Canon 3(E)(1) of the American Bar Association's Code of Judicial Conduct which states:

> E. Disqualification.
> (1) A judge shall disqualify himself or herself in a proceedings in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of a disputed evidentiary facts concerning the proceeding; . . .

[4] Prior to the enactment of IIRIRA, section 242(b) of the INA mandated recusals in certain situations. This provision was eliminated by IIRIRA. Recusals are now only regulatory. Section 242(b) of the INA prior to its amendment read as follows:

> No special inquiry officer shall conduct a proceeding in any case under this section in which

immigration judges, and state, in part:

> The immigration judge assigned to conduct the hearing shall at any time withdraw if he or she deems himself or herself disqualified. 8 C.F.R. § 1240.1(b).

The Board of Immigration Appeals (BIA) has addressed the issue of recusal in Matter of Exame, 18 I&N Dec. 303 (BIA 1982). In Exame, the BIA recognized three instances that warrant recusal: (1) when the alien demonstrates that he was denied a constitutionally fair proceeding; (2) when the immigration judge has a personal bias stemming from an "extrajudicial" source; and (3) when the immigration judge's judicial conduct demonstrates "such pervasive bias and prejudice." Id. at 305 (quoting Davis v. Board of Sch. Comm'rs of Mobile County, 517 F.2d 1044 (5th Cir. 1975).

III. WHEN IS RECUSAL WARRANTED?

Recusal is not a tool which parties and judges can arbitrarily invoke to rid themselves of unpleasant or difficult cases. Rather, recusal is mandated only in certain clearly delineated instances. Indeed, **judges have *an obligation not to recuse themselves*** in certain circumstances. *See* Laird v. Tatum, 409 U.S. 824, 837 (1972) (holding "a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified") (and cases cited therein); Nichols v. Alley, 71 F.3d 347, 351 (10th Cir. 1995) ("Further, we are mindful that a judge has as strong a duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts require.") (and cases cited therein); United States v. Greenough, 782 F.2d 1556, 1558 (11th Cir. 1986) ("A second policy is that a judge, having been assigned to a case, should not recuse himself on unsupported, irrational, or highly tenuous speculation."); Martin-Trigona v. Lavien, 573 F. Supp. 1237, 1243 (D. Conn. 1983) ("There is an obligation on the part of a judge to decline to recuse himself for a 'relatively trivial reason.'"); Sexson v. Servaas, 830 F. Supp. 475, 482 (S.D. Ind. 1993) (finding "a judge's duty not to recuse when confronted with a motion that has little basis in reality, both factual and legal, is as strong as the duty to recuse"); *but see* United States v. Kelly, 888 F.2d 732, 744 (11th Cir. 1989) (holding that § 455 eliminated the doctrine of "duty to sit").[5] This obligation is to prevent parties from using

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> he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions.

[5] When Congress amended § 455 in 1974 to create an objective standard for recusal, its intent was to "promote public confidence in the impartiality of the judicial process . . . ." H. R. Rep. No. 93-1453, 1974 at 6355. Congress, by clarifying § 455, attempted to remove the old "duty to sit" doctrine, a subjective test which required "a judge, faced with a close question on disqualification, was urged to resolve the issue in favor of a 'duty to sit.'" Id. Congress cautioned, however that "the new test [objective test] should not be used by judges to avoid sitting on difficult or controversial cases . . . Disqualification for lack of impartiality must have a reasonable basis. Nothing in this proposed legislation should be read to warrant the

recusal as an excuse to judge or forum shop, as well as to preserve the integrity of the judicial process. *See* Martin-Trigona, 573 F. Supp. at 1242 (claiming "the right to an impartial judge cannot be advanced so broadly as to permit the parties to engage in 'judge-shopping' under the guise of a motion to recuse . . . or to permit a litigant to disqualify without reasonable grounds a succession of judges for the apparent purpose of impeding the administration of justice") (*citing* United States v. Boffa, 513 F. Supp. 505, 508 (D. Del. 1981)); In re Parr, 13 B.R. 1010 (E.D.N.Y. 1981)); *see also* Greenough, *supra* at 1558 ("If this [unsubstantiated recusal] occurred, the price of maintaining the purity of the appearance of justice would be the power of litigants or third parties to exercise a veto over the assignment of judges."); *see also* Laird, *supra*; United States v. Kanahele, 951 F. Supp. 921, 925 (D. Haw. 1995), *dismissed in part, aff'd in part*, 103 F.3d 142 (1996).

The test for determining whether recusal is an appropriate remedy is an objective one. Under this standard, a judge should recuse him or herself when it would appear to a reasonable person, knowing all the relevant facts, that a judge's impartiality might reasonably be questioned. *See* Liteky v. U.S., *supra*; Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988); US v. Winston, 613 F.2d 221 (9th Cir. 1980); Davis, 517 F.2d at 1052. Moreover, the Supreme Court has found that prejudice or bias stemming from an "extrajudicial source," although not required for recusal, is significant and often determinative in establishing grounds for recusal. Liteky v. U.S., *supra*. As one court concisely put it, "the negative bias or prejudice from which the law of recusal protects a party must be grounded in some personal animus or malice that the judge harbors against him, of a kind that a fair-minded person could not entirely set aside when judging certain persons or causes." U.S. v. Balistrieri, 779 F.2d 1191, 1201 (7th Cir. 1985), *cert. denied*, 477 U.S. 908 (1986).

A. RELEVANT CASE LAW

Case law offers a wealth of guidance for determining when recusal is or is not warranted. The Seventh Circuit concluded that a motion to recuse was properly denied where the respondent claimed that the same immigration judge could not hear both the bond hearing and removal hearing**.** Flores-Leon v. INS, 272 F.3d 433, 440 (7th Cir. 2001). **Further, a judge should not recuse himself merely because a party sues or threatens to sue him**. Ronwin v. Arizona, 686 F.2d 692 (9th Cir. 1981), *rev'd on other grounds*, 466 U.S. 588 (1984); United States v. Grismore, 564 F.2d 929 (10th Cir. 1977); Kanahele, 951 F. Supp. at 925; United States v. Blohm, 579 F. Supp. 495 (S.D.N.Y. 1984); Martin-Trigona v. Lavien, 573 F. Supp. 1237 (1983). In addition, the **remoteness in time and circumstances of any events which could potentially bias a judge should also be considered.** *See* Balistrieri, *supra*, at 1200 (finding that events

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transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice." Id. Accordingly, **judges continue to have a duty not to disqualify themselves without a reasonable basis.**

taking place ten to twelve years earlier were too remote to meet the reasonable person standard); Kanahele, *supra* at 925 (rejecting a recusal request because of "remoteness and implausibility"). **Nor will a judge's cutting or hostile comments to an attorney regarding his or her skill mandate recusal**. Pau v. Yosemite Park and Curry Co., 928 F.2d 880, 885 (9th Cir 1991); U.S. v. Tucker, 78 F.3d 1313 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 76 (1996); *see also* Davis, *supra* at 1050 (rejecting a plaintiff's claim that the judge's bias against their attorney was imputed on to them). Other circumstances which courts have rejected as insufficient basis for recusal include: adverse rulings against a party; Martin-Trigona, 575 F. Supp. at 1242; a party's attorney is a former law clerk of the judge; Smith v. Pepsico, 434 F. Supp 524 (S.D. Fla. 1977); when a judge has pretrial knowledge of facts from earlier participation in the case; Winston, *supra*; when a judge has formulated an understanding or an opinion on a legal issue through his or her previous exposure to it; *See* Laird, *supra;* or when the media has made characterizations about the case or the judge. *See* Greenough, *supra*. For an excellent summary of factors that would not warrant recusal, *see* United States v. Cooley, 1 F.3d 985 (10th Cir. 1993), *cert. denied*, 515 U.S. 1104 (1995).

B. OTHER CIRCUMSTANCES WHERE RECUSAL IS PERMITTED

Recusal is permitted where threats, accompanied by action, are so extreme and rise to such a level as to possibly endanger the judge's life. *See* Kanahele, *supra* at 925 (noting that murder threats and steps taken to murder a judge were sufficient to recuse a judge). Recusal is also permissible when the judge has a financial or fiduciary connection with one of the parties. Liljeberg, *supra*. It is also necessary when the parties have a familial relationship, but only to certain degrees. 28 U.S.C. § 455(b)(5). Indeed, the statute clearly outlines circumstances where disqualification is mandated. 28 U.S.C. § 455(b) specifically provides:

> (b) He shall also disqualify himself in the following circumstances:
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> (2) Where in private practice 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;
> (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
> (4) 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;
> (5) 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.

Thus, in these instances, a judge is obliged to disqualify him or herself regardless of the reasonable person test. *see id.*; *see also*, H.R. Rep. 93-1453, *supra* ("Subsection (b) of the amended statute sets forth specific situations or circumstances *when the judge must disqualify himself* . . . by setting specific standards, Congress can eliminate the uncertainty and ambiguity arising from the language in the existing statute and will have aided the judges in avoiding possible criticisms for failure to disqualify themselves.") (emphasis added).

Because recusals attack the essence of our legal system--the impartiality of a judge-- they are a serious matter. Indeed, judges faced with a possible recusal situation must go through an extensive analysis of the surrounding circumstances prior to issuing any decision on the matter. Moreover, **such decisions must be predicated on compelling evidence rather than mere allegations or conclusory facts**. Balistrieri, *supra* at 1220 ("Disqualification of a judge for actual bias or prejudice is a serious matter, and it should be required only when the bias or prejudice is proved by compelling evidence."); Sexson, *supra* at 477 ("the judge makes the disqualification decision considering a truthful and thorough examination of the relevant facts and circumstances, not merely those contentions and innuendos played out by counsel"); Taylor v. O'Grady, 888 F.2d 1189, 1201 (7th Cir. 1989) (holding that a judge's remarks were not "compelling evidence" and "too inconsequential to mandate disqualification").

C. BLANKET RECUSALS

There have been circumstances when parties before the Court have requested blanket recusals of immigration judges. Blanket, or broad disqualifications of a judge should be carefully considered, since the compelling evidence standard dictates that judges examine and analyze each case *individually* to make a determination that disqualification is required. *See* In re Acker, 696 F. Supp. 591 (N.D. Ala. 1988) (rejecting a broad recusal order on all government cases and instead deciding that "case-by-case" analysis was more consistent with applicable case law); El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136 (5th Cir. 1994) (remanding the case because recusals require a sufficient factual basis). Indeed, broad recusals should only be considered in those circumstances in which the statute mandates automatic disqualification. *see* 28 U.S.C. § 455(b).

IV. PROCEDURES FOR RECUSAL

A judge has an obligation not to recuse himself or herself based upon mere allegations or threats. Therefore, all requests for recusal shall be made on the record, or filed in writing, and supported by specific reasons why recusal is warranted.

A. PRIOR TO THE HEARING

If, at any time prior to the hearing, an immigration judge issues a decision on a recusal matter, he or she must render it in writing and serve it upon the parties to ensure that the parties have sufficient notice that their hearing will be rescheduled with another immigration judge. The written decision must contain a well-reasoned opinion explaining the circumstances and legal reasoning behind either the grant or the denial of the recusal. Moreover, the judge must issue a written decision in every case, regardless if the recusal was sua sponte or predicated upon a motion by one of the parties. Simple form or blanket orders will not suffice unless the immigration judge had a role in the case as a DHS attorney or private attorney. In that case, the order shall simply state that the immigration judge had a role in the case as a DHS attorney or private attorney.

B. DURING THE HEARING

There may be circumstances where the grounds for a recusal may not become apparent until the actual hearing. In these situations, the judge must go on the record and issue an oral decision describing the reasons behind the grant or denial of the recusal motion. The decision must contain a well-reasoned opinion explaining the circumstances and legal reasoning behind either the grant or the denial of the recusal.

V. CONCLUSION

Recusals are a serious matter and judges, including immigration judges, should not recuse themselves from cases without first thoroughly analyzing the circumstances behind such a recusal. Moreover, since a judge has an equally important obligation not to recuse himself or herself arbitrarily, his or her recusal should be based upon compelling evidence indicating that his or her judgment would be compromised. This process is vital to ensure that parties are accorded a hearing with an impartial judge without encouraging the use of recusal as a method to forum or judge "shop."

If you have any questions regarding this OPPM, please contact Brenda O'Malley, Counsel to the Chief Immigration Judge, at (703) 305-1247, or your Assistant Chief Immigration Judge.

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