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JUDICIAL DISQUALIFICATION FOR PERSONAL BIAS IN NEW YORK STATE

Hon. Jerome P. Vanora

Introduction

It is undeniable that a fair trial implies a trial judge who is impartial and unbiased. Clearly, as the New York Court of Appeals has stated, a judge must "conduct himself in such a way that the public can perceive and continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property". While the disqualification of a judge in New York State based on interest in the matter or relationship to a party is governed and mandated by statute, disqualification for bias or prejudice is, at best, discretionary and a matter for the judge's personal conscience.

1/ The author is the Chief Administrative Law Judge in the Office of Rent Administration, New York State Division of Housing and Community Renewal and as such decides motions to disqualify administrative law judges for "personal bias or disqualification" made pursuant to 9 NYCRR 2051.3(d)(2)(i).


3/ Judiciary Law Section 14 provides in pertinent part that "a judge shall not sit as such in, or take any part in the decision of an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree".

It has been noted that there is a paucity of law on the subject in New York and that it is therefore appropriate to consider the existing body of Federal case law. The governing Federal statute provides for the filing by a party in good faith of a "timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party . . . ." The New York State Administrative Procedure Act ("SAPA"), which governs administrative hearings conducted by New York State agencies, contains a similar provision under which a hearing officer or administrative law judge may likewise be disqualified for "personal bias". Case law relating to the disqualification of a judge for bias would be equally applicable to an administrative law judge (ALJ), whose "role . . . is 'functionally comparable' to that of a judge".

**What Constitutes Bias**

As already noted, under the statute, bias, to be disqualifying, must be "personal". Bias has been held to be "personal" when it stems from an "extra-judicial" source rather than from what the judge has learned from his participation in the case. If a judge's adverse attitude toward a party is the result of his study of the papers submitted in the case, there is no "extra-judicial" or "personal" bias. On the other hand, an adverse attitude against a party stemming from a preexisting racial or ethnic prejudice harbored by the judge is from an "extra-judicial" source and is "personal" and, thus, disqualifying. An affidavit setting forth with specificity a judge's remarks evidencing ethnic bias is legally sufficient to disqualify. The United States Supreme Court so held in a case under the Espionage Act of 1917 where the defendants alleged in an affidavit under the Federal Judicial Code that the Federal trial judge was

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5/ Ortiz v. City of New York, NYLJ, 8/27/87, p. 11, col. 3 (Sup. Ct. NY Co.).
7/ SAPA Section 303.
10/ Id. at 583.
prejudiced against them based on their German national origin. 11/ The trial judge whose recusal is sought passes on the legal sufficiency of the allegations. 12/ Of course, it is not for said judge to pass on the truth of the allegations made against him for no man is competent to judge his own cause.

It is clear that a judge cannot be made subject to disqualification whenever any allegation of bias, however conclusory and unsupported, is made. Thus, the sufficiency of the affidavit must always be tested in light of the applicable legal standard. The Federal Judicial Code itself requires the affidavit to disqualify a Federal judge to "state the facts and the reasons for the belief that bias or prejudice exists" and further requires that it be "accompanied by a certificate of counsel of record stating that it is made in good faith".

It may be noted that in New York State the motion pursuant to SAPA Section 303 to disqualify an administrative law judge is determined by "the agency", which may by rule designate someone other than the judge himself (e.g., a supervisor) to pass on the motion. 13/ What Does Not Constitute Bias

The cases are replete with examples of what does not constitute disqualifying bias. The fact that a judge presided over a prior trial of the defendant resulting in a criminal conviction does not preclude him from presiding over a retrial of the same charge where the judge determines that he harbors no bias or prejudice against defendant. 14/ It is often said that adverse rulings by a trial judge are not a basis for disqualifying him for bias. On a recusal motion, it is neither necessary nor appropriate to examine the merits of the

12/ Id. at 36.
13/ 28 U.S.C. Section 144.
14/ See, e.g., 9 NYCRR 2051.3(d)(2)(i).
15/ People v. Bartolomeo, 126 AD 2d 375 (2d Dept. 1987).
judge's trial rulings for they are subject to review on appeal. Even repeated rulings which are clearly erroneous do not provide a basis for disqualification. A litigant should be aware that it is by making timely objection on the record that he preserves issues for later appellate review.

A judge's expression of an opinion concerning applicable law is not a basis for recusal. His remarks about the merits of the case at bar are likewise not a basis. Even where a judge's comments on the merits at a settlement conference included an invitation to one of the parties to move for summary judgment, it was held that no bias or prejudice was thereby shown as a judge inviting such a motion is not prejudging it but may well end up denying it after a full review of all the papers.

During the course of a long and heated trial a judge may occasionally lose patience and use intemperate language toward a party or counsel. It has been held that an occasional display of irritation, even if unwarranted, is insufficient to show bias or prejudice. After all, a judge is human and not some "passionless thinking machine". Even where there is hostility on the part of the judge toward counsel, there is no basis for disqualification where the judge believes that his feelings toward counsel will not prejudice the client. The Second Circuit Court of Appeals has pointed out, however, that where antipathy toward counsel crystallizes to the point where counsel can do no right, there may well be a frame of mind on the judge's part preventing impartiality. A judge can and should recuse himself when he believes in good conscience that his present

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19/ Ortiz v. City of New York, supra.
20/ Rosen v. Sugarman, 357 F. 2d 794 (2d Cir. 1966).
21/ In re J. P. Linahan, 138 F. 2d 650, 652-53 (2d Cir. 1943).
feelings toward counsel will prevent him from continuing to conduct the trial in a fair and impartial manner. 44/

Conclusion

Clearly, the motion to remove a judge for bias or prejudice is an important albeit drastic remedy. And it can be subject to misuse. It has been suggested that the "obnoxious practice" of judge shopping may be behind the making of such a motion. 26/ Or the motivation may be the delays attendant upon making the motion and compelling a new trial before a newly assigned judge. It may be that the motion is viewed as a convenient vehicle for immediately challenging what are perceived to be clearly erroneous rulings which an impatient aggrieved party believes should be corrected now rather than later on appeal.

Even when such a motion is legally insufficient to compel recusal, the affected judge should seriously examine his conscience. If his impartiality may reasonably be called into question, he should voluntarily recuse himself. For example, where a judge had been associated with the same law firm as the attorney for a party, the New York Court of Appeals stated that while recusal in such a situation was not legally required, it would have been "the better practice for the court to have disqualified itself and thus to maintain the appearance of impartiality". 26/ On the other hand, as Judge John Sirica (among others) has pointed out, there is as much a duty to deny recusal and to sit when the motion is baseless as there is to grant recusal when the motion has a proper basis. 44/

24/ 28 N.Y. Jur. 2d, Courts and Judges, Section 110.
25/ People v. Wallace, 378 N.Y.S. 2d at 297.