MLRC Media Law Resource Center

COMMITTEE REPORT

To Recuse or Not to Recuse? That is the Question

Landis C. Best and Benjamin D. Battles

Prepared for the Pre-Trial Committee
Defense Counsel Section
Media Law Resource Center

November 9, 2009

Media Law Resource Center, Inc.
520 Eighth Avenue, North Tower, 20th Floor
New York, New York 10018
(212) 337-0200; Fax (212) 337-9893
www.medialaw.org

To Recuse or Not to Recuse? That is the Question

*Landis C. Best and Benjamin D. Battles**

When should a media defendant move to recuse the presiding judge in a defamation case? The decision to file a recusal motion is rarely an easy one. The bar for recusal is high, and most litigants understandably are hesitant to risk an unsuccessful motion that would leave their case in the hands of a judge whose impartiality they have formally questioned. It may become clear to a defendant, however, that the presiding judge is predisposed to favor the opposing party. In the defamation context, for example, the subject of the allegedly defamatory publication may be a relative, colleague or political ally of the judge. Perhaps the particular media defendant has been a harsh critic of the judge, or perhaps the judge's past opinions or actions reveal an animus towards the particular media defendant. In these situations and others, recusal may be warranted. In extreme cases, recusal may even be constitutionally required.

The Supreme Court recently considered such an extreme case, although not in the defamation context. In *Caperton* v. *A.T. Massey Coal Co.*, Brent Benjamin, a newly elected Justice of West Virginia's highest court, had denied a recusal motion before signing a 3-2 majority opinion in a decision that overturned a $50 million jury verdict against a coal company run by Don Blankenship, an individual who had spent millions of dollars to help elect Benjamin to his judicial seat.[1] In a 5-4 split, the Supreme Court held that because Blankenship had a "significant and disproportionate influence" in Justice Benjamin's election, Benjamin's failure to recuse himself violated the plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment.[2]

The *Caperton* decision "addresses an extraordinary situation where the Constitution requires recusal."[3] Conflicts of interest do not often rise to this level, however, and most recusal motions accordingly are based not on the Constitution, but on local rules and statutes. The recusal rules of most jurisdictions mirror the American Bar Association ("ABA")'s Code of Judicial Conduct.[4] Under the ABA code, recusal is required if the judge has a direct interest in

---

* Ms. Best is a partner at Cahill Gordon & Reindel LLP, where Mr. Battles was formerly an associate and is currently serving as law clerk to the Honorable Morton I. Greenberg, United States Court of Appeals for the Third Circuit. The authors would like to thank Adam Mintz, a 2009 Cahill summer associate from Columbia Law School for his research assistance with this article.

1 556 U.S. ___, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (June 8, 2009).

2 *Id.* at 14. The majority opinion, authored by Justice Kennedy, noted three situations where the Court previously had held that "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable": (1) where, as was prohibited at common law, the judge has "a direct, personal, substantial, pecuniary interest" in a case; (2) where the procedures of a local tribunal provide the decisionmaker with a financial interest in the outcome of a case that might tempt an average judge to favor a particular outcome; and (3) where the judge in a contempt proceeding is likely to be conflicted because of that judge's relationship with the contempt defendant in the prior proceeding. In ruling that Justice Benjamin's recusal was constitutionally required, the Court added a narrow fourth category: "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Id.* at 1, 6, 7-11, 14.

3 *Id.* at 16.

4 *See* Hon. D. Duff Mckee, *Disqualification of Trial Judge for Cause*, 50 Am. Jur. Proof of Facts 3d 449 § 4 (2008). The federal recusal statutes, like the ABA code, call for recusal where there is actual bias, *see* 28 U.S.C. §§ 144, 455(b), or an appearance of bias, 28 U.S.C. § 455(a). For a thorough discussion of the federal recusal statutes, *see generally* Federal Judicial Center, *Recusal: Analysis of Case Law Under 28 U.S.C. §§ 455 & 144* (2002).

the lawsuit, has actual bias towards or against one party to the lawsuit, or if the judge's hearing of the case would create an appearance of bias.[5] A direct interest exists if the judge is a party to the lawsuit, related to a party, or has an actual stake in the outcome of the case.[6] To demonstrate actual bias, the moving party faces the difficult task of showing that the judge suffers from "such deep rooted animus that a fair minded person could not be expected to set it aside in judging the certain person or cause before the court."[7] The requisite sentiment must be "significantly different from and more particularized than the normal, general feelings of society at large."[8] An appearance of bias, however, exists where the circumstances of the case "would give rise in the mind of a reasonable person a suspicion or reasonable inference that the judge would be influenced by it."[9] Finally, judges retain the power to recuse themselves on their own motion even if the conflict in question fails to rise to the levels articulated above.[10]

Although only a few reported decisions address recusal motions in media defamation cases, several categories appear within this limited universe. Some are unique to the media context, such as where the media defendant's previous publications or broadcasts harshly criticized the presiding judge, or alternatively, where the presiding judge previously has criticized the publications or broadcasts of the media defendant. Other types of conflicts conceivably may arise in any type of litigation. For example, the judge may have a personal or professional reason to curry favor with the plaintiff in the case, may have had *ex parte* communications with the plaintiff, or may have exhibited bias against a co-defendant in the case. We explore these categories below.

I. Media Defendants' Prior Publications

A media defendant's prior publications or broadcasts might provide grounds for recusal in a defamation case. If the defendant has been particularly critical of the presiding judge or someone close to the judge, the judge's impartiality may be cast into doubt. This type of conflict is similar to that in a line of cases described by the Supreme Court in *Caperton*, where a judge in a criminal contempt proceeding becomes biased against the contempt defendant because of the judge's participation in the proceeding where the contempt occurred.[11] In those decisions, the Court had

---

[5] ABA Model Code of Judicial Conduct R. 2.11 (2007).

[6] *Id.*; Mckee, *supra* note 4, at § 6.

[7] Mckee, *supra* note 4, at § 13.

[8] 13D Wright & Miller, Federal Practice and Procedure § 3542 (2d ed.) (citing *Mims* v. *Shapp*, 541 F.2d 415, 417 (3d Cir. 1976)).

[9] Mckee, *supra* note 4, at § 14.

[10] *See, e.g.*, Scheehle v. Justices of the Supreme Court of the State of Arizona, 120 P.3d 1092, 1110 (Ariz. 2005) ("A judge may on his own motion, if he acts timely, recuse himself even though the reason given might not be sufficient to form the basis of a legal disqualification.") (quoting Zuniga v. Superior Court, 269 P.2d 720, 721 (Ariz. 1954)); 48A C.J.S. Judges § 291 (2009).

[11] *See supra* note 2. An older line of cases involving criminal contempt proceedings against newspapers also exists. In these cases, newspapers held in contempt for publishing statements or cartoons criticizing the court would move to recuse the trial judge from presiding over the contempt proceeding. *See, e.g.*, Toledo Newspaper v. United States, 237 F. 986 (6th Cir. 1916); Myers v. State, 22 N.E. 43 (Ohio 1889); Snyder's Case, 152 A. 33 (Pa. 1930). Subsequently, the Supreme Court held that the First Amendment protects such speech. Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941). First Amendment law is not the only body of law to have changed since that time. It is important to note that these cases were litigated at a time when

held that where a contempt defendant has "vilified" or otherwise insulted the integrity of the presiding judge, recusal may constitutionally be required if the presiding judge "becomes embroiled in a running, bitter controversy" with the contempt defendant.[12] Similarly, a judge that has been regularly criticized by a media defendant conceivably might view that defendant unfavorably.

An interesting situation is described in an opinion of the United States Court of Appeals for the Fourth Circuit.[13] In that case, a federal district judge was assigned a libel lawsuit involving a defendant newspaper that previously had severely criticized the judge in a number of articles unrelated to the pending lawsuit.[14] Upon learning the identity of the presiding judge, the newspaper communicated with the judge *ex parte* in an attempt to persuade the judge from presiding over the case.[15] After the judge stated his ignorance of the articles in question and expressed his lack of hostility towards the newspaper, the newspaper formally moved for recusal, and included with their motion an affidavit to which was attached the critical articles.[16] Relying on the federal recusal statutes, the judge found no actual bias or prejudice that would require disqualification, but nevertheless recused himself to further the appearance of justice.[17] Despite winning the recusal motion, the newspaper filed a complaint with the Fourth Circuit, alleging that the district judge failed to expeditiously remove himself from the case, despite being hostile to the newspaper from the outset and even intending to file his own lawsuit against the newspaper.[18] The court, finding no prejudice to either the newspaper or the administration of justice, dismissed the complaint.[19]

In another case, county commissioners from Lackawanna County, Pennsylvania brought a libel suit against the *Scranton Times-Tribune* and one of its writers, Jennifer Henn, for a story associating the commissioners with corruption at the county prison. The *Times-Tribune* sought to replace Judge Robert A. Mazzoni with a judge outside of Lackawanna County. The newspaper was concerned because Judge Mazzoni had handled earlier proceedings in the case and previously had complained to the newspaper that Ms. Henn's coverage of those proceedings included certain remarks made by Judge Mazzoni that were intended to be off-the-record.[20] Judge Mazzoni denied the newspaper's motion.[21]

One high-profile case where this issue arose, albeit in a more tangential way, involved a libel lawsuit filed by the Chief Justice of the Illinois Supreme Court, Robert Thomas, against the *Kane County Chronicle* and one of its columnists over a series of columns claiming that Thomas

---

the recusal standard was far more onerous. Mckee, *supra* note 4, at § 3. Until the 1970s, most jurisdictions adhered to the "duty to sit" doctrine, which prevented recusal except in the most extreme circumstances. *Id.*

[12] Caperton v. A.T. Massey Coal Co., 556 U.S. ___, 129 S. Ct. 2252, 173 L. Ed. 2d 1208, slip op. at 11 (June 8, 2009) (quoting Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971)).

[13] In re Judicial Complaint Under 28 U.S.C. § 372, 795 F.2d 379, 379-81 (4th Cir. 1986).

[14] *Id.* at 379-80.

[15] *Id.* at 380.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 381.

[20] *See* Pl. Mem. in Opp. to Defs. Pet. for Appt. of Out of County Judge, Castellani v. The Scranton Times, No. 05-CV-69, 2008 WL 5403621 (Pa. Ct. Com. Pl. July 28, 2008); *see also* David Singleton, *Newspaper Asks for Outside Judge to Hear Libel Suit*, Scranton Times-Tribune, May 24, 2008.

[21] Telephone Interview with Kevin Abbott, Partner, Reed Smith LLP (July 23, 2009).

had given favorable treatment to an attorney facing disciplinary charges in exchange for political favors from the attorney's supporters.[22] After Thomas won a multi-million dollar judgment on his libel claim in state court, the newspaper filed a federal civil rights lawsuit naming Thomas and all of the state court judges involved with the case as defendants, seeking to enjoin enforcement of the state court judgment. The federal complaint alleged that the newspaper could not get a fair appeal in the state court system given Thomas' position as head of the court system. The federal trial judge to whom the newspaper's case was assigned, Judge Blanche Manning, recused herself on her own motion, finding that although she believed she "could impartially and fairly consider th[e] case," her involvement could create an improper appearance of bias because she previously had served on a state appellate court with three of the defendants, and had tried cases with a fourth defendant while working in the State's Attorney's Office.[23]

Another Illinois case involved Vincent Lopinot, a judge of the St. Clair County Court, who recused himself from a defamation suit filed against the *Madison County Record* by a disbarred attorney that the newspaper claimed had, among other things, exerted influence over a number of county judges in the 1990s. Upon learning that his father was one of the judges the plaintiff allegedly influenced, Judge Lopinot *sua sponte* disqualified himself from presiding over the case. Lopinot determined that his hearing of the case might create an appearance of impropriety because his rulings could be interpreted as designed to protect his father's reputation.[24] Although the defendant had not published an article directly criticizing the sitting judge or his father, the content of the article at issue in the litigation led directly to the recusal.

II. Prior Statements of the Presiding Judge

In addition to situations involving the media's own publications, cases have arisen where the judge's prior statements about a particular media defendant have provided a basis for recusal.

Sprague v. *Walter* is one such case.[25] *Sprague* involved a defamation suit brought by a former Philadelphia prosecutor over an article published in the *Philadelphia Inquirer*. The judge assigned to the case, I. Raymond Kremer, previously had opposed the *Inquirer* in libel suits as both a plaintiff and an advocate.[26] Additionally, throughout his career as a lawyer and judge, Kremer had been an outspoken critic of the power and influence of the press in general and of the *Inquirer*'s publisher in particular.[27] On the basis of this history, the newspaper moved to disqualify Judge Kremer from hearing its case.[28] In his opinion on the motion, Judge Kremer detailed a number of his past statements criticizing the press, and also explained at great length

---

[22] Brian Mackey, *Manning Steps Aside in Libel Defendant's Civil Rights Claim*, Chicago Daily Law Bulletin, June 18, 2007; *Newspaper Files Federal Suit Against Judge Who Won Libel Case*, Associated Press, June 13, 2007, available at http://www.firstamendmentcenter.org/%5Cnews.aspx?id=18665 (last visited July 27, 2009).

[23] Shaw Suburban Media Group v. Thomas, No. 07 C 3289 (N.D. Ill. June 15, 2007). For more information regarding the litigation, see http://www.kcchronicle.com/articles/2007/06/12/news/local/doc466ef639-e6006510227465.txt (last visited Sept. 24, 2009) and MediaLawLetter, June 2007, at 3. The case ultimately settled. *See Defamation Suit Settled*, Chicago Tribune, Oct. 12, 2007, available at http://www.archives.chicagotribune.com/2007/oct/12/news/chi-thomassuit_12oct12 (last visited Sept. 24, 2009).

[24] Steve Korris, *Judge Lopinot Punts Cueto Defamation Suit*, Madison County Record, Aug. 31, 2007.

[25] 22 Pa. D. & C.3d 564 (Pa. Ct. Com. Pl. 1982).

[26] *Id.* at 568-82.

[27] *Id.* at 568-75.

[28] The *Inquirer* previously had successfully sought the recusal of several other judges in the case. *Id.* at 565-67.

why he believed major newspapers such as the *Philadelphia Inquirer* posed serious threats to judicial independence. In one of many colorful passages in the opinion, Judge Kremer compared the Philadelphia press to leaders of the Soviet Union because they had ignored his recommendation that an ombudsman "with real power" be established to correct the press's "errors and improprieties."[29] Despite this discussion, Judge Kremer denied the newspaper's motion, finding that his beliefs and past statements did not threaten to deprive the defendant of due process, evidence actual bias, nor even create an appearance of impropriety.[30] The judge ultimately recused himself on his own motion, however, because "of all of the unusual factors in th[e] particular case," which included the judge having been tangentially involved in the facts described in the allegedly defamatory article.[31]

In *Kirchner* v. *Greene*, a man sued the *Chicago Tribune* for libel after the newspaper published a series of newspaper articles criticizing his attempts to obtain custody of his infant son after the mother had relinquished the child for adoption without the man's knowledge.[32] The *Tribune* won dismissal of the suit and the ruling was upheld on the initial appeal.[33] Thereafter, the plaintiff filed a petition for review with the Illinois Supreme Court. The *Tribune* sought to disqualify Justice James Heiple from considering the petition because, in the underlying custody case, Justice Heiple wrote an opinion that included a large discussion excoriating the *Tribune's* coverage of the custody suit.[34] Although Heiple did not participate in the determination of the recusal motion, and despite his comments in the previous opinion, the Illinois Supreme Court ruled

---

[29] *Id.* at 589.
[30] *Id.* at 589-95.
[31] *Id.* at 593-96.
[32] Kirchner v. Greene, 691 N.E.2d 107 (Ill. App. Ct. 1998).
[33] *See id.*
[34] Justice Heiple's comments included the following:

> Columnist Bob Greene apparently does not care. Rather, columnist Greene has used this unfortunate controversy to stimulate readership and generate a series of syndicated newspaper columns in the Chicago Tribune and other papers that are both false and misleading. In so doing, he has wrongfully cried "fire" in a crowded theatre, and has needlessly alarmed other adoptive parents into ill-founded concerns that their own adoption proceedings may be in jeopardy. In support of his position, Greene has stirred up contempt against the Supreme Court as an institution, concluding one of his columns by referring to all of the Justices with the curse, "Damn them all." . . . Greene, however, elevates himself above the facts, above the law, and above the Supreme Court of Illinois. He arrogates to himself the right to decide the case.
>
> In support of his objective, Greene brings to bear the tools of the demagogue, namely, incomplete information, falsity, half-truths, character assassination and spurious argumentation. He has conducted a steady assault on my abilities as a judge, headlining one of his columns "The Sloppiness of Justice Heiple." ...
>
> Make no mistake about it. These are acts of journalistic terrorism. These columns are designed to discredit me as a judge and the Supreme Court as a dispenser of justice by stirring up disrespect and hatred among the general population. . . .
>
> The trouble with Greene's treatment of the subject, however, is that his columns have been biased, false and misleading. They have also been destructive to the cause of justice both in this case and in the wider perspective. Part of Greene's fury may be attributable to the fact that . . . the Supreme Court had the audacity to base its decision on the law rather than on his newspaper column. So much for his self-professed moralizing.

In re Petition of Doe, 638 N.E.2d 181, 189-90 (Ill. 1994).

that he did not have to recuse himself.[35] In the same order, the court also denied the plaintiff's petition for leave to appeal.[36] Despite its ruling on the recusal motion, the ruling denying the plaintiff's petition states, without explanation, that Justice Heiple took no part in the decision.[37]

In *Cottrell* v. *Berkshire Hathaway, Inc.*, the *Buffalo News* asked New York State Supreme Court Judge Nelson Cosgrove to recuse himself from presiding over a libel case brought against the newspaper by a local businessman.[38] Additionally, the newspaper sought to disqualify Judge Cosgrove from participating in all future actions involving the newspaper, its owner, or any of its employees.[39] The reason for the *News*'s concern stemmed from Cosgrove's actions during an unrelated medical malpractice trial over which the judge was presiding.[40] In the course of that trial, the lawyer for the defendant in the case was arrested in a domestic dispute.[41] Upon learning that the newspaper was preparing an article on the arrest, Judge Cosgrove, fearing a mistrial, called the newspaper and asked its editors not to publish the story.[42] According to the *Buffalo News*, when Cosgrove's request was refused, the judge stated he was "pissed off" and he threatened to use his judicial position to "hurt" or "get" the newspaper in the future.[43] After the newspaper filed its motion, Judge Cosgrove asked to be removed from the case.[44] Although it was unclear whether he would be barred from presiding over future cases involving the *Buffalo News*, in at least one subsequent case, the docket indicates that Judge Cosgrove recused himself and was replaced by another judge.[45]

III. Other Grounds for Recusal

As the cases described above demonstrate, defamation lawsuits involving media defendants may give rise to unique recusal situations because of the defendant's prior news coverage, and the effect that coverage may have had on the presiding judge. Not all conflicts of interest are unique to the media context, of course, and some conceivably may arise in any lawsuit.

---

[35] Kirchner v. Greene, 699 N.E.2d 1032 (Ill. 1998); John Flynn Rooney, *Justices Reject 264 Petitions for Appeal, Accept 11*, Chicago Daily Law Bulletin, June 3, 1998, at 1.

[36] *Kirchner*, 699 N.E.2d 1032.

[37] *See id.*

[38] *Judge's Threat to Paper Leads to His Recusal*, John Caher, Law.com, http://www.law.com/jsp/article.jsp?id=1069801698468 (last visited July 15, 2009); *Judge Threatens Newspaper; Recuses Himself from Libel Case*, The Reporters Committee for Freedom of the Press, Dec. 1, 2003, http://www.rcfp.org/newsitems/index.php?i=3738 (last visited June 30, 2009).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*; A somewhat similar situation arose in an 1897 Pennsylvania case, where the presiding judge in a libel suit previously had sent a letter to the defendant newspaper editor in regard to several articles the newspaper had published unrelated to the libel suit, "and expressing the opinion that [the editor] could, and did sometimes, control the columns of the News, and 'could put a stop to this if you [he] wished to." *See* Wallace v. Jameson, 36 A. 12 (Pa. 1897). Applying the older, stricter standard, the judge declined to recuse himself, and the Supreme Court of Pennsylvania affirmed. *Id.*; *see supra* note 11.

[44] Caher, *supra* note 38; Reporters Committee, *supra* note 38.The ultimate disposition of the case can be found at Cottrell v. Berkshire Hathaway, 798 N.Y.S.2d 846 (Sup. Ct. 2004), *aff'd*, 809 N.Y.S.2d 714 (App. Div. 2006).

[45] *See* Buffalo News v. Eckert, No. 0003160 (N.Y. Sup. Ct. 2004).

A. Powerful Plaintiffs

Even if there is no reason for a defendant to believe that the presiding judge harbors it any ill will, the defendant may nevertheless believe the judge has reason to curry favor with the opposing party. This was the situation in *Laxalt* v. *McClatchy*, which involved a defamation suit filed by United States Senator Paul Laxalt of Nevada.[46] The judge in the case, United States Magistrate Judge Phyllis Atkins, recently had sought and been interviewed by Senator Laxalt for his recommendation to the President of the United States for an appointment to become a United States District Judge.[47] Although Atkins was not selected, the individual Laxalt recommended received the Presidential appointment and it was possible that a similar position might become available in the future.[48] The media defendants argued that another district court vacancy might arise and that this possibility raised an appearance of partiality that required Judge Atkins' recusal.[49] The district court affirmed the magistrate's decision not to recuse herself, finding no clear error, because the evidence of the appearance of bias was too speculative.[50] The court reasoned that because judges often have political connections, such speculative evidence would too readily disqualify a judge.[51]

B. Ex Parte Communications

A defendant also may wish to seek recusal upon discovering that the opposing party has had *ex parte* communications with the presiding judge. This situation arose in extraordinary fashion in a bench trial presided over by Judge Bernard Snyder of the Court of Common Pleas of Philadelphia County, Pennsylvania. The trial involved a libel claim brought by a nightclub owner against the publisher of *Philadelphia Magazine* over an article claiming the nightclub owner was "one of the biggest" cocaine dealers in Atlantic City.[52] The magazine's lawyer moved for recusal on the ground that Judge Snyder was close friends with the plaintiff's attorney, and had helped him plot trial strategy in the case over which he was presiding.[53] Rather than rule on the recusal motion, Judge Snyder entered a verdict against the magazine for $7 million, and then held the recusal hearing, at which he both presided and testified.[54] The Supreme Court of Pennsylvania subsequently disqualified the Judge from ruling on his own recusal motion.[55] Judge Snyder eventually was removed from office.[56]

Another case where recusal was sought on the basis of *ex parte* contact between the plaintiff and the presiding judge was *Post-Newsweek Stations* v. *Kaye*.[57] In *Kaye*, an air transport company sued a television station after the station aired a news report stating the

[46] Laxalt v. McClatchy, 622 F. Supp. 737 (D. Nev. 1985).
[47] Laxalt v. McClatchy, 602 F. Supp. 214, 215-16 (D. Nev. 1985).
[48] *Id.*
[49] *Id.*
[50] *Id.* at 216-18.
[51] *Id.* at 217-18.
[52] Mary Thornton, *Philadelphia Lawsuit Becomes a City Sport*, The Washington Post, July 31, 1983, at A8.
[53] *Id.*; William Robbins, *Judge Testifies in Own Court on His Fitness to Rule*, N.Y. Times, July 12, 1983, at A12.
[54] *Id.*
[55] Municipal Publications v. Court of Common Pleas of Philadelphia County, 489 A.2d 1286 (Pa. 1985)
[56] *Washington News*, United Press International, Oct. 5, 1987.
[57] Post-Newsweek Stations v. Kaye, 585 So.2d 430, 431-32 (Fla. Dist. Ct. App. 1991).

plaintiff's planes and pilots were being used by the CIA to transport drugs that were being exchanged for guns used to arm the Contras in Nicaragua.[58] As the case entered discovery, the television station sought documents linking the plaintiff to the United States Government.[59] The plaintiff claimed the documents were protected by a national security privilege and proposed the judge review them *in camera* with the president of the business to determine the basis for the asserted privilege.[60] The television station argued these communications biased the judge and required recusal.[61] The judge disagreed and declined to recuse himself. The ruling was affirmed on appeal.[62]

C. Bias Against a Codefendant

Additionally, a defendant may encounter a judge it believes to be biased against its codefendant in the case. In such a situation, the defendant understandably may be concerned that bias against a codefendant will lead the judge to issue rulings that negatively impact all of the defendants. A case involving this situation arose in Arkansas, where Judge Tom Keith presided over a defamation suit filed by a county sheriff against the *Arkansas Chronicle*.[63] The sheriff's lawsuit also named as defendants two individuals who previously had brought an action against Judge Keith and other county officials, alleging violations of the Racketeer Influenced and Corrupt Organizations Act.[64] Based on this perceived conflict, the defendants sought Judge Keith's recusal.[65] It is unclear if the recusal motion was successful as the plaintiff's claims were dismissed.[66]

D. Relationship With Party or Other Connection to Case

Finally, another category for recusal are cases where the judge has a professional or personal relationship with a party or some other connection to the case. While this information is often publicly available and can be investigated ahead of time by the litigants, some relationships or connections are not public knowledge. In such cases, the litigants are dependant upon disclosure from the judge in the first instance. For example, one of the authors of this article recently represented a media defendant in a defamation case brought by a state court judge. Judge-as-plaintiff cases often raise recusal issues because of the possibility that the presiding judge has professional connections with the plaintiff. After two judges recused themselves on their own volition apparently due to such connections, the third judge assigned to preside over the case informed the parties before the start of oral argument on the defendants' respective motions to dismiss that he was professionally acquainted with the plaintiff judge, but that he had also served on a bar association panel with a lawyer at the law firm representing one of the media defendants.

---

[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.* at 430.
[63] Michelle Bradford, *Hearing Set for Circuit Judge to Decide on Recusal in Sheriff's Defamation Suit*, Arkansas Democrat-Gazette, Jan. 4, 2001 at B7.
[64] *Id.*
[65] *Id.*
[66] *See* Dodge v. Lee, 100 S.W.3d 707 (Ark. 2003).

The presiding judge asked whether, in light of these relationships, any of the parties wished to seek recusal. The parties did not. The court went on to grant one of the media defendant's motion to dismiss in full and the other media defendant's motion to dismiss in part.[67]

In another case, a lawyer for a media defendant in a defamation case before an appellate panel arrived at the argument site to find that one of the announced panel judges had been replaced. The new judge informed the parties that his son had been a plaintiff in another libel case against a different media organization, that he did not think this would bias his judging, but that he wanted to disclose it and determine whether any party objected to his participation in the case. No other judge was available at that distant location to substitute for this judge, and the announcement came at the outset of argument, so objecting would have meant rescheduling argument after several hours of travel. The lawyer consented and won the appeal.[68] These two incidents, in addition to perhaps shedding light on why so few reported decisions address recusal, highlight the split-second tactical decisions that must often be made in litigation in general, and in the recusal context specifically.

IV. Conclusion

A lawyer considering whether to file a recusal motion faces a difficult strategic question, and there are few reported cases to help guide the practitioner and client. The dearth of reported cases may suggest the need for recusal rarely arises, or that when it does, the issue is generally handled in a manner amenable to all parties. It may also suggest, however, that the impediments to securing recusal discourage many defendants from seeking the remedy. The cases described above indicate that when motions are filed, they often are based on explosive facts. Even in the cases where recusal seems most appropriate, however, judges may technically deny or decline to rule on the defendant's motion, and instead recuse on their own volition. Technicalities notwithstanding, this remedy still provides the defendant with the relief sought -- a new judge. Relatedly, and not surprisingly, judges appear much more inclined to base a recusal decision on the need to satisfy the appearance of justice, rather than on a finding of actual bias. The available case law thus suggests that when a media defamation defendant has reason to believe the presiding judge is biased against it, the greatest chance for securing a new judge lies in filing a recusal motion that details very specific factual allegations that would leave a reasonable observer to question whether the judge was capable of impartially deciding the case. Generic allegations of bias that could be made in many cases are unlikely to be successful.

---

[67] Rivera v. NYP Holdings, Inc., 847 N.Y.S.2d 904 (Sup. Ct. 2007) (Acosta, J.), *aff'd*, Rivera v. Time Warner Inc., 867 N.Y.S.2d 405 (App. Div. 2008).

[68] *See* Knaeble v. Cowles Media Co., 1997 WL 33021, 25 Media L. Rptr. 1860 (Minn. Ct. App. 1997) (unpublished).