CHAPTER 25

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Judicial Disqualification: The Motion to Recuse

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§ 25.1 GENERALLY

The principle of impartial justice is expressly enshrined in article 29 of the Massachusetts Constitution Declaration of Rights:

> It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.

"A rigid adherence to that principle is essential to the maintenance of free institutions. . . . It may never be relaxed."[1] Article 29 is "at least as rigorous in exacting high standards of judicial propriety" as is the due process clause of the Fourteenth

* With thanks to Michelle Dame for research assistance.

[1] Thomajanian v. Odabshian, 272 Mass. 19, 23 (1930).

Amendment.[2] Article 29 extends not only to judges but also to all persons authorized to decide the rights of litigants, including masters, auditors, and presumably clerk-magistrates.[3]

In ruling on a motion seeking recusal, a judge must "consult first his own emotions and conscience. If he pass[es] the internal test of freedom from disabling prejudice, he must next attempt an objective appraisal of whether this [is] a proceeding in which his impartiality might reasonably be questioned."[4] The "internal test" requires that the judge determine whether he harbors an actual disqualifying bias and prejudice,[5]

[2] King v. Grace, 293 Mass. 244, 247 (1936). "A fair trial in a fair tribunal is a basic requirement of due process." Caperton v. A.T. Massey Coal Co., Inc., -- U.S. --, --, 129 S.Ct. 2252, 2259 (2009) (citing and quoting from In re Murchison, 349 U.S. 133, 136 (1955)); Weiss v. United States, 210 U.S. 163, 178 (1994) (same). "Not only is a biased decisionmaker constitutionally unacceptable, but 'our system of law has always endeavored to prevent even the probability of unfairness. . . . In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable. Among those cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him." Withrow v. Larkin, 421 U.S. 35, 47 (1975). "Justice must satisfy the appearance of justice" (Offutt v. United States, 348 U.S. 11, 14 (1954)), and therefore, "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law." Tumey v. Ohio, 273 U.S. 510, 532 (1927), cited and quoted in Caperton v. A.T. Massey Coal Co., Inc., -- U.S. --, --, 129 S.Ct. 2252, 2260 (2009). *See* Ward v. Village of Monroeville, 409 U.S. 57, 59 (1972). So important is the appearance of fairness that it may require a judge to disqualify himself even though he has no actual bias or prejudice and would in fact do "his very best to weigh the scales of justice equally." Taylor v. Hayes, 418 U.S. 488, 501 (1974).

In light of the explicit protections guaranteed by art. 29, the critical nature of which have been frequently stressed by the S.J.C. (*see, e.g.*, Commonwealth v. Leventhal, 364 Mass. 718, 721 (1974); Beauregard v. Dailey, 294 Mass. 315, 324 (1936); King v. Grace, 293 Mass. 244, 246–47 (1936); Thomajanian v. Odabshian, 272 Mass. 19, 22 (1930)), it can persuasively be argued that art. 29 in fact demands a higher standard of judicial conduct than does the due process clause of the Fourteenth Amendment, which mandates judicial disqualification for bias and prejudice "only in the most extreme of cases." Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821 (1986).

[3] *See, e.g.*, Police Comm'r v. Municipal Court, 368 Mass. 501, 507 (1975); Beauregard v. Dailey, 294 Mass. 315, 324 (1936).

[4] Commonwealth v. Eddington, 71 Mass. App. Ct. 138, 143 (2008) (quoting Lena v. Commonwealth, 369 Mass. 571, 575 (1976)). *See also* Commonwealth v. Dane Entertainment Servs., 18 Mass. App. Ct. 446, 450 (1984); Commonwealth v. Gogan, 389 Mass. 255, 259 (1983); Dist. Ct. Standards of Judicial Practice: Trials and Probable Cause Hearings, Standard 1:05 (District Court Administrative Office, Nov. 1981).

[5] This "internal test" appears to be the state equivalent of that embodied in 28 U.S.C. § 144, which governs recusal in the federal courts where the judge has an actual disqualifying bias and prejudice, the major distinction being that the state test leaves the matter of disqualification to the conscience of the individual judge, whereas under § 144, the judge may not pass upon the truth of the matters set forth on the party's affidavit, *e.g.*, United States v. Kelley, 712 F.2d 884, 889 (1st Cir. 1983), but must disqualify himself if the facts and reasons stated are legally sufficient to give fair support to the "charge of a bent of mind that may prevent or impede impartiality of judgment." Berger v. United States, 255 U.S. 22, 33-34 (1921); United States v. Balistrieri, 779 F.2d 1191, 1199 (7th Cir. 1985); Bell v. Chandler, 569 F.2d 556, 559 (10th Cir. 1978).

and the determination is committed to the good conscience and discretion of the judge.[6] Generally, the fact that the judge went forward with the proceeding under the circumstances that were called to his attention is regarded as "a most unequivocal assertion" that the judge had examined his conscience and found no disqualifying bias and prejudice.[7]

As the "inward test" is obviously difficult of proof and the assessment of the judge so thoroughly controlling on the matter of whether he in fact harbors a disqualifying bias and prejudice,[8] counsel moving to disqualify a trial judge is probably well advised to stress the "outward test": whether in light of the circumstances advanced in support of the motion, the judge's impartiality might reasonably be questioned.[9] If the answer is positive, the judge must grant the recusal motion regardless of such consequences as trial delay, which are immaterial.[10] Furthermore, he

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[6] *See, e.g.*, Commonwealth v. Dane Entertainment Servs., 18 Mass. App. Ct. 446, 450 (1984).

[7] Commonwealth v. Leventhal, 364 Mass. 718, 722 (1974); King v. Grace, 293 Mass. 244, 247 (1936);Commonwealth v. Zine, 52 Mass. App. Ct. 130, 133 (2001); Commonwealth v. Dane Entertainment Servs., 18 Mass. App. Ct. 446, 449 (1984).

[8] The S.J.C. has, however, noted that "a judge, although not disposed to recuse himself sua sponte might well react in a different way to a motion to compel his withdrawal which indicated that the person affected would consider himself abused if the judge continued to sit. . . ." Lena v. Commonwealth, 369 Mass. 571, 577 (1976). A motion to recuse based on perceived actual bias and prejudice may serve several salutary purposes. If the motion raises a good-faith concern as to the judge's ability to be fair and impartial, it should ideally prompt the judge to a careful and honest searching of his conscience regarding his ability to do justice under the circumstances. He may then grant the motion in his discretion, but if the motion is denied, it may nonetheless have served the valid function of permitting the defendant's concern to be aired at the outset, and the judge's preliminary assurances that he can and will be fair and impartial may cause him to redouble his efforts throughout the proceedings to prevent any opinions or feelings he may have about the defendant or the offense from improperly impinging upon the decisionmaking process. And, if all else fails, and actual bias and prejudice are subsequently manifested during the trial or other hearing, the record will have been preserved for meaningful appellate review.

[9] Code of Judicial Conduct, S.J.C. Rule 3:09, Canon 3(E)(1).

[10] Parenteau v. Jacobson, 32 Mass. App. Ct. 97, 104 (1992). *See* Code of Judicial Conduct, S.J.C. Rule 3:09, Canon 3(E)(1), which in pertinent part provides: "A judge *shall* disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned" (emphasis added). The 2003 amendments to the Code substituted the term "shall" for "should" in this provision, thus intending to replace a "hortatory", non-binding principle with one that is "authoritative." *See* Code of Judicial Conduct, S.J.C. Rule 3:09, Preamble ¶ 3. This intent to make disqualification mandatory in appropriate circumstances is underscored in the Commentary to this amended section, the first paragraph of which states:

> Under this rule, a judge shall disqualify himself or herself whenever the judge's impartiality might reasonably be questioned, regardless of whether any specific rules in Sections 3E(1)(a) through (h) apply. For example, even though a judge may not be required to disqualify himself or herself because of an economic or relationship interest, the judge may be required to do so on other grounds. A more than de minimis interest, under Sections 3E(1)(f)(iii), (g)(iii), and (h)(iii) may include non financial interests; as an example, support by the judge of an organization advocating a particular position, where the interests of the organization could be substantially affected by the outcome of the proceeding.
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> Code of Judicial Conduct, S.J.C. Rule 3:09, Commentary to Canon 3(E)(1).

must "completely dissociate" himself from the case; he may not "partially" recuse himself by presiding over a jury trial of the case.[11] If the Supreme Judicial Court is of opinion that a judge has wrongly denied a party's motion that he recuse himself from further involvement in a case, it may exercise its supervisory power to remove the judge from the case.[12]

§ 25.2 BASES FOR RECUSAL

The most common potentially disqualifying circumstances are codified in the Code of Judicial Conduct, S.J.C. Rule 3:09, Canon 3(E)(1),[13] including bias or

[11] Parenteau v. Jacobson, 32 Mass. App. Ct. 97, 104 (1992).

[12] Commonwealth v. O'Brien, 432 Mass. 578, 583-584 (2000).

[13] This Rule provides as follows. *Terms marked by an asterisk* are defined in the Code's Terminology section, which precedes the Canons and applies generally to the Code's provisions.

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding 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;

(b) the judge served as a lawyer in the matter in controversy;

(c) a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter in controversy;

(d) the judge has been, or is to the judge's knowledge* likely to be, a material witness concerning the matter in controversy;

(e) the judge has personal knowledge* of disputed evidentiary facts concerning the matter in controversy;

(f) the judge is a party to the proceeding or an officer, director, or trustee of a party or the judge knows*, or reasonably should know*, that he or she, individually or as a fiduciary*, has (i) an economic interest* in the subject matter in controversy or in a party to the proceeding, which interest could be substantially affected by the outcome of the proceeding, (ii) a relationship interest* to a party to the proceeding where the party could be substantially affected by the outcome of the proceeding or (iii) any other more than de minimis* interest that could be substantially affected by the outcome of the proceeding;

(g) the judge knows*, or reasonably should know*, that the judge's spouse or child wherever residing, or any other member of the judge's family residing in the judge's household,* has (i) an economic interest* in the subject matter in controversy or in a party to the proceeding, which interest could be substantially affected by the outcome of the proceeding, (ii) a relationship interest* to a party to the proceeding where the party could be substantially affected by the outcome of the proceeding or (iii) any other more than de minimis* interest that could be substantially affected by the outcome of the proceeding; or

(h) the judge's spouse or domestic partner, as well as a person within the third degree of relationship* to the judge, the judge's spouse, or the judge's domestic partner, or a spouse or domestic partner of such other 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 any more than de minimis* interest that could be substantially affected by the outcome of the proceeding, or (iv) is to the judge's knowledge* likely to be a material witness in the proceeding.

prejudice,[14] prior involvement as a lawyer[15] or witness, financial interest, prior personal knowledge, a family member's interest, and others.[16] However, because of the peculiarly subjective elements inherent in motions to recuse, there are no controlling rules limiting their proper subject matter. Even though certain bases of asserted disqualification may be generally held not to *mandate* disqualification, disqualification is so thoroughly committed to the exercise of sound judicial discretion that the judge hearing the motion may determine that the appearance of justice requires him to step aside.[17] Moreover, because the governing standard is the *appearance* of lack of impartiality, reviewing courts have placed much stock on whether counsel, knowing the purported disqualifying circumstances, objected to the judge's continued participation.[18]

Rule 3:09, Canon 3(E)(1) substantially tracks the cognate federal provision, 28 U.S.C. § 455, such that cases decided under § 455 may provide significant guidance as to the disqualifying circumstances encompassed within Rule 3:09, Canon 3(E)(1).

Section 455(a) embodies an objective standard intended to foster public confidence in the judicial system by requiring disqualification "if there is a reasonable factual basis for doubting the judge's impartiality." H. Rep. No. 1453, 93d Cong., 2d Sess., 1974 U.S. CODE CONG. & ADMIN. NEWS at 6355. Accordingly, the standard by which disqualification under § 455 (a) is to be determined is "whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion . . . but rather in the mind of the reasonable man." United States v. Cowden, 545 F.2d 257, 265 (1st Cir. 1976), *cert. denied*, 430 U.S. 909 (1977); United States v. Kelley, 712 F.2d 884, 890 (1st Cir. 1983); United States v. Mirkin, 649 F.2d 78, 81 (1st Cir. 1981); United States v. Martorano, 620 F.2d 912, 919 (1st Cir.), *cert. denied*, 449 U.S. 952 (1980). *See also* Pepsico, Inc. v. McMillen, 764 F.2d 458 (7th Cir. 1985). Because § 455(a) focuses on the *appearance of impartiality* as opposed to the existence in fact of any bias or prejudice, "a judge faced with a potential ground for his disqualification ought to consider how his participation in a given case looks to the average person on the street. Use of the 'might' in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality." Home Placement Serv. v. Providence Journal Co., 739 F.2d 671, 676 (1st Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985). *See also* Blizard v. Frechette, 601 F.2d 1217, 1220–21 (1st Cir. 1979).

[14] *See* Commonwealth v. Daye, 435 Mass. 463, 469-470 (2001).

[15] *See* Commonwealth v. Daye, 435 Mass. 463, 470 (2001).

[16] This section focuses primarily on bias or prejudice as a ground for disqualification, as it is the ground most frequently advanced in support of disqualification. Other potentially disqualifying circumstances are set forth in S.J.C. Rule 3:09, Canon 3(E)(1). The list set forth in Rule 3:09, Canon 3(E)(1) is, however, explicitly nonexclusive, encompassing many but not all circumstances under which the judge's impartiality might reasonably be questioned. *See also* Mass. R. Crim. P. 38, governing substitution of trial judge because of death, sickness, or other disability, upheld in Commonwealth v. Carter, 423 Mass. 506 (1996) (upholding midtrial substitution of judge disabled by sickness, where substitute judge complied with Rule 38(a)).

[17] *See, e.g.*, Commonwealth v. Siano, 9 Mass. App. Ct. 912 (1980); Commonwealth v. O'Connor, 7 Mass. App. Ct. 314, 320 (1979).

[18] *See, e.g.*, Commonwealth v. Dane Entertainment Servs., 18 Mass. App. Ct. 446, 448 (1984); Commonwealth v. Clark, 379 Mass. 623, 630-631 (1980); Lena v. Commonwealth, 369 Mass. 571, 575 (1976). If counsel does not object, the defense burden on appeal will be to demonstrate a substantial risk of a miscarriage of justice. *Dane, supra*, 18 Mass. App. Ct. at 448. *See also* Code of Judicial Conduct, S.J.C. Rule 3:09, Canon 3(F), Remittal of Disqualification, providing that a judge disqualified by the terms of Section 3E (other than disqualification for (1) personal bias or prejudice concerning a party or his lawyer, (2) prior service as a lawyer in the case in question, or (3) having been, or the potential for becoming, a

Therefore, counsel who believes that a judge's impartiality might reasonably be questioned should normally move that the judge disqualify himself from all further proceedings and should do so at the earliest possible opportunity after discovery of the disqualifying circumstances.[19]

§ 25.2A. PREJUDICE CONCERNING A PARTY, COUNSEL, OR THE EVIDENCE

The most frequently litigated grounds of disqualification are those asserting that the judge has "a personal bias or prejudice concerning a party . . . [or] personal knowledge of disputed evidentiary facts concerning the matter in controversy."[20] Generally, such disqualifying "personal" bias or "personal" knowledge must have an extrajudicial origin rather than arising from information gleaned or impressions formed in the performance of the judicial function.[21] Thus, cases have held that recusal was not

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witness in the case in question) may disclose to the parties the basis for his or her disqualification and request that the parties consider a joint waiver of disqualification.

[19] If the claim is not asserted promptly, counsel will generally be found to have acquiesced in the judge's continued participation and will not be heard to raise the issue after the proceedings said in retrospect to have been tainted by judicial bias or prejudice. *See, e.g.*, Commonwealth v. Dane Entertainment Servs., 18 Mass. App. Ct. 446, 448 (1984); Cefalu v. Globe Newspaper Co., 8 Mass. App. Ct. 71, 79 (1979), *cert. denied*, 444 U.S. 1060 (1980); Edinburg v. Cavers, 22 Mass. App. Ct. 212, 217 (1986) (recusal after hearings begun only for compelling reasons); Thomajanian v. Odabshian, 272 Mass. 19, 23–24 (1930). The Court suggested in Commonwealth v. Coyne, 372 Mass. 599, 601 (1977), and Commonwealth v. Zine, 52 Mass. App. Ct. 130, 133 (2001), that filing a waiver of jury trial after the denial of a motion to recuse may amount to a waiver of the motion. Also, when a judge discloses circumstances to counsel that he believes are not disqualifying but that he nonetheless wishes to make known so counsel may voice any objection they may have, an election not to object at that time will in all likelihood preclude later resurrection of the issue. *See* Thomajanian v. Odabshian, 272 Mass. 19, 24 (1930). The bringing of a motion to recuse pretrial may, therefore, be essential to protect the appellate record, for the defendant will not be heard to complain on appeal that prejudicial occurrences at trial were the product of bias and prejudice the grounds of which were known before trial, at least where those occurrences do not themselves rise to the level of reversible error.

On the other side of the waiver question, counsel may, after full disclosure by the court and consultation with the client, agree that the court may continue to participate in the proceeding, at least where the potentially disqualifying reasons do not fall within Canon 3(E)(1)(a)(b) or (d). S.J.C. Rule 3:09, Canon 3(F).

[20] S.J.C. Rule 3:09, Canon 3(E)(1)(a), (d). *See also* 28 U.S.C. § 455(B)(1).

[21] *See, e.g.*, Commonwealth v. Adkinson, 442 Mass. 410, 415 (2004); Commonwealth v. Foster, 77 Mass. App. Ct. 444, 448 (2010) (*citing* Adkinson); Commonwealth v. Clerico, 35 Mass. App. Ct. 407, 415 (1993) (*citing* Fogarty v. Commonwealth, 406 Mass. 103, 111 (1989)); Howe v. Prokop, 21 Mass. App. 919, 919-20 (1985), *further appellate review denied*, 396 Mass. 1105 (1986); Commonwealth v. Gogan, 389 Mass. 255, 259 (1983); Commonwealth v. Leventhal, 364 Mass. 718, 722 (1974); Kennedy v. Justice of the Dist. Court, 356 Mass. 367, 379 (1969). *See also* Liteky v. United States, 510 U.S. 540, 540-41 (1994) ("extrajudicial source" factor applies to construction of 28 U.S.C. § 455(a); judicial rulings require recusal only when they evidence "such deep-seated favoritism or antagonism as would make fair judgment impossible"). While "personal" generally connotes bias or prejudice arising from a personal rather than a judicial basis, "[f]indings by a trial judge unsupported by the record are evidence that the judge has relied on extrajudicial sources in making such determinations, indicating personal bias and prejudice." Blizard v. Fielding, 454 F. Supp. 318, 321 (D. Mass. 1978), *aff'd*

required despite judicial remarks highly critical of a party's prior conduct in the litigation;[22] the judge's earlier expression of his opinion as to a matter to be decided;[23] very damaging knowledge acquired by the judge while hearing pretrial motions[24] or presiding at prior proceedings involving the same defendant;[25] or exposure to otherwise inadmissible evidence.[26] However, the fact that prejudicial knowledge was acquired by the judge in his judicial role is not dispositive:[27] heightened sensibility is called for

sub nom. Blizard v. Frechette, 601 F.2d 1217 (1st Cir. 1979). *See* Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., 839 F.2d 1296, 1302 (8th Cir.), *cert. denied,* 109 S. Ct. 177 (1988). Conversely, even where a judge exhibits bias or favoritism she might not be found to have abused her discretion in refusing to step down if her findings are supported by the evidence. *See* MacCormack v. Boston Edison Co., 423 Mass. 652, 665 (1996).

[22] *See, e.g.,* Logue v. Dore, 103 F.3d 1040, 1046 (1st Cir. 1997) (judge's statement outside presence of jury calling plaintiff an "absolute and incorrigible liar"); Commonwealth v. Dane Entertainment Servs., 18 Mass. App. Ct. 446, 449-50 (1984); Perez v. Boston Hous. Auth., 379 Mass. 703, 740 (1980). *See also* Commonwealth v. Alexander, 2 Mass. App. Ct. 911, 911 (1975).

[23] *See, e.g.,* Wessman v. Boston Sch. Comm., 979 F. Supp. 915, 917 (D. Mass. 1997) (fact that judge actively advocated a policy or opinion before being a judge is no bar to adjudicating a case that implicates that policy or opinion) (citing Laird v. Tatum, 409 U.S. 824, 830 (1972)). Commonwealth v. Dane Entertainment Servs., 18 Mass. App. Ct. 446, 450 (1984); Commonwealth v. Clark, 379 Mass. 623, 630-31 (1980); Kennedy v. Justice of the District Court, 356 Mass. 367, 379 (1969); King v. Grace, 293 Mass. 244, 247 (1936). *But see* Matter of Scott, 377 Mass. 364, 367, 380–81 (1979) (misconduct not to recuse after giving opinion on juvenile transfer).

[24] *See, e.g.,* Howe v. Prokop, 21 Mass. App. Ct. 919, 919 (1985), *further appellate review denied,* 396 Mass. 1105 (1986); Commonwealth v. Coyne, 372 Mass. 599, 601 (1977); Commonwealth v. Williams, 364 Mass. 145, 149 (1973). *But* see Commonwealth v. Coyne, 372 Mass. 599, 601–03 (1977) (recusal may be required in jury-waived trial where judge found confession involuntary).

[25] *See, e.g.,* Demoulas v. Demoulas Super Mkts., 424 Mass. 501, 524 (1997) (judge presided over previous trial involving same plaintiff and some of the defendants); Commonwealth v. Kope, 30 Mass. App. Ct. 944 (1991) (prior involvement in plea discussions and rejection of plea); Commonwealth v. Simpson, 6 Mass. App. Ct. 856, 856 (1978); Commonwealth v. Campbell, 5 Mass. App. Ct. 571, 587 (1977); Lena v. Commonwealth, 369 Mass. 571, 575 (1976). It is, for example, assumed that the trial judge will hear any motion for new trial that is filed. *See, e.g.,* Commonwealth v. Leventhal, 364 Mass. 718, 722 (1974). *But see* Parenteau v. Jacobson, 32 Mass. App. Ct. 97, 101-03 (1992) (judge who in earlier trials had decided that defendant was "an outrageous liar" who "probably wouldn't have much of a shot if I were to decide the facts in the case" erred in denying recusal motion and, instead, ordering jury trial over which he presided).

[26] *See, e.g.,* Petitions of the Dep't of Social Servs. to Dispense with Consent to Adoption, 399 Mass. 279, 286 n.1l (1987); Commonwealth v. Williams, 8 Mass. App. Ct. 283, 288–89 (1979); Commonwealth v. Valliere, 366 Mass. 479, 483 (1974). However, the particular circumstances of a judge's participation in the issuance of warrants may be disqualifying if that involvement "might be termed participation in preindictment investigations." Williams, *supra*, 8 Mass. App. Ct. at 289 (citing United States v. Zarowitz, 326 F. Supp. 90, 92–94 (C.D. Cal. 1971)).

[27] *See, e.g.,* Parenteau v. Jacobson, 32 Mass. App. Ct. 97, 103–04 (1992) (recusal required because of unfavorable impression of defendant's credibility formed while presiding at prior proceedings); Lena v. Commonwealth, 369 Mass. 571, 574–75 (1976). The federal courts have also developed an exception to the extrajudiciality requirement which requires disqualification where the record demonstrates a "pervasive bias," even though arising from

when the judge is to be the trier of fact,[28] and the greater the judge's involvement with extraneous pretrial matters, the closer will be the scrutiny given to the fairness of the proceeding.[29]

While the object of the asserted lack of impartiality is generally the defendant, personal bias or prejudice against counsel may also be grounds for disqualification.[30]

§ 25.2B. SPECIFIC SITUATIONS REQUIRING RECUSAL

In the context of criminal *contempt*, "[t]he contempt charges shall be heard by a judge other than the trial judge whenever the nature of the alleged contemptuous conduct is such as is likely to affect the trial judge's impartiality."[31] In addition, the legislature has mandated disqualification in certain specified circumstances. For example:

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wholly judicial sources. *See, e.g.*, United States v. Giorgi, 840 F.2d 1022, 1033 (1st Cir. 1988); Shu Ling Ni v. Bd. of Immigration Appeals, 439 F.3d 177, 181 (2nd Cir. 2006); In re M. Ibrahim Khan, P.S.C., 751 F.2d 162, 164 (6th Cir. 1984); Davis v. Commissioner of Internal Revenue, 734 F.2d 1302, 1303 (8th Cir. 1984); Gardiner v. A.H. Robins Co., 747 F.2d 1180, 1192 (8th Cir. 1984); Hamm v. Members of Bd. of Regents, 708 F.2d 647, 651 (11th Cir.), *rehearing denied*, 715 F.2d 580 (1983); United States v. Holland, 655 F.2d 44, 47 (5th Cir. 1981); Nicodemus v. Chrysler Corp., 596 F.2d 152, 155 (6th Cir. 1979).

[28] "Where the judge is the trier of fact, he must be most scrupulous both to avoid losing his impartiality and to maintain his unfamiliarity with disputed matter which may come before him and with extraneous matters which should not be known by him. . . . How far a judge's other pretrial contact with a matter may require his disqualification will depend on the circumstances of a given case." Furtado v. Furtado, 380 Mass. 137, 151-52 (1980). *See also* Commonwealth v. Dane Entertainment Servs., 18 Mass. App. Ct. 446, 450 (1984); Commonwealth v. Gogan, 389 Mass. 255, 260 (1983); Commonwealth v. Valliere, 366 Mass. 479, 483 (1974); Commonwealth v. O'Brien, 423 Mass. 841, 849 (1996); Commonwealth v. Brown, 364 Mass. 471, 480 n. 20 (1977); Duro v. Duro, 392 Mass. 574, 582 n. 10 (1984). *See also* Commonwealth v. Coyne, 372 Mass. 599, 602–03 (1977) (recusal might be required in jury-waived trial where judge found confession involuntary). But the need for recusal is not avoided when the judge "merely" presides over a jury trial. *See* Paranteau v. Jacobson, 32 Mass. App. Ct. 97, 103–04 (1992).

[29] Spence v. Reeder, 382 Mass. 398, 419 (1981).

[30] *See, e.g.*, Commonwealth v. Edgerly, 6 Mass. App. Ct. 241, 264 (1978); Commonwealth v. Cresta, 3 Mass. App. Ct. 560, 564–65 (1975); Police Comm'r v. Municipal Court, 368 Mass. 501, 508 (1975); Code of Judicial Conduct, S.J.C. Rule 3:09, Canon 3(E)(1)(a) (explicitly including as a potential ground for disqualification a judge's "personal bias or prejudice concerning a party or a party's lawyer"). *But see* Commonwealth v. Cresta, 3 Mass. App. Ct. 560, 565 (1975) (no recusal required where judge registers ethical complaints about defense counsel in unrelated case); Edinburg v. Cavers, 22 Mass. App. Ct. 212, 217–18 (1986). The federal courts have also recognized that "there may indeed be instances when a judge's attitude toward a particular attorney is so virulent that the judge's impartiality concerning the attorney's client might reasonably be questioned." United States v. Kelley, 712 F.2d 884, 890 (1st Cir. 1983). *See also* In re Cooper, 821 F.2d 833, 844 (1st Cir. 1987); United States v. Burt, 765 F.2d 1364, 1368 (9th Cir. 1985); United States v. Ritter, 540 F.2d 459, 462 (10th Cir.), *cert. denied sub nom.* Bell v. Chandler, 569 F.2d 556, 559–60 (10th Cir. 1978); Olson Farms, Inc. v. United States, 429 U.S. 951 (1976); United States ex rel. Wilson v. Coughlin, 472 F.2d 100, 107 (7th Cir. 1973); Wolfson v. Palmieri, 396 F.2d 121, 124 (2d Cir. 1968); Rosen v. Sugarman, 357 F.2d 794, 798 (2d Cir. 1966).

[31] *See* Mass. R. Crim. P. 44(C); *infra* § 46.4B(2) (recusal of judge in contempt proceedings).

1. Under the district court single-trial system, governing cases commencing on or after January 1, 1994, no judge who has previously been involved in a case is permitted to preside over a jury trial in that case.[32] Additionally, at the bench session, the defendant may insist that the trial be before a judge who has not rejected a joint recommendation or a dispositional request by the defendant previously.[33]

2. The judge who imposed sentence on the defendant may not sit or act on an appeal of sentence to the appellate division of the superior court.[34]

3. A judge faced with a motion for new trial should grant recusal "liberally, particularly where requested by the moving party."[35]

4. A district court judge who issued a warrant or complaint may be disqualified from presiding at a subsequent trial on the merits if the defendant objects before jeopardy attaches.[36]

5. Finally, if a district court judge elects to retain jurisdiction following a discussion with counsel of inadmissible and prejudicial facts the defendant has a right to be tried by another judge.[37]

[32] G.L. c. 218, § 27A(d) prohibits a judge presiding over a jury session to act in a case in which "he has sat or held an inquest or otherwise taken part in any proceeding therein."

[33] G.L. c. 218, § 26A, ¶ 3.

[34] G.L. c. 278, § 28A.

[35] Reporter's Notes to Mass. R. Crim. P. 30.

[36] G.L. c. 218, § 35. *But see* Commonwealth v. Williams, 8 Mass. App. 283, 288 (1979) (no recusal at jury trial of judge who issued wiretap warrant).

[37] Corey v. Commonwealth, 364 Mass. 137, 141 n.7 (1973).