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Disqualifications of District Judges in Wyoming: An Assessment of the Revised Rules

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COMMENTS

DISQUALIFICATION OF DISTRICT JUDGES IN WYOMING: AN ASSESSMENT OF THE REVISED RULES

Recently the Wyoming Supreme Court made a change in Wyoming procedural rules which evoked a great deal of criticism from members of the Wyoming bar and from within the court itself. The court's elimination of rules providing for peremptory challenge of judges in civil and criminal cases has sparked controversy among Wyoming practitioners, who see the change as significantly curtailing their right to disqualify judges in certain cases.[1] This comment avoids discussion of the merits of this change and instead addresses the remaining and now critically important rules relating to challenge for cause of judges in civil and criminal cases.

In April, 1983, the Wyoming Supreme Court issued an order[2] directing that certain portions of the Wyoming Rules of Civil Procedure (W.R.C.P.) and Wyoming Rules of Criminal Procedure (W.R.Cr.P.) be deleted.[3] This order eliminated the right of attorneys to challenge peremptorily district judges in civil and criminal cases. The order also provided procedures for a hearing and review of an attorney's motion to challenge a district judge for cause.[4] Before the court's order, attorneys could seek disqualification of a judge either peremptorily or for cause. After the change, the challenge for cause is the only avenue by which an attorney may seek disqualification of a district judge in civil and criminal cases.

This comment provides a detailed examination of the current Wyoming rules on disqualification of judges, to determine just what the challenge for cause means. In so doing, significant comparison will be made with federal rules regarding disqualification. There are strong reasons for this comparison. To begin with, the federal rules have undergone substantial revision in the past decade, with a similar amount of thoughtful and thorough case interpretation. This experience can be useful in evaluating the Wyoming rules. Second, a great deal of Wyoming's other procedural law is modeled after the federal provisions, and reference to federal disqualification procedures would be consistent with that approach.[5] Finally, the statutory changes in the federal rules have now made those rules nearly identical to the Code of Judicial Conduct. Although Wyoming has adopted the same Code of Judicial Conduct, Wyoming's statutory rules remain different.[6]

1. *See* PROCEEDINGS OF THE WYOMING STATE BAR CONVENTION 1983, XIX LAND & WATER L. REV. 321 (1984).
2. The Supreme Court is given authority to adopt, modify, and repeal rules and forms governing pleading, practice, and procedure in all courts. WYO. STAT. §§ 5-2-114 to -117 (1977).
3. MEMORANDUM OF THE WYOMING SUPREME COURT (March 14, 1983). The court changed WYO. R. CIV. P. 40.1(b) (1), and WYO. R. CRIM. P. 23(d).
4. MEMORANDUM OF THE WYOMING SUPREME COURT (March 14, 1983).
5. *See, e.g.*, The Wyoming Rules of Civil Procedure and The Wyoming Rules of Evidence.
6. As the Congressional draftees noted, "the purpose of the amended bill is to amend section 455 . . . by making the statutory grounds for disqualification . . . conform generally with the recently adopted canon of the Code of Judicial Conduct which relates to disqualification of judges for bias, prejudice, or conflict of interest." H.R. REP. No. 1453, 93d Cong., 2d Sess. 3, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6351. Wyoming adopted the American Bar Association Code of Judicial Conduct on September 4, 1983, by court order. The Code can be found in the Wyoming Rules.

This comment will show that the Wyoming rules are vague and inadequate, and use a comparison with the federal rules to make suggestions for improvement.

BACKGROUND

The peremptory challenge was convenient because reasons for the challenge were unnecessary, and the decision to disqualify was in effect the attorney's, provided only that proper procedural steps were followed. This was an advantage to attorneys because they did not have to risk alienating the judge by specifying reasons for the disqualification motion, and could also use the challenge as a trial strategy to get a different judge.

In the Wyoming Supreme Court's view, there were significant problems with the peremptory challenge portion of the disqualification rules. Initially, the court felt that the peremptory challenge was often used simply for the purpose of delay.[7] Moreover, there was a problem with party alignment because it was unclear whether each named party should have a peremptory challenge or whether the parties should be aligned by interest and then each interest given a challenge.[8] In complex multi-party litigation, a peremptory challenge could have had major impact upon the total number of judges subject to disqualification. As the court noted in its memorandum to the Wyoming bar, the problems of delay and party alignment were sufficiently great with a challenge for cause, and far greater when the challenge was without cause.[9] Although amending the rule to make a showing for cause the only avenue for disqualification does not entirely eliminate those problems, it does decrease the number of times a challenge will be used; simply because a reason for the challenge is now an essential element of the rule. In addition, the Wyoming court observed that federal courts and most state courts operate without a peremptory challenge.[10]

In response to these issues, the Wyoming Supreme Court amended the Wyoming rules to eliminate the peremptory challenge in both civil and criminal cases. What remains are challenge for cause provisions in both civil and criminal matters.

CURRENT CIVIL DISQUALIFICATION

As amended by the Wyoming Supreme Court, the civil rule now allows a challenge for cause in five different cases:

(1) when the presiding judge has been engaged as counsel in the action prior to his election or appointment as judge;

(2) when the judge is interested in the action;

(3) when the judge is related by consanguinity to a party;

7. MEMORANDUM OF THE WYOMING SUPREME COURT (March 14, 1983).
8. *Id.*
9. *Id.*
10. *Id.*

(4) when the judge is a material witness in the action; and

(5) when the judge is biased or prejudiced against one of the parties or his counsel.[11]

All motions for disqualification must be accompanied by an affidavit stating sufficient facts to support the disqualification.[12]

The federal rule for disqualification is significantly more detailed than Wyoming's rule. The main provision is found at 28 U.S.C. § 455.[13] Some prominent features of the federal rule include an "appearance of impartiality" test,[14] disqualification for any financial interest whatsoever,[15] and detailed provisions regarding relationships with any of the parties.[16] These features will be discussed later.

A second section of the federal code sets out a procedure for disqualification by means of an affidavit,[17] similar to the Wyoming rule. This procedural section in the federal code is to be construed *in pari materia* with the substantive provisions of section 455.[18]

(1) Where the judge has been engaged as counsel in the action prior to his election or appointment as judge.[19]

This provision is a great deal narrower than the federal rule, which not only will disqualify a judge who had previously served as a lawyer in the matter, but will also disqualify a judge where "a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter."[20]

The primary emphasis in the Wyoming provision lies with the words "engaged as counsel." It is important to understand why judges should be disqualified when they have been engaged as counsel in the action. There are three basic reasons, the first of which is the opportunity judges would have to obtain some prior knowledge of the facts.[21] This gives rise to the danger that a judge will rely not on the facts as presented by the parties during the course of the action, but on his own recollection of the facts from the prior association. The Supreme Court has observed that this recollection may "weigh far more heavily . . . than any testimony given in the open hearings."[22] Second, the judge's prior association as counsel may have pro-

11. WYO. R. CIV. P. 40.1(b) (1).
12. *Id.*
13. 28 U.S.C. § 455 (1976).
14. 28 U.S.C. § 455(a) (1976).
15. 28 U.S.C. § 455(d) (4) (1976).
16. 28 U.S.C. § 455(b) (5) (1976).
17. 28 U.S.C. § 144 (1976).
18. United States v. Sibla, 624 F.2d 864, 867 (9th Cir. 1980). *See also infra* notes 98-101 for a discussion of the purposes behind § 144.
19. WYO. R. CIV. P. 40.1(b) (1) (A).
20. 28 U.S.C. § 455(b) (2) (1976).
21. Roberson v. United States, 249 F.2d 737, 741 (5th Cir. 1957).
22. In re Murchison, 349 U.S. 133, 138 (1955). Murchison was a Detroit policeman being questioned before a Michigan judge acting as a one man grand jury. The judge later tried and convicted Murchison for perjury arising from the same proceeding in which the judge was the grand jury. In the Court's view, this procedure was totally inconsistent with the due process clause of the 14th amendment. *Id.* at 139.

vided an avenue by which the judge could have expressed an opinion on the matter.[23] Third, the judge's previous acquaintance with the facts may have led him to apply the law to the facts ahead of time,[24] and he will approach the trial or hearing with preconceived conclusions about the facts. An additional concern is the appearance of partiality that results from situations where the judge has been involved previously with the pending action.[25]

The words "engaged as counsel" in the Wyoming rule should be construed narrowly. Prior to the adoption of the Code of Judicial Conduct in 1974, the federal statute contained a similar provision[26] which was construed literally by the courts.[27] At a minimum, the judge had to have been an attorney for one of the parties before him,[28] which meant he must have signed a pleading or brief, or actively participated in the case.[29] However, it is important to remember the original purpose of the provision was to prevent the judge from acquiring advance knowledge of the facts.[30] As such, it is logical to focus on the judge's ability to acquire facts in the previous relationship. For example, if an attorney (later to become the judge) did not actually handle a case or sign documents, he is probably not technically "engaged as counsel." But, if he was a member of a firm where a case was frequently discussed, he certainly had an opportunity to learn the facts outside of the trial or proceeding and should be disqualified.[31]

A question arises as to whether a judge must have been engaged as counsel in the *same action* as that presently before him. One commentator has noted that a judge is not necessarily disqualified merely because a party to a case was a client of the judge while the judge was in practice, if the pending case is not connected with any matter in which the judge had acted as counsel.[32] This would appear to be the situation in Wyoming where the rule provides for disqualification when the judge has been "engaged as counsel *in the action* prior to his election or appointment as judge."[33] The same conclusion was reached in the case of *Chitimacha Tribe of Louisiana*

23. Previous public statements of Justice Rehnquist before the Senate Judiciary Committee were at the heart of the respondent's motion to disqualify under 28 U.S.C. § 455 in Laird v. Tatum, 409 U.S. 824 (1972). Although Justice Rehnquist ultimately denied the motion, his sixteen-page response memorandum is ample evidence that prior expressions of opinion by a judge may raise a fairness issue.
24. American Cyanamid Co. v. F.T.C., 363 F.2d 757 (6th Cir. 1966). In this case, the Chairman of the Federal Trade Commission had previously sat on the Senate Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, and played an active role in investigating and preparing a report on various issues and facts. Those same facts and issues later came before him at the Federal Trade Commission. The appeals court held that the Chairman should have been disqualified. The court noted that the Chairman's earlier opinions "were conclusions as to facts and not merely 'an underlying philosophy.' " 363 F.2d at 765. Having made these conclusions, the Chairman's later participation in the case amounted to a denial of due process.
25. *See infra* text accompanying notes 145-155.
26. 28 U.S.C. § 455 (1976).
27. Comment, *Disqualification for Interest of Lower Federal Court Judges: 28 U.S.C. § 455*, 71 MICH. L. REV. 538, 550 (1973).
28. Carr v. Fife, 156 U.S. 494, 498 (1895).
29. Laird v. Tatum, 409 U.S. 824 (1972). Justice Rehnquist pointed out, active participation and signing of pleadings or briefs are not always synonymous. Any one of these activities may constitute being "engaged as counsel." *Id.* at 827.
30. *See supra* text accompanying notes 21-25.
31. SCA Services, Inc. v. Morgan, 557 F.2d 110, 114 (7th Cir. 1977).
32. 13 WRIGHT, MILLER, & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3544 (1975).
33. WYO. R. CIV. P. 40.1 (b) (1) (A) (emphasis added).

v. Harry L. Laws Co. where the Tribe sued claiming ownership of a large tract of land in Louisiana. One of the defendants was Texaco, Inc., who had also been a client of the judge prior to his appointment to the bench. In affirming the denial of the Tribe's disqualification motion, the court said "Judge Davis was appointed to the bench six years ago. The fact that he once represented Texaco in unrelated matters does not forever prevent him from sitting in a case in which Texaco is a party."[34]

As the above discussion indicates, two inquiries are relevant to the "engaged as counsel" grounds for disqualification: first, the nature and extent of the judge's involvement as counsel in the earlier case; and second, the connection between that prior case and the pending case before him in his judicial capacity. An attorney seeking disqualification will not only have to show that the judge actively participated in the previous matter, but that it was the same matter as that currently pending.

These qualifications can be extremely important. For example, assume a lawsuit between A and B for divorce before Judge X. Prior to his appointment, Judge X has represented A in a variety of business matters. Part of the divorce action will involve a division of assets. Under the Wyoming rule the attorney seeking to disqualify Judge X must first show that X was engaged as counsel by A. This depends upon the circumstances of the relationship, as well as an interpretation of the term "engaged as counsel." Assuming these hurdles are overcome, the attorney must then show that A and Judge X's previous relationship concerned the same matter as the pending divorce action. Obviously, prior business advice and a divorce are not the same action. In this situation, the Wyoming rule is totally inadequate. By using only the words "engaged as counsel" the rule leaves judges and attorneys completely without guidance as to which prior relationships warrant disqualification.

The federal rule has been modified in two ways which are relevant to the above example. The "of counsel" language now reads "lawyer in the matter in controversy."[35] This makes the rule somewhat more definitive.[36] Congress also added an appearance of impartiality test,[37] whereby a judge might consider himself disqualified if he had a long association with a party as counsel, even on matters not involved in the proceeding.[38] In the above example, disqualification would be far more likely, (and perhaps properly so) than under the Wyoming provision.

Although the brief term "engaged as counsel in the action" has the virtue of simplicity, it fails to provide guidance in dealing with the variety of situations that arise when the judge has been previously involved with parties before him in his judicial capacity.

34. Chitimacha Tribe of Louisiana v. Harry L. Laws Co., 690 F.2d 1157, 1166 (5th Cir. 1982).
35. 28 U.S.C. § 455(b) (2) (1976).
36. 13 WRIGHT, MILLER, & COOPER, *supra* note 32, at § 3544.
37. 28 U.S.C. § 455(a) (1976). The appearance of impartiality standard is discussed later in this comment.
38. 13 WRIGHT, MILLER, & COOPER, *supra* note 32, at § 3544 n.4.

(2) Where the judge is interested in the action.[39]

The Wyoming rule provides a second ground upon which an attorney may challenge a judge for cause in civil cases, and that is when "the judge is interested in the action." This particular section can be interpreted either very broadly or very narrowly, and there is little Wyoming case law to clarify the issue.

The comparable federal statute regarding interested judges has undergone considerable change since it was first enacted. Originally, the federal rule disqualified judges that were in any way "concerned in interest."[40] In 1948, this was modified to read "substantial interest."[41] Then in 1974, Congress again altered the statute to be consistent with the ABA Code of Judicial Conduct, so that it primarily addresses financial interests, and "any other interest that could be substantially affected by the outcome of the proceeding."[42] These changes reflect the fact that traditionally, "interest" within the meaning of the federal disqualification statute has referred to pecuniary and beneficial interests.[43] The case of *Tumey v. Ohio* is a good example.[44] Tumey was convicted of unlawfully possessing intoxication liquor by the mayor of an Ohio town and fined $100. By means of various ordinances, the mayor was compensated for his judicial services from a fund comprised of fines levied against criminal defendants. The United States Supreme Court observed that "[t]here is, therefore, no way by which the mayor may be paid for his service as judge if he does not convict those who are brought before him."[45] As such, the Court held the defendant was clearly deprived of due process for lack of an impartial judge.[46]

Tumey v. Ohio illustrates that pecuniary and beneficial interests of the judge are an important disqualification issue, even to the point of constituting deprivation of due process. Judicial interpretation of the term "interest" in the federal statute makes it clear that financial interests are the primary concern. In *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, the plaintiffs filed a motion to disqualify the trial judge under 28 U.S.C. § 455.[47] The judge's wife had owned 100 shares of the defendant's stock and the judge himself was a stockholder, officer, and director of a company that did business with the defendant. In considering the effect of these interests, the court said the trial judge "gained not the slightest pecuniary advantage whether the plaintiff won or lost. It is this type of interest to

39. WYO. R. CIV. P. 40.1(b) (1) (B).
40. Act of May 8, 1982, Ch. 36, 1. Stat. 278-79.
41. 27 U.S.C. § 455 (1976).
42. 28 U.S.C. § 455(b) (4) (1976).
43. United States v. Bell, 351 F.2d 868 (6th Cir. 1965). This case also contains an important lesson for attorneys filing disqualification motions. In his petition for change of judge the defendant alleged that the trial judge was "incompetent to hear and try the case." In chastising the defense attorneys the appellate court aptly noted that the issue is one of prejudice and *not* incompetence. *Id.* at 878.
44. 273 U.S. 510 (1926).
45. *Id.* at 520.
46. *Id.*
47. 324 F. Supp. 1371 (S.D. Tex. 1969), *aff'd*, 441 F.2d 631 (5th Cir. 1969).

which this portion of the statute is directed."[48] An earlier case involving a similar motion was *Adams v. United States,* where the court said "it is doubtless true that the term 'substantial interest' normally refers to a pecuniary or beneficial interest of some kind."[49]

The legislative progress of the federal statute reinforces the above interpretation. What was originally just an "interest" later became a "financial interest," with specific provision as to the nature and scope of the financial interests encompassed.[50] The legislative history of section 455 highlights the fact that a substantial interest is a financial interest. The House report on the 1974 changes to 28 U.S.C. § 455 noted that a financial interest was now defined as any legal or equitable interest however small, and thus "uncertainty and ambiguity about what is a 'substantial interest' is avoided."[51]

In sharp contrast to the development of the federal rule, Wyoming only provides for disqualification if the judge is "interested in the action." As such, the section needs considerable interpretation. The above discussion of the manner in which the federal courts have interpreted the phrase "substantial interest" makes it tempting to limit Wyoming's provision to financial interests. However, there is support for a position that financial interests are not the only ones involved. In discussing the federal statute, the recent case of *Potashnick v. Port City Construction Co.* made a reference to non-economic non-financial interests.[52] In *Potashnick,* the district judge was disqualified because he was involved in business dealings with the plaintiff's attorney. The judge's father was also a senior partner in the law firm representing the plaintiff. After giving careful consideration to section 455, the Fifth Circuit Court of Appeals noted: "the Congressional drafters recognized that *non-economic interests* may affect a judge's bias or prejudice."[53] Moreover, the court specifically observed that the language of section 455(b)(5)(iii) referring to 'an interest' does not require that the interest of the judge's lawyer-relative[54] be financial.[55]

An examination of the amended federal statute makes the holding in *Potashnick* clear. After the 1974 changes, the statute addresses the subject of interests in three different ways. Section 455(b)(4) refers to a "financial interest in the matter in controversy."[56] Financial interest is later defined as "ownership of a legal or equitable interest, however small."[57] Section 455(b)(4) also speaks of "any other interest that could be substantially

48. 324 F. Supp. at 1385. This case arose during the time when only the term "substantial interest" was included in section 455. The result of the case would probably be different under the 1974 changes which require disqualification for *any* financial interest. 28 U.S.C. § 455(d)(4) (1976). *See* Comment, *supra* note 27, at 553 for a further discussion of this subject.
49. 302 F.2d 307, 310 (5th Cir. 1962).
50. H.R. REP. No. 1453, 93d Cong., 2d Sess. 3, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6351, 6356. For the extent of financial interests encompassed by the federal statute, see *infra* notes 56-59.
51. *Id.*
52. 609 F.2d 1101 (5th Cir. 1980).
53. *Id.* at 1113 (emphasis added).
54. SCA Services Inc. v. Morgan, 557 F.2d 110, 115 (7th Cir. 1977).
55. 609 F.2d at 1113.
56. 28 U.S.C. § 455(b)(4) (1976).
57. 28 U.S.C. § 455(d)(4) (1976).

affected by the outcome of the proceeding."[58] Finally, section 455(b)(5) uses the language "an interest that could be substantially affected" in addressing not only the judge, but his spouse and various relatives as well.[59]

The initial distinction in section 455(b)(4) between a "financial interest" and "any other interest that might be substantially affected" was an issue before the court in *In re New Mexico Natural Gas Antitrust Litigation.*[60] The court held that if the judge has direct ownership, legal or equitable, then disqualification is required, regardless of the size of the interest. An interest not entailing direct ownership fell within an "other interest" and required disqualification only if the litigation could substantially affect it. As the court said, "the difference is thus framed in terms of directness of ownership and effect on the outcome."[61] An example is found in *In re Virginia Electric & Power Co.*,[62] where the judge's rulings could possibly have had a beneficial effect on his future utility bills. The Fourth Circuit Court of Appeals characterized this not as a financial interest, but as an "other interest" requiring disqualification under the substantially-affected test.[63]

As noted previously, section 455(b)(5) is the third reference to interests of a judge, and includes interests of the judge's spouse and certain relatives as well.[64] This was the section discussed in *Potashnick,*[65] and also requires application of the substantially-affected test.

The above cases emphasize that when a judge is "interested in an action," a variety of meanings could emerge. At a minimum, the term should include financial interests. The next issue is whether or not non-financial interests are within the term. *In re Virginia Electric & Power* would support including at least economic interests, and *Potashnick* properly includes non-economic interests. A final concern is whether any interest will disqualify, or only those which would be substantially affected by the litigation.

In the absence of statutory guidance, a court will have to use judicial interpretation. *Adams v. United States*[66] is a good example. In a prosecution for perjury, the defendant filed a motion to disqualify because the judge had been a United States attorney from the office out of which the perjury prosecution had arisen. In upholding the denial of the motion, the court said "[a]lthough . . . the term 'substantial interest' *normally* refers to a pecuniary or beneficial interest of some kind, we construe the language broadly enough to comprehend the interest that any lawyer has in pushing his case to a successful conclusion."[67]

58. 28 U.S.C. § 455(b) (4) (1976).
59. 28 U.S.C. § 455(b) (5) (1976).
60. 620 F.2d 794 (10th Cir. 1980).
61. *Id.*
62. 539 F.2d 357, 360 (4th Cir. 1976).
63. *Id.* at 367-68. It is worth noting, however, that this "other interest," though not necessarily financial, should probably be at least economic.
64. 28 U.S.C. § 455(b) (5) (1976).
65. 609 F.2d 1101.
66. 302 F.2d 307 (5th Cir. 1962).
67. *Id.* at 310 (emphasis added).

Wyoming's simplistic provision that a judge can be disqualified if he is "interested in the action," leaves the rule vulnerable to significant amounts of varying interpretation. As such, it is unclear what the rule means. This leads to a total lack of guidance for the judges and lawyers who must cope with disqualification issues as they arise. At a minimum, the rule should address the type of interest which will disqualify, and the degree to which it must exist before disqualification is warranted.

(3) Relation by consanguinity to a party.[68]

As subsequent discussion will reveal, this section of the disqualification rule is very limited. Two questions are involved in a challenge for cause based on this provision. The first question considers the meaning of the term "consanguinity," and the second discusses to whom the consanguinity provision applies.

Consanguinity is clearly limited to a blood relationship.[69] Consanguinity may be lineal, such as a direct line from one person to another, or collateral, where persons are related by blood to the same ancestor.[70] Most importantly, consanguinity should not be confused with affinity, which is the connection existing in consequence of marriage, between each of the married persons and the kindred of the other.[71] Courts have been careful to distinguish between consanguinity and affinity.[72]

The current federal rule is much different from the Wyoming provision. Section 455 of the federal code provides for disqualification when either the judge or his spouse is within the third degree of relationship to any of the participants.[73] This relationship is calculated by the civil law system, which computes from the judge up to the common ancestor of the judge and the relative, and then back down to the relative. Under the civil law system, the following persons are within the third degree of relationship: children, grandshildren, great grandchildren, parents, grandparents, great grandparents, uncles, aunts, brothers, sisters, nephews, and nieces.[74]

In addition to the judge's spouse, the spouses of the parties and their attorneys may subject the judge to disqualification under this provision as well.[75] Thus, if the wife of an attorney who were related to the judge within the third degree, disqualification would be warranted. The federal rule not only contemplates relationships based on consanguinity but on affinity as well.

The policy of the federal disqualification statute is to foster the appearance of impartiality.[76] The link between this policy and various

68. WYO. R. CIV. P. 40.1(b) (2) (C).
69. Todd v. Ehresman, 175 N.E.2d 425, 428 (Ind. App. 1961).
70. BLACK'S LAW DICTIONARY 275 (5th Ed. 1979).
71. *Id.*
72. State v. Geddes, 101 N.H. 164, 136 A.2d 818, 819 (N.H. 1957).
73. 28 U.S.C. § 455(b) (5) (1976).
74. 17 WRIGHT, MILLER, & COOPER, *supra* note 32, at § 3458, n.3. For a thorough discussion of the civil law method, see RITCHIE, DECEDENT'S ESTATES AND TRUSTS 13, n.23 (2d ed. 1961).
75. 28 U.S.C. § 455(b) (5) (1976).
76. H.R. REP. NO. 1453, 93d Cong., 2d Sess. 3, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6351, 6354-55.

relationships involving the judge was at issue in *McCuin v. Texas Power & Light.*[77] The defendants sought to disqualify the district judge because the judge's brother-in-law was a senior partner in a firm representing the defendant. The court stated that section 455 "lists several instances in which the appearance of impartiality is so inherently undermined that disqualification is always required. One of those instances arises when a close relative of the judge by *blood or marriage* is acting as a lawyer in the proceeding."[78] In *SCA Services Inc. v. Morgan,*[79] the court issued a writ of mandamus directing the lower court judge to disqualify himself. The appellate court observed: "[t]his appearance of partiality begins with the natural assumption that brothers enjoy a close personal and family relationship and, consequently, would be inclined to support each other's interests."[80]

By limiting itself to consanguinity, the Wyoming rule eliminates relationships through the judge's spouse as a grounds upon which to challenge for cause. This is a significant failure since there are situations where the judge's spouse or in-laws could be related to one of the participants or involved in the proceedings, and yet disqualification is not available under this provision. For example, one of the parties may be the sister of the judge's wife. Since there is no blood relationship, the Wyoming rule does not apply. Unless, bias, prejudice, or some type of interest were asserted, the challenging party would be without recourse. Where partiality of a judge is at issue, there is no logical reason for distinguishing between consanguinity and affinity. As the *McCuin* court pointed out, partiality may be called into question by blood *or* marriage relationship.[81]

The second question regarding the Wyoming consanguinity provision is which participants are covered. Disqualification is limited to instances where the judge is related by consanguinity to a *party.*[82] The meaning of the word *party* is both technical and precise, including those by or against whom legal suit is brought.[83] It does not include the attorneys for a party.[84] The Wyoming disqualification rule itself reinforces this idea. Where W.R.C.P. 40.1(b)(2)(E), dealing with bias or prejudice, conspicuously refers to "the party or his counsel," the consanguinity provision of (c) is limited to "a party."[85] The distinction should not be treated lightly. In discussing the related portion of the federal statute, the Historical and Revision notes to 28 U.S.C.A. § 455 (1968) comment that "[r]elationship to a party's attorney is included in the revised section as a basis of disqualification in conformity

77. 538 F. Supp. 311 (E.D. Tex. 1982).
78. *Id.* at 313 (emphasis added).
79. 557 F.2d 110 (7th Cir. 1977).
80. *Id.* at 116.
81. 538 F. Supp. at 313. An additional limitation on the Wyoming rule is that it fails to specify the *degree* of consanguinity which would warrant disqualification. While the federal rule limits to the third degree, the Wyoming rule is without limit, which could have undesirable results. As the court in Vernon v. Manners, 75 Eng. Rep. 639, 640 (K.B. 1572), noted, "there would be no bounds put to challenges, for the whole world is of one blood, and all the inhabitants of the earth are descended from Adam and Eve, and so are cousins to each other . . . ." While courts would certainly not carry the rule to such a result, the need for a specified limit is clear.
82. WYO. R. CIV. P. 40.1(b) (2) (C).
83. BLACK'S LAW DICTIONARY 1010 (5th ed. 1979).
84. *Id.*
85. WYO. R. CIV. P. 40.1(b) (2) (C) and (E).

with the views of judges cognizant of the grave possibility of undesirable consequences resulting from a less inclusive rule."[86]

In sharp contrast to Wyoming's disqualification for relationship by consanguinity, the federal rule is exhaustive, covering not only parties, but officers, directors, and trustees of parties, lawyers in the proceeding, those who may be material witnesses and anyone else related to the judge who may have an interest in the outcome.[87] The limitation regarding parties is a significant weakness in the Wyoming rule. It is interesting that in both the *SCA Services* and *McCuin* cases discussed above, the relationship in question was not between the judge and a party, but between the judge and an attorney for a party. The Wyoming rule would not have covered either of those fact situations.

As this section has indicated, the Wyoming rule is illogical in allowing for disqualification because of consanguinity while ignoring relationships by affinity. Moreover, by limiting disqualification to relationships involving only parties the rule totally fails to address a variety of relationships with other participants, such as attorneys.

(4) Where the judge is a material witness in the action.[88]

A fourth provision by which an attorney may challenge a judge for cause in Wyoming civil cases is when the judge is a material witness in the action. The federal statute has a similar provision,[89] although case law on the subject is somewhat sparse.

Most of the federal law involves situations where a judge has occasion to participate in a case after he has already acted as a judge in the same case. Although not technically a witness, the judge has information about the matter which could be used in reaching decisions in the later proceeding. These situations may include retrial of the same case,[90] sitting at trial after issuing preliminary orders,[91] or passing on motions to vacate sentence after having presided at arraignment and imposed sentence.[92] The concern in these cases is that the judge may use his own memory to supplement the facts,[93] or that he may have acquired some reason for partiality.[94] For example, a judge who was a material witness for the government at a suppression hearing cannot make later findings of fact in the case or act in any judicial capacity.[95]

An important exception to the material witness provision in federal law is found at 28 U.S.C. § 2255. This section states the separate federal policy of having certain criminal matters reviews by the same judge before whom

86. 28 U.S.C. § 455 (1976), Historical and Revision Notes.
87. 28 U.S.C. § 455(b) (5) (i)-(iv) (1976).
88. WYO. R. CIV. P. 40.1(b) (2) (D).
89. 28 U.S.C. § 455(b) (2) (1976).
90. United States v. Bryan, 393 F.2d 90 (2nd Cir. 1968).
91. Panico v. United States, 412 F.2d 1151, 1156 (2nd Cir. 1969).
92. Petition of Geisser, 554 F.2d 698, 707 (5th Cir. 1977).
93. United States v. Smith, 337 F.2d 49, 53 (4th Cir. 1964).
94. United States v. Bryan, 393 F.2d 90, 91 (2nd Cir. 1968); United States v. Mitchell, 354 F.2d 767, 769 (2nd Cir. 1966).
95. Government of Virgin Islands v. Gereau, 502 F.2d 914, 937 (3rd Cir. 1974).

the original proceedings were conducted.[96] Wyoming has a similar statute found at section 7-14-101.[97]

These "post-conviction relief" statutes, much like a writ of habeus corpus, came about for several reasons. If a defendant brought a habeus corpus action in a court other than the one in which the original trial took place, the judge from the original trial had to appear as an ordinary witness at the later proceeding.[98] One court observed, "an intolerable situation developed of having the testimony of the trial judge and the word of the convicted felon pitted against each other. This result was manifestly incompatible with the dignity of the Federal judiciary."[99] Another reason for post-conviction relief statutes was administrative convenience. It was far easier to conduct a review in the same court where the initial trial took place.[100] Finally, at the time the federal statute was enacted there were a large number of districts having only one judge, and it was geographically desirable to have review in the same court.[101]

United States v. Smith is one of the only cases to thoroughly discuss the relationship between section 2255 and the judicial disqualification rule.[102] At Smith's original trial, he pled guilty to federal burglary charges, and waived assistance of counsel. Two years later, Smith sought post-conviction relief under section 2255, asserting that his guilty pleas were entered involuntarily and his waiver of counsel was improper. The same judge who had presided at Smith's original proceeding denied the motion for post-conviction relief. Smith appealed, saying the judge had an obvious interest in affirming the original proceedings, and should be disqualified under section 455. In analyzing the policies behind the post-conviction relief statute, the *Smith* court held that sections 455 and 2255 should be construed together. As such, the trial judge is not a material witness under section 455 and disqualification was not in order.[103]

The primary rationale for the holding in *Smith* was that the trial judge was not a witness in the technical sense of taking the stand and testifying.[104] A better rationale is that the policies behind the post-conviction relief statutes simply outweigh those behind the material witness provision in most cases.[105] The real concern with the material witness portion of the disqualification rule is that the judge will make improper use of his involvement in the original proceeding.[106]

96. 28 U.S.C. § 2255 (1976) provides that "[a] prisoner in custody under sentence of a court established by Act of Congress . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence."
97. WYO. STAT. § 7-14-101 (1977).
98. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 172-73 (1948).
99. U.S. v. Edwards, 152 F. Supp. 179, 182 (D.D.C. 1957), *aff'd*, 256 F.2d 707 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 847 (1958).
100. United States v. Smith, 337 F.2d 49, 53 (4th Cir. 1964).
101. *Id.* The same concept may very well apply to Wyoming. *See, e.g.*, Cline v. Sawyer, 600 P.2d 725, 729 (Wyo. 1979).
102. 337 F.2d 49 (4th Cir. 1964).
103. *Id.* at 53.
104. *Id.*
105. *See supra* text accompanying notes 90-96.
106. Post conviction relief policies are discussed in text accompanying notes 99-101; those discussing the judge as a material witness in text accompanying notes 90-96.

(5) Where the judge is biased or prejudiced against a party or his counsel.[107]

This final ground for disqualification of judges in civil cases is also the broadest and most important. The Wyoming rule not only incorporates both bias and prejudice, but applies it to both parties and their attorneys.

It should be noted that bias and prejudice do not mean the same thing. Courts use the terms together, and even the phrasing of the rule may imply that the terms are synonymous. However, the terms should be distinguished. Prejudice indicates some type of a prejudgment or forming an opinion without sufficient knowledge or examination.[108] Bias, on the other hand, is a leaning of the mind or an inclination toward (or against) one person over another.[109]

Both bias and prejudice are incapable of precise measurement[110] and are subject to abuse because an attorney could easily use bias and prejudice as a catch-all for anything he feels would pose a danger of partiality. As one author has noted, "bias, from the litigant's standpoint, is the most serious disqualification problem. The very obviousness of the other grounds [for disqualification] minimizes difficulty; yet, it is the sense of bias which converts into the sense of injustice."[111]

As a result of the imprecision and potential for abuse associated with bias and prejudice, courts have imposed limits on the type and degree of bias and prejudice necessary for disqualification. The most important limitation is that the bias or prejudice must come from an extrajudicial source.[112] An extrajudicial source is information or knowledge other than what the judge heard during the case, such as that arising from personal experience.[113] Mere expression of a viewpoint on a general legal issue is not enough to disqualify for bias or prejudice,[114] nor are feelings generated from facts learned in a judicial capacity.[115] It is also insufficient to base disqualification on a particular judicial leaning or attitude derived from experience on the bench.[116] An exception to the extrajudicial source rule arises from the basic reality that a judge may develop a closed mind during the case, and thus disqualification would be warranted.[117]

A good example of bias developed during the course of a judicial proceeding is found in *United States v. Willis W. Ritter*.[118] Ritter was the district judge for the United States District Court in Utah, presiding over a lawsuit by the Navaho Indians against the United States for unlawful

107. WYO. R. CIV. P. 40.1(b) (1) (D).
108. Cline v. Sawyer, 600 P.2d 725, 729 (Wyo. 1979).
109. *Id.*
110. Frank, *Commentary on Disqualification of Judges—Canon 3C*, UTAH L. REV. 377, 379 (1972).
111. *Id.* at 380.
112. United States v. Veteto, 701 F.2d 136, 140 (11th Cir. 1983); Fitzgerald v. Penthouse International Ltd., 691 F.2d 666, 672 (4th Cir. 1982).
113. Dee v. Institutional Networks Corp., 559 F. Supp. 1282, 1285 (D.C.N.Y. 1983).
114. Johnston v. Citizens Bank & Trust Co., 659 F.2d 865, 869 (8th Cir. 1981).
115. United States v. Patrick, 542 F.2d 381, 390 (7th Cir. 1976).
116. Phillips v. Joint Legislative Committee on Performance and Expenditure Review, 637 F.2d 1014, 1020 (5th Cir. 1981).
117. Frank, *supra* note 110, at 380.
118. 273 F.2d 30 (10th Cir. 1959).

seizure and destruction of horses and burros belonging to the Indians.[119] Although the Tenth Circuit Court of Appeals had previously "suggested" he step aside,[120] Ritter refused and the United States sought an order disqualifying Ritter. The Tenth Circuit Court of Appeals issued the order and, in doing so, observed that "the District Judge was so incensed and embittered, perhaps understandably so, by the general treatment over a period of years of the plaintiffs and other Indians . . . that . . . he cannot give the calm impartial consideration which is necessary. . . ."[121]

Bias or prejudice that develops during the course of a judicial proceeding has been characterized as "pervasive."[122] As such it requires a greater showing than that required for bias or prejudice arising from outside the proceeding.[123]

Bias and prejudice, as interpreted by the federal courts, require more than a simple leaning or opinion in the case. Instead, they result from an aversion or hostility that cannot be set aside when acting in a judicial capacity.[124] In *United States v. Conforte,* for example, the Ninth Circuit Court of Appeals described bias and prejudice as "an animus more active and deep-rooted than an attitude of disapproval toward certain persons because of their known conduct."[125]

In Wyoming, the case of *Cline v. Sawyer*[126] makes it clear that a judge should not recuse himself for bias or prejudice without a valid reason. *Cline* involved a suit by owners of a trailer court against a plumber to recover damages for allegedly defective work. Among the various motions filed by the defendant was one seeking disqualification of the judge under W.C.R.P. 40.1. An attached affidavit asserted that the judge and the plaintiff were close personal friends, that they attended the University of Wyoming together, that they may have belonged to the same fraternities and associations while at the university, and that the judge and plaintiff

119. United States v. Hatahley, 220 F.2d 666 (10th Cir. 1955). This was the first time this case appeared before the Tenth Circuit Court of Appeals. The Tenth Circuit Court of Appeals reversed the District Court, but the U.S. Supreme Court reversed and remanded to the District Court on the issue of damages. Hatahley v. United States, 351 U.S. 173 (1955). After retrial on damages, the Tenth Circuit Court of Appeals again reversed. 257 F.2d 920 (10th Cir. 1958).

120. When the Tenth Circuit Court of Appeals reversed the district court's retrial of the damage issue they said "we suggest that when the case is remanded to the district court, the Judge . . . take appropriate preliminary steps to the end that further proceedings in the case be had before another judge." 257 F.2d at 926. Ritter refused the suggestion, and the Tenth Circuit Court of Appeals then ordered him to step aside in the case. U.S. v. Ritter, 273 F.2d 30 (10th Cir. 1959).

121. 273 F.2d at 32.

122. Davis v. Board of School Commissioners of Mobile County, 517 F.2d 1044, 1051 (5th Cir. 1975). *See also* Hamm v. Members of Bd. of Regents of State of Florida, 708 F.2d 647, 651 (11th Cir. 1983).

123. Whitehurst v. Wright, 592 F.2d 834, 838 (5th Cir. 1979). Although the decisions are clear that a greater showing *is* required, they have been unclear as to *why.* One reason may be that the administrative consequences of a disqualification after proceedings have commenced are understandably greater than a disqualification before actual proceedings begin. Another may be that some partiality during the course of an adversary proceeding is a by-product of the proceeding itself, and thus to be expected.

124. United States v. Professional Air Traffic Controllers Org., 527 F. Supp. 1344, 1360 (N.D. Ill. 1981) (quoting United States v. Conforte, 624 F.2d 869, 881 (9th Cir. 1980)).

125. 624 F.2d at 881.

126. 600 P.2d 725 (Wyo. 1979).

had close political affiliations and social relationships in the community.[127] In the Wyoming Supreme Court's view, this did not warrant disqualification. In upholding the denial of the defendant's motion,[128] the court said the affidavit did "not state sufficient facts to show the existence of bias or prejudice."[129] The court also noted that "an allegation of friendship, without more, is not sufficient . . . ."[130]

In *Cline,* the Wyoming court quoted *Simonson v. General Motors Corp.,*[131] a personal injury suit where a disqualification motion and affidavit had been filed under 28 U.S.C. § 144 and § 455. According to *Simonson,* there remained under the federal statute "what has been sometimes termed a duty-to-sit."[132] This meant that a judge would resolve close disqualification decisions in favor of remaining with the case. It is now clear that the 1974 amendments to section 455 have ended the duty-to-sit concept in federal courts.[133] The drafters of the amendments expressly stated that "the language also has the effect of removing the so-called duty-to-sit which has become a gloss on the existing statute."[134]

The court's holding in *Cline v. Sawyer* requires a showing of actual bias or prejudice on the part of the judge since circumstances which *could* create bias or prejudice were insufficient to disqualify. This is different than the federal rule, which does not adopt an actual bias standard but relies on an "appearance of impartiality" test,[135] which will be examined shortly. Because of the Wyoming court's approach in *Cline,* an attorney must inquire deeply into a judge's affairs, and thus risk alienating the judge.[136] The *Cline* approach is unnecessary and it places attorneys in an intolerable position. Short of an express admission by the judge, actual bias and prejudice will be difficult to show. As subsequent discussion will reveal, the appearance of impartiality test is a satisfactory alternative to making a subjective inquiry into the judge's affairs.

The Wyoming rule also includes attorneys of the parties within the bias or prejudice provision, so a judge may be disqualified if he is biased or prejudiced towards an attorney as well as a party. In situations where an attorney appears frequently before the same judge, yet on different matters, this section can create numerous inconvenient disqualifications if an unhealthy relationship between the judge and the attorney should develop.

127. *Id.* at 728.
128. It is not clear from the reported case what action the district court took regarding the defendant's motion. An order was not entered, but another judge was not called in to try the action. 600 P.2d at 728.
129. *Id.*
130. *Id.* at 729.
131. 425 F. Supp. 574 (D. Pa. 1976).
132. *Id.* at 578.
133. 13 WRIGHT, MILLER, & COOPER, *supra* note 32, at § 3549.
134. H.R. REP. NO. 1453, 93d Cong. 2d Sess. 3, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6351, 6355. *See also* Potashnick v. Port City Construction Co., 609 F.2d 1101 (5th Cir. 1980).
135. *See infra* notes 145-55.
136. Note, *Disqualification of Judges and Justices in the Federal Courts,* 86 HARV. L. REV. 736, 738 (1972). It is also worth noting the dissenting opinion of Justice Rose in the Wyoming Supreme Court's memorandum of March 14, 1983 (cited at n.2), where he hints at the hard feelings which might be created when an attorney inquires into the judge's affairs.

However, most courts have held that bias or prejudice must bear directly on the proceeding in which recusal is sought.[137] This is a more rational interpretation of the rule. Allowing disqualification motions on the basis of an ongoing adverse relationship between judge and lawyer could result in frequent disqualifications. In a sparsely populated area, this will significantly hamper the judicial process.

On its face, the bias and prejudice provision of the Wyoming rule is one of the few disqualification provisions that does not suffer serious shortcomings. However, *Cline v. Sawyer* demonstrates that a proper standard for evaluating bias and prejudice is needed. While keeping in mind that the rule can be abused, standards of bias and prejudice which are impossible to prove should not be required. The key concept is remembering the limits to bias and prejudice, discussed above, such that the provision is not abused.

CURRENT CRIMINAL DISQUALIFICATION

As noted previously, Wyoming has separate rules for civil and criminal matters. Where the civil rule allows disqualification in five separate instances, the criminal rule allows a judge to be disqualified only if he is biased or prejudiced against the state, the prosecutor, the defendant, or the defendant's attorney.[138] This restrictive provision opens the door for a variety of problems. For example, if the judge is related to an attorney before him in a criminal case, there is no specific measure upon which a disqualification motion could rest. The only remedy for the challenging attorney is to argue that the relationship between the judge and the party would cause bias or prejudice, thus fitting within the rule. This same lack of specific provisions could cause problems in other contexts, such as where the judge is a material witness,[139] or where financial matters are concerned.[140] Arguably, unless the challenging attorney could show that the circumstances created bias or prejudice, no disqualification would be warranted in criminal cases.

The significantly limited nature of the criminal disqualification rule demands attention by the Wyoming court. Particularly in criminal matters, the concern for impartiality should be great, and yet the criminal rule is significantly less inclusive than the civil measure. As such, a broad interpretation of the phrase "bias and prejudice" would be tempting. However, logic and sound reasoning compel a uniform construction of the terms in both civil and criminal contexts. There is no apparent reason for having different standards in each of the two rules. Indeed there is little reason for having two rules,[141] except to allow for procedural differences. A previous

137. Matter of Searches Conducted on March 5, 1980, 497 F. Supp. 1283, 1288 (E.D. Wis. 1980).

138. WYO. R. CRIM. P. 23(d).

139. Panico v. United States, 412 F.2d 1151 (5th Cir. 1969), *cert. denied*, 397 U.S. 921 (1969). *Panico* was a criminal case where the judge as a material witness became an issue. Although 28 U.S.C. § 2255 (post-conviction relief) controlled the outcome, the fact that the material witness issue even arose is ample evidence that criminal disqualification rules should address it.

140. United States v. Nobel, 696 F.2d 231 (3rd Cir. 1982). *Nobel* was also a criminal case, wherein the financial interests of the judge in the corporate victim were at issue.

141. It is worth noting that the federal system operates with only one rule (28 U.S.C. § 455) controlling both civil and criminal cases.

commentator on the procedural aspects of Wyoming's disqualification rules concluded that "the laws in both civil and criminal cases should be harmonized. Unless substantial policy reasons support variations in time of filing and judge-change procedures, the civil and criminal procedures are unnecessarily confusing."[142]

The above quotation urges that the procedural parts of the disqualification rules should be unified. It would be wise to unify the grounds for disqualification as well. If bias and prejudice in a criminal context do have different meanings than in a civil context, the rule must specify what those differences are. Otherwise both attorneys and judges are without guidance as to when disqualification is properly warranted in a criminal case.

THE APPEARANCE OF IMPARTIALITY STANDARD

Thus far, this comment has engaged in a detailed examination of the meaning of Wyoming's disqualification rules by means of a comparison with the federal statute. As noted before, the federal statute has adopted Canon 3C of the Code of Judicial Conduct,[143] thus making the statutory and ethical obligations identical for federal judges. Wyoming has adopted the ethical standards via Canon 3C, but Wyoming's rule standards are not identical.[144]

An important part of Canon 3C and the federal statute is the appearance of impartiality standard. This standard is not in Wyoming's disqualification rules. 28 U.S.C. § 455 states that "any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

The appearance of impartiality is not a new concern. In 1966 the United States Supreme Court observed in the case of *Sheppard v. Maxwell* that "no one should be punished without a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power."[145] Justice Frankfurter commented in 1954 that "justice must satisfy the appearance of justice."[146]

The public's confidence in the integrity of the judicial system is an important part of this disqualification provision,[147] and the appearance of impartiality standard is designed to bolster this confidence.[148] *Appearance* is a key part of the entire concept.[149] A judge should not inquire into his own

142. Comment, *Civil and Criminal Procedure—Disqualification of District Judges for Prejudice in Wyoming,* 6 LAND & WATER L. REV. 743, 751 (1971).
143. *See supra* note 6.
144. *See supra* note 138.
145. 384 U.S. 333, 350 (1966).
146. Offutt v. United States, 348 U.S. 11, 14 (1954).
147. As Judge Hand noted in *Potashnick v. Port City Construction Co.,* "an appearance of evil is often worse than the evil itself, and others get the notion that we do not administer justice in our court system." 609 F.2d 1101, 1111, n.8 (5th Cir. 1980). *See also* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring).
148. 609 F.2d at 1111.
149. Marshall v. Jerrico Inc., 446 U.S. 238, 242-43 (1980).

introspective capacity to sit in fair and honest judgment,[150] but should ask whether a reasonable member of the public at large, aware of all the facts, might fairly question his impartiality.[151] Any indecision of the judge should be resolved in favor of disqualification.[152] As one federal court noted, "the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system."[153]

In addition to the concern for public confidence, the appearance test has the advantage of being objective in nature.[154] Rather than framing the issue in terms of whether the attorney thinks the judge is biased or interested, the focus shifts to what a reasonable man might think.[155] By removing the introspective nature of the disqualification inquiry, the judge has a clearer standard to determine if disqualification is in order. This also makes the disqualification process more effective by removing tensions between attorney and judge when the attorney suggests disqualification.

Wyoming needs an appearance of impartiality provision in the disqualification rules. The objective standard will help promote public confidence in the system, and aid judges in the disqualification decision. It also will reduce tension when an attorney must move for disqualification, since judge and attorney now focus on the appearance of a reasonable man. Finally, an appearance provision will help unify ethical and statutory standards for disqualification and make the judge's disqualification decision easier, since he will no longer be faced with two different standards.

CONCLUSION

When the Wyoming Supreme Court made the change in Wyoming's rules for disqualification of judges, loss of the strategic peremptory challenge was the subject of much controversy. As this comment points out, a far more important concern is the meaning of the remaining challenge for cause provisions of the disqualification rules. Without a peremptory challenge, these provisions are now of heightened and critical importance.

It is imperative that the Wyoming Supreme Court address the weaknesses in the disqualification rules. Unity of civil and criminal measures, clarity and detail should be the overriding goals. To work smoothly and effectively the rules must be attentive to the problems that arise in seeking judicial impartiality. The present rules are completely inadequate in this respect. Moreover, ethical and statutory provisions must be unified so a judge is not faced with two different standards in making the disqualification decision.

Above all, the disqualification rules must be drafted and interpreted to address not only the compelling need for judicial impartiality, but the appearance of such impartiality as well.

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150. UNITED STATES v. FERGUSON, 550 F. SUPP. 1256, 1259-60 (S.D.N.Y. 1982).
151. *Id.*
152. *Id.*
153. United States v. Columbia Broadcasting System, 497 F.2d 107, 109 (5th Cir. 1974).
154. 550 F. Supp. at 1260.
155. *Id.*