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State v. Fie: Determining the Proper Standard for Recusal of Judges in North Carolina

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One of the most valued rights of American citizens is the right to a fair trial.[1] One component of a fair trial is an impartial judge.[2] To preserve impartiality, all state and federal courts provide a mechanism through which a judge may be disqualified from hearing a particular case. The majority of states provide for disqualification through recusal.[3] Not all states, however, use the same test for determining when recusal is appropriate. Traditionally, recusal was deemed appropriate if the party requesting it could prove that at least one of the objective factors listed in the controlling statute was present.[4] More recently, some state courts[5] have followed the lead of the federal courts[6] and the ABA

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1. *See* Ponder v. Davis, 233 N.C. 699, 704, 65 S.E.2d 356, 359 (1951); U.S. CONST. amend. V.

2. *Ponder*, 233 N.C. at 703, 65 S.E.2d at 359.

3. Recusal is the temporary disqualification of a judge to hear a specific case due to prejudice, interest, or bias. The purpose of judicial recusal is to ensure that a judge will not preside over a case unless he or she is completely disinterested. The rule operates not only to protect the parties' interest in a fair trial, but also to preserve society's confidence in the integrity of the judicial system. 46 AM. JUR. 2D *Judges* § 86 (1969). Recusal can either be sua sponte (on the judge's own initiative) or imposed as a response to a motion by one of the parties.

Instead of a recusal procedure to ensure impartiality, a minority of the states use a peremptory challenge procedure similar to that used to challenge a juror. For a review of the experience of the states using the peremptory challenge in 1981, and of two proposals to allow the peremptory challenge in the federal courts, see A. CHASET, DISQUALIFICATION OF FEDERAL JUDGES BY PEREMPTORY CHALLENGE (Federal Judicial Center 1981). *See also* Note, *Disqualification of Federal District Court Judges for Bias or Prejudice: Problems, Problematic Proposals, and a Proposed Procedure*, 46 ALB. L. REV. 229 (1981) [hereinafter Note, *Disqualification*] (arguing against adoption of the peremptory challenge in the federal judicial system); Note, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CALIF. L. REV. 1445, 1469-80 (1981) (arguing that the federal system will not benefit from the adoption of the peremptory challenge).

Recusal and peremptory challenge should be distinguished from judicial discipline/removal. Judicial discipline/removal addresses a judge's conduct, whereas disqualification merely prevents a judge from sitting on a particular case where his or her ability to ensure a fair trial is in question.

4. Typical disqualifying factors include: pecuniary interest in the case, 46 AM. JUR. 2D *Judges* § 98 (1969); previous service by the judge as counsel in the case, *id.* § 185; relationship to a party, *id.* § 140; or obvious personal bias or prejudice concerning a party in the case, *id.* § 166.

5. *See, e.g.*, Taylor v. Public Convalescent Serv., 245 Ga. 805, 806, 267 S.E.2d 242, 244 (1980); Stamper v. Commonwealth, 228 Va. 707, 710, 324 S.E.2d 682, 686 (1985).

6. 28 U.S.C. § 455 (1982) provides in part:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in

Code of Judicial Conduct[7] in declaring that recusal is appropriate if specific objective factors are met, or if nonrecusal would give the *appearance* of impro-

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a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding or an officer, director or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

28 U.S.C. § 455(a), (b) (1982).

Cases interpreting § 455 are numerous. The unifying theme of these cases is that § 455(a) focuses on the appearance of impartiality determined under the reasonable person standard, while § 455(b) focuses on the existence of actual bias determined by prior connection with the case or any of the parties, or a judge's pecuniary interest in the case regardless of size of the interest. *See, e.g.*, Potashnick v. Port City Constr. Co., 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980); U.S. v. Gigax, 605 F.2d 507, 511-13 (10th Cir. 1979); Idaho v. Freeman, 478 F. Supp. 33 (D. Idaho 1979); *see also* Note, *Civil Procedure—Judicial Disqualification—Extra-Judicial Associations and the Appearance-of-Prejudice Test of 28 U.S.C. § 455(a)*—Idaho v. Freeman, 31 KAN. L. REV. 200 (1982) (examining whether the judge should have recused himself, under U.S.C. section 455(a), from deciding a challenge to the proposed Equal Rights Amendment (ERA) because of his status as an officer in the Mormon Church, which is officially opposed to the ERA).

Articles discussing the federal statute are also numerous. *See, e.g.*, Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. 662 (1985); Nevels, *Bias and Interest: Should They Lead to Dissimilar Results in Judicial Qualification Practice?*, 27 ARIZ. L. REV. 171 (1985); Note, *Disqualification, supra* note 3; *see also* Annotation, *Construction and Application of 28 USCS § 455(a) Providing for Disqualification of Justice, Judge, Magistrate or Referee in Bankruptcy in any Proceeding in Which His Impartiality Might Reasonably Be Questioned*, 40 A.L.R. FED. 954 (1978) (collecting cases dealing with the federal appearance-of-impropriety test).

There is a second federal statute under which a judge might be recused. *See* 28 U.S.C. § 144 (1982). However, recusal under this narrowly construed statute is difficult. To obtain recusal under § 144, a party must file an affidavit proving that the judge is actually biased. Recusal under § 455 is much more likely; hence, motions are more often made under § 455 even if a § 144 challenge is possible. Bloom, *supra*, at 666-670.

7. Canon 3(C) of the ABA Code of Judicial Conduct, which served as the model for section 455, provides in part:

(1) a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree to either of them, or the spouse of such a person;

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

CODE OF JUDICIAL CONDUCT Canon 3(C) (1980). For information on the process of determining these particular provisions, *see* W. THODE, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 60-73 (1973).

North Carolina has adopted Canon 3(C) verbatim. N.C. CODE OF JUDICIAL CONDUCT Canon 3(C) (1987).

priety.[8] This Note examines North Carolina's law on recusal to determine the appropriate test for applying the doctrine.[9] The Note then analyzes the North Carolina Court of Appeal's decision in *State v. Fie*,[10] focusing specifically on whether the court of appeals applied the correct test and whether the motion to recuse should have been granted. The Note concludes that North Carolina law has supplemented its objective-factor test with the appearance-of-impropriety test as an appropriate ground for recusal. It further concludes that the *Fie* majority's denial of recusal[11] was inconsistent with the results of other similar cases, and that the denial resulted from the court's application of the wrong standard.

Fie is one of a series of cases that arose out of a breaking and entering and larceny of a doctor's office and the subsequent murder of a security guard.[12] Defendant filed a motion requesting Judge Burroughs to recuse himself, alleging the judge was biased against the defendant. The basis for defendant's motion was a letter by Judge Burroughs to the District Attorney, written immediately after defendant testified in a hearing of a co-defendant, requesting that the grand jury consider bringing charges against Fie.[13] Judge Burroughs referred the mo-

8. The addition of the appearance-of-impropriety test as grounds for recusal was initiated by the American Bar Association in the Code of Judicial Conduct as a response to public distrust of the judiciary following Watergate and other scandals. J. MACKENZIE, THE APPEARANCE OF JUSTICE 225, 239-40 (1974). Two years later, Congress amended 28 U.S.C. § 455 to make it consistent with the Code of Judicial Conduct, and to replace the former subjective standard with an objective test. *See* Bloom, *supra* note 6, at 672-73; see also H.R. REP. NO. 1453, 93d Cong., 2d Sess. 2, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6351, 6351-63 (recommending passage of the amended bill).

9. The standard for recusal of a judge is determined primarily by individual jurisdictions. The United States Supreme Court has ruled, as recently as 1986, that only under the most extreme circumstances would disqualification on the basis of bias be constitutionally required under the due process clause. Aetna Life Ins. Co. v. Lavoie, 106 S. Ct. 1580, 1585 (1986).

10. 80 N.C. App. 577, 343 S.E.2d 248, *new trial granted*, 359 S.E.2d 774 (1987).

11. *Id.* at 581, 343 S.E.2d at 252.

12. *Id.* at 578, 343 S.E.2d at 250.

13. *Id.* at 581, 343 S.E.2d at 252. The motion to recuse stated:

> By this Motion the Defendant moves the Honorable Robert M. Burroughs, Judge of the Superior Court of Mecklenburg County, to recuse or disqualify himself and shows the following:
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> 1. That subsequent to the trial of Donna Rowe (79CRS711), a co-defendant to the defendant herein, a letter was written from the presiding judge, Robert M. Burroughs, to Marcellus Buchanan, the District attorney for the Thirtieth Judicial District (a copy of said letter attached hereto as Exhibit "A", and incorporated herein by reference) requesting that seven (7) charges be brought before the grand jury against this defendant based upon testimony presented during the trial of Donna Rowe. That the bulk of the State's case against Donna Rowe was testimony elicited from a third co-defendant, David Hugh Chambers, who was granted immunity from prosecution in these matters in exchange for his testimony. That the presiding judge's request for the charges to be brought against this defendant would be sufficient evidence for a reasonable man to determine that the presiding judge had (1) predetermined the guilt of this defendant and; (2) granted more right to testimony of David Hugh Chambers and the other State's witnesses than to the testimony of various defense witnesses, all of which would show evidence of partiality and the absence of objectivity by the trial court to this defendant. That upon information and belief the defendant believes that the witnesses for the State and defense in the Rowe matter will be the same witnesses called in the various cases of the defendant indicated above. That by virtue of the above, Judge Burroughs has shown himself to be prejudiced against the moving party or in favor of the State's witnesses or against the defense's witnesses in this action.
>
> 2. That the conduct complained of in Paragraph 1 above has caused or would give

tion to Judge Downs, who denied it.[14] Judge Burroughs then presided over the trial of defendant Fie, who was convicted of conspiracy to break and enter, conspiracy to commit larceny, and of being an accessory before the fact to breaking and entering and larceny.[15] The murder-related charges were dismissed.[16] Fie appealed, charging numerous errors, including Judge Downs' failure to disqualify Judge Burroughs from presiding at the trial.[17] The court of appeals, in an opinion by Chief Judge Hedrick, affirmed Judge Downs' conclusion that Judge Burroughs' letter "did not constitute 'such direct action against [the defendants] so as to warrant a recusal.' "[18] Judge Martin, in his concurrence, noted:

> [T]he burden is upon the party moving for disqualification to demonstrate objectively that grounds for disqualification actually exist. Such

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an appearance of partiality in favor of the State contrary to the case law now existing in this state. That judges should disqualify themselves not only when their impartiality may be questioned but even when their conduct only gives an appearance of impropriety or partiality.

WHEREFORE, the defendant herein respectfully prays that Judge Burroughs will recuse or disqualify himself or that in the alternative that an evidentuary [sic] hearing be had to determine the facts alleged herein and that the said Judge then recuse or disqualify himself.

Record at 7-8, *Fie* (No. 8530SC1236).

The letter written from Judge Burroughs to Mr. Buchanan stated:

Based upon the evidence, in the case of State vs. Donna Rowe 79 CRS711, I would request that the Grand Jury be asked to consider the following charges arising out of the death of Willard Setzer and the breaking or entering and larceny of Dr. Abbatt's office on or about 17 September 1978.

Floyd Fie

1. Murder
2. Accessory before the fact of murder
3. Accessory after the fact of murder
4. Conspiracy to commit murder
5. Accessory before the fact to commit breaking or entering and larceny
6. Accessory after the fact to commit breaking or entering and larceny
7. Conspiracy to commit breaking or entering and larceny
8. Possession (NOT receiving) of stolen property

. . . .

I hope these matters can be presented to the Grand Jury when they meet in Haywood County on May 8, 1984 or as soon thereafter as possible.

Id. at 8-9.

14. Judge Downs' order stated:

Based on the foregoing findings of fact, the court makes the following conclusions of law:

1. In making a request of the District Attorney to have the grand jury consider charges against an individual the then presiding trial judge has not taken such direct action against such individual so as to warrant a recusal or disqualification of the said judge from presiding at the eventual trial of the said defendant for the same said charges, because the Court is required to instruct the then trial judge that the defendant is innocent until his guilt has been proven beyond a reasonable doubt and further, that the charges against the defendant is no evidence of guilt. Based on the foregoing conclusions of law

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion to recuse and disqualify Judge Robert M. Burroughs as the presiding judge over the trial of the above captioned defendant be and the same is hereby denied.

Id. at 12-13.

15. *Fie*, 80 N.C. App. at 578, 343 S.E.2d at 250-51.

16. Brief for the State at 2.

17. *Fie*, 80 N.C. App. at 581, 343 S.E.2d at 252.

18. *Id.* (quoting Judge Downs' order).

> a showing must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially.[19]

Judge Wells dissented, arguing that the defendants had been tried before the wrong judge.[20] He asserted that the "appropriate standard in these matters is whether Judge Burroughs by actively seeking the indictment of these defendants had cast a reasonably founded doubt in the minds of defendants as to whether he could give them a fair and impartial trial."[21] On August 12, 1986, the North Carolina Supreme Court granted certiorari to decide which recusal standard is the proper one.[22]

There are two types of recusal standards: those that depend exclusively on the presence of objective disqualifying factors, usually statutorily specified, and those that permit disqualification based on *either* the presence of objective disqualifying factors *or* the ground that nondisqualification would create an appearance of impropriety, even though the objective factor test is not met. Therefore, the major difference in recusal standards is whether or not the jurisdiction supplements the specified objective factors standard with the appearance-of-impropriety test. While there are some variations in the specific objective factors used, or glosses on the way in which the factors are applied in the different jurisdictions, certain principles characterize the objective factor test for recusal. For example, most jurisdictions hold that the disqualification rule applied in that particular jurisdiction applies in all cases, civil and criminal,[23] and that prior *nonjudicial* knowledge of the facts of a case may be grounds for disqualification.[24] However, prior *judicial* knowledge of the facts of a case is generally held to be insufficient for disqualification; therefore, a judge usually is not disqualified from sitting on a case merely because he or she previously presided at a trial involving the same event or evidence.[25] Likewise, a judge usually is not disqualified solely because he or she previously has presided over a trial involving the same person.[26] It is generally recognized that a judge will be disqualified if he or she is biased or prejudiced for or against one of the parties.[27] However, since bias and prejudice refer to mental attitudes regarding one or more of the parties, and not the subject matter of the case, opinions as to the merits of the case do not constitute bias and are not generally disqualifying.[28] Therefore, the fact that a judge has formed an opinion as to guilt in a criminal case usually is not dis-

19. *Id.* at 584, 343 S.E.2d at 254 (Martin, J., concurring).

20. *Id.* at 585, 343 S.E.2d at 254 (Wells, J., dissenting).

21. *Id.* at 588, 343 S.E.2d at 255 (Wells, J., dissenting).

22. State v. Fie, 317 N.C. 710, 347 S.E.2d 447 (1986).

23. 46 AM. JUR. 2D *Judges* § 91 (1969).

24. *Id.* § 94.

25. *Id.* § 180.

26. *Id.*; *see also* Annotation, *Disqualification of a Judge for Having Decided Different Case Against Litigant*, 21 A.L.R. 3d 1369, 1370 (1968) (collecting civil and criminal cases in which the judge's ability to preside over a proceeding is challenged based on the fact that he or she ruled against the moving party in a previous case).

27. 46 AM. JUR. 2D *Judges* §§ 166-67 (1969).

28. *Id.* §§ 166-69.

qualifying.[29] It is also generally held that a judge will be disqualified if he or she has a pecuniary interest in the case,[30] has served as counsel in the case at an earlier stage,[31] or is related to a party or attorney in the proceeding.[32]

It is only in the last twenty-five years that the appellate courts of North Carolina have considered cases involving recusal-type issues with any regularity. During this period a variety of recusal cases have been decided. From these cases three major principles of North Carolina recusal law can be ascertained. A key procedural rule governing judicial recusal can be traced back to a case decided by the North Carolina Supreme Court in 1951, *Ponder v. Davis*.[33] In *Ponder*, defendants filed a motion for recusal alleging that the judge was biased against them. Defendants put forth evidence that the judge had actively campaigned for the plaintiff in the election, the outcome of which was the subject of the litigation.[34] The trial judge denied the motion, found the defendants in contempt of court, and referred the matter to another judge for sentencing.[35] The North Carolina Supreme Court, in reviewing the case, vacated all orders and judgments subsequent to the petition for recusal and remanded the case.[36] In reaching this result the supreme court noted that every litigant is entitled to an impartial judge, and because the petition alleged partiality the judge was not competent to make a factual determination of his own impartiality. Thus, he should have transferred the matter to another judge and filed his own affidavit in reply to the motion or asked to testify in the case.[37]

The principle enunciated in *Ponder*, that if a motion's allegations are sufficient to require the judge to find facts of impartiality he or she should refer the motion to another judge for consideration, had become a standard part of the case law by the late 1970s.[38] In *North Carolina National Bank v. Gillespie*[39] a dispute arose between a bank and a used car dealer over demand notes executed by the used car dealer.[40] The defendant moved to recuse the judge, alleging bias in that: 1) there had been an unfriendly termination of attorney-client relations between the judge and the defendant's family; 2) the judge had prosecuted defendant in a criminal action; and 3) the judge had money in the plaintiff's bank and was friendly with the bank's employees.[41] The North Carolina Supreme Court held that the allegations required the judge to find facts related to bias,

29. *Id.* § 169.

30. *Id.* § 98. For an argument that the federal pecuniary interest standard may severely limit the pool of judges permitted to preside over a case in which one of the parties is a large corporation with many stockholders, see Levy, *Judicial Recusals*, 2 PACE L. REV. 35 (1982).

31. 46 AM. JUR. 2D *Judges* § 94 (1969).

32. *Id.*

33. 233 N.C. 699, 65 S.E.2d 356 (1951).

34. *Id.* at 701-02, 65 S.E.2d at 357-58.

35. *Id.* at 702, 65 S.E.2d at 358.

36. *Id.* at 707, 65 S.E.2d at 361.

37. *Id.* at 704, 65 S.E.2d at 359.

38. *See, e.g.*, North Carolina Nat'l Bank v. Gillespie, 291 N.C. 303, 311, 230 S.E.2d 375, 380 (1976); McClendon v. Clinard, 38 N.C. App. 353, 356, 247 S.E.2d 783, 785 (1978).

39. 291 N.C. 303, 230 S.E.2d 375 (1976).

40. *Id.* at 303-05, 230 S.E.2d at 376-77.

41. *Id.* at 310, 230 S.E.2d at 380.

and therefore required him to disqualify himself or refer the motion to another judge.[42]

In *McClendon v. Clinard*[43] plaintiff made a motion for recusal alleging bias.[44] The basis for this motion arose when plaintiff's attorney, having checked the calendar and having determined that his case would not be called for several hours, left the courtroom for lunch. The case, however, was called while the attorney was away, and the judge dismissed the action with prejudice.[45] Approximately one week later plaintiff's attorney filed a motion to set aside the judgment for excusable neglect. The papers filed with the motion revealed that the attorney had taken lunch with a venireman serving jury duty that week in district court.[46] A few days later the judge called the president of the local bar association into open court, informed him of the attorney's contact with the venireman, and requested an investigation of the matter.[47] The judge also gave a report to the newspaper regarding the incident.[48] Two weeks later plaintiff filed a motion requesting that the judge recuse himself from hearing plaintiff's motion to set aside the judgment. The motion alleged that the statement to the press indicated that the judge was prejudiced.[49] The judge held a hearing on the motion, and then denied both that motion and the motion to set aside the judgment.[50] The North Carolina Court of Appeals held that because the allegations were sufficient to require the judge to find facts of bias, he should have referred the motion to recuse to another judge for consideration.[51]

A second principle of North Carolina recusal law, that the appearance of justice is relevant to questions of recusal or disqualification, can also be traced to *Ponder*. In *Ponder* the court found the judge had a personal interest in the outcome of the case and hence was disqualified under the statute.[52] This would have resolved the issue, but the court continued at length on the importance of the appearance of justice. Two passages from the opinion demonstrate the emphasis the North Carolina Supreme Court placed on this principle. The first passage stated:

> "It is but the utterance of a legal platitude to say that it is of the utmost importance that every man should have a fair and impartial trial of his case, and that to secure this great boon two things are absolutely essential—an impartial jury, and an unbiased judge. But we go further and say that it is also important that every man should know that he has had a fair and impartial trial, or, at least, that he should have no

42. *Id.* at 311, 230 S.E.2d at 380.
43. 38 N.C. App. 353, 247 S.E.2d 783 (1978).
44. *Id.* at 355, 247 S.E.2d at 784.
45. *Id.* at 354, 247 S.E.2d at 784.
46. *Id.*
47. *Id.* at 355, 247 S.E.2d at 784.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 356, 247 S.E.2d at 785.
52. *Ponder*, 233 N.C. at 703, 65 S.E.2d at 359.

just ground for the suspicion that he has not had such a trial."[53] The second passage read: "Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge."[54]

This appearance-of-justice theme was further developed by the *McClendon* court. As support for the ruling that the judge should have disqualified himself or referred the matter to another judge, the court of appeals quoted approvingly from Canon 3(C)(1) of the Code of Judicial Conduct which states that a "judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned."[55] The court of appeals also suggested a test for determining whether a judge's impartiality might reasonably be questioned: whether a reasonable person, knowing all the circumstances, would have doubts about the judge's ability to rule impartially.[56]

Another case utilizing this appearance-of-prejudice test is *In re Dale*.[57] In *Dale* defendant made a motion to recuse, alleging that the wording of the allegations[58] leveled against him by the judge for failure to perfect an appeal for defendant's client in another proceeding, indicated that the judge had formed preconceptions of defendant's conduct before hearing any evidence.[59] The motion was denied.[60] On appeal the North Carolina Court of Appeals stated that the judge had not formed preconceptions as to defendant's conduct.[61] Rather, the court concluded that the wording "was an effort by Judge Snepp to fully advise respondent of the seriousness of the inquiry."[62] Despite its finding that the judge was not in fact prejudiced, the court did not affirm Judge Snepp's denial of the motion to recuse.[63] The proper course of action, according to the court of appeals, would have been for Judge Snepp to disqualify himself, and to refer the inquiry to another judge, because "our courts must not only do justice but they should give the appearance of doing justice."[64]

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53. *Id.* at 706, 65 S.E.2d at 361 (quoting Kentucky Journal Publishing Co. v. Gaines, 139 Ky. 747, 758, 110 S.W. 268, 272 (1908)).

54. *Id.* at 705-06, 65 S.E.2d at 360.

55. *McClendon*, 38 N.C. App. at 356, 247 S.E.2d at 785. For pertinent text of Canon 3, see *supra* note 7.

56. *McClendon*, 38 N.C. App. at 356, 247 S.E.2d at 785.

57. 37 N.C. App. 680, 247 S.E.2d 246 (1978). *Dale* is a disciplinary proceeding. A disciplinary proceeding is one in which an attorney is asked to respond to charges that he or she has violated an ethical mandate of his or her profession. The attorney may be cleared of all wrongdoing, reprimanded either privately or publicly, suspended, or disbarred.

58. The allegations stated:

> On 3 June 1976 you were appointed to represent the defendant in *State v. Kenneth Mathis*, 76 CR 1377 upon appeal from conviction of first degree rape. You have negligently failed to perfect the appeal or to seek appellate review by any other means, in violation of Disciplinary Rule 1-201(1)(5) and Disciplinary Rule 6-101(3) as contained in the Code of Professional Responsibility.

Id. at 681, 247 S.E.2d at 247.

59. *Id.* at 684-85, 247 S.E.2d at 249.

60. *Id.*

61. *Id.* at 684, 247 S.E.2d at 249.

62. *Id.*

63. *Id.* at 684-85, 247 S.E.2d at 249.

64. *Id.* at 685, 247 S.E.2d at 249.

The North Carolina Supreme Court recently reiterated this view in *State ex rel. Edmisten v. Tucker*.[65] In *Tucker* the constitutionality of the North Carolina Safe Roads Act was challenged.[66] The State argued that placing judges in a position of ruling for or against a position taken by the Attorney General gave the judges an interest in the proceedings.[67] The supreme court noted that under both statutory and case law, a judge must disqualify himself "when he has an interest in the outcome of the case before him or when he has any doubt as to his ability to preside impartially or whenever his impartiality can reasonably be questioned."[68]

A third principle evident from North Carolina case law on recusal is that a judge who has been exposed in his or her official capacity to testimony concerning an event is not disqualified from presiding over another proceeding in which the same or similar testimony is given. For example, in *State v. Duvall*[69] defendant moved for the judge's recusal, alleging that the judge was biased against him.[70] He attributed this bias to the fact the judge had presided over an earlier trial of a co-defendant in which testimony that incriminated Duvall was heard.[71] The court of appeals affirmed the denial of the motion to recuse.[72]

Likewise, a judge who has been exposed in his official capacity to a person is not disqualified from presiding over a subsequent proceeding in which that person is a litigant, unless there is substantial evidence to support allegations of interest or prejudice. For example, in *Perry v. Perry*,[73] a civil case for pendente lite child support, defendant father moved to recuse the judge because the judge had presided over a prior criminal proceeding in which defendant had been tried for failure to provide adequate support for his child.[74] Defendant alleged that the judge in the prior proceeding had made statements that indicated he had an opinion relevant to the present issue.[75] The trial judge denied any memory of the statement and denied the motion.[76] The court of appeals held that even if the judge had made the statement the judge should not have been required to disqualify himself because the record indicated that the hearings were conducted in a fair and impartial manner.[77]

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65. 312 N.C. 326, 323 S.E.2d 294 (1984).

66. *Id.* at 327, 323 S.E.2d at 297.

67. *Id.* at 342, 323 S.E.2d at 305.

68. *Id.* at 341, 323 S.E.2d at 305. The supreme court in *Tucker*, however, found that the State's reasoning was faulty and that recusal was unnecessary. *Id.* at 341-42, 323 S.E.2d at 305.

69. 50 N.C. App. 684, 275 S.E.2d 842, *rev'd on other grounds*, 304 N.C. 557, 284 S.E.2d 495 (1981).

70. *Id.* at 693, 275 S.E.2d at 850-51.

71. *Id.*

72. *Id.* at 694, 275 S.E.2d at 851.

73. 33 N.C. App. 139, 234 S.E.2d 449, *cert. denied*, 292 N.C. 730, 235 S.E.2d 784 (1977).

74. *Id.* at 144, 234 S.E.2d at 453.

75. *Id.* The judge allegedly had stated at the prior proceeding that anyone having the amount of income that defendant and his current wife had should have provided more support for the child. *Id.*

76. *Id.*

77. *Id.* at 144-45, 234 S.E.2d at 453.

Another case enunciating this third principle is *Love v. Pressley*,[78] which involved a landlord-tenant dispute. The landlord moved to recuse alleging bias on the part of the judge who had entered an order against the landlord in another case involving similar issues.[79] The court of appeals, upholding the judge's denial of the motion to recuse, stated: "This Court has held that the fact that a trial judge has repeatedly ruled against a party is not grounds for disqualification of that judge absent substantial evidence to support allegations of interest or prejudice."[80]

Further, a judge is not automatically disqualified because he has been exposed in his official capacity to both the litigant and testimony about the defendant. For example, in *State v. Vega*[81] the judge declared a mistrial[82] because of his concern that the emotional outburst heard by the jury members could prevent them from rendering a judgment based solely on the evidence.[83] The trial judge determined there was no reason why he should not preside over the retrial. The decision was affirmed by the court of appeals.[84]

Apparently, a judge's exposure to a particular person or event before the present legal proceeding does not give rise to an appearance of impropriety, because such an interpretation would completely invalidate the third principle that prior official exposure is not disqualifying. Public policy supports this interpretation. If prior exposure to a litigant or event was seen as giving rise to an appearance of impropriety, serious administrative difficulties could arise in finding a qualified judge to try a repeat offender or a defendant who had several codefendants being tried separately.

Three other guiding principles in recusal law are evident in the North Carolina recusal statute, which governs only criminal proceedings.[85] First, the stat-

78. 34 N.C. App. 503, 239 S.E.2d 574 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E.2d 843-44 (1978).

79. *Id.* at 506, 239 S.E.2d at 577.

80. *Id.*

81. 40 N.C. App. 326, 253 S.E.2d 94, *disc. rev. denied*, 297 N.C. 457, 256 S.E.2d 809, *cert. denied*, 444 U.S. 968 (1979).

82. For a discussion of the variety of views held by different jurisdictions on the propriety of rehearing by the original trial judge, see Annotation, *Disqualification of Original Trial Judge to Sit on Retrial After Reversal or Mistrial*, 60 A.L.R. 3d 176 (1974).

83. *Vega*, 40 N.C. App. at 330, 253 S.E.2d at 97.

84. *Id.* at 331, 253 S.E.2d at 97.

85. N.C. GEN. STAT. § 15A-1223 (1983 & Supp. 1985). The statute provides:

(a) A judge on his own motion may disqualify himself from presiding over a criminal trial or other criminal proceeding.

(b) A judge, on motion of the State or the defendant, must disqualify himself from presiding over a criminal trial or other criminal proceeding if he is:

(1) Prejudiced against the moving party or in favor of the adverse party; or

(2) [repealed by Act of June 29, 1984, ch. 1037, § 6, 1983 N.C. Sess. Laws 206, 206 (Extra Sess. 1984)].

(3) Closely related to the defendant by blood or marriage; or

(4) For any reason unable to perform the duties required of him in an impartial manner.

(c) A motion to disqualify must be in writing and must be accompanied by one or more affidavits setting forth facts relied upon to show the grounds for disqualification.

(d) A motion to disqualify a judge must be filed no less than five days before the time the

ute provides that a judge "may disqualify himself from presiding over a criminal trial or other criminal proceeding on his own motion."[86] Thus, it is not necessary for the judge's impartiality to be challenged by one of the parties for recusal to occur. Second, a judge is automatically disqualified if certain conditions listed in the statute are present. The conditions, which operate as automatic disqualifiers, include actual prejudice for or against one of the parties, a close blood or marriage relationship to the defendant, the appearance of the judge as a witness for or against one of the parties in the case, or any other reason preventing the judge from performing his or her duties in an impartial manner.[87] The third principle evident from the statute is that recusal motions must be made in writing, accompanied by affidavits detailing the alleged disqualifying facts and filed within specified time limits to be effective.[88]

Thus, the applicable statute and case law provide for a procedural rule governing recusals: if the State or defendant makes a timely, written motion accompanied by affidavits setting forth the alleged grounds of disqualification,[89] and these allegations are sufficient to necessitate a finding of facts as to bias, then the motion must be referred to another judge for consideration.[90] If, however, the allegations, even if true, are so insubstantial that the judge's impartiality is not drawn into question, or if the motion is not timely made in writing, then the challenged judge may rule on the recusal motion. The substantive rule provides that judges who know that grounds for disqualification exist may disqualify themselves.[91] A judge may also be recused on motion of the defendant or the State if he or she is actually prejudiced, related to defendant, will appear as a witness in the case,[92] or if a reasonable person would question the judge's impartiality in the case.[93]

Applying the principles of North Carolina's recusal law discussed above to a situation in which the defendant's recusal motion was based solely on the fact that, during the trial of a co-defendant, the judge had heard testimony incriminating the current defendant, it seems clear that this defendant could not compel recusal. In such a situation, the third case-law principle, that a judge's previous official exposure to a litigant or testimony concerning the event does not require disqualification, absent substantial evidence of bias or prejudice, would apply. If a judge were in fact prejudiced against a defendant by prior exposure, he or she would be under a duty to withdraw,[94] but recusal could not be compelled be-

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case is called for trial unless good cause is shown for failure to file within that time. Good cause includes the discovery of facts constituting grounds for disqualification less than five days before the case is called for trial.

(e) A judge must disqualify himself from presiding over a criminal trial if he is a witness for or against one of the parties in the case.

86. *Id.* § 15A-1223(a).
87. *Id.* § 15A-1223(b).
88. *Id.* § 15A-1223(c), (d).
89. *See supra* text accompanying note 88.
90. *See supra* text accompanying notes 33-51.
91. *See supra* text accompanying note 86.
92. *See supra* text accompanying note 87.
93. *See supra* text accompanying notes 52-68.
94. N.C. GEN. STAT. § 15A-1223(b)(1), (4) (1983 & Supp. 1985).

cause silent prejudice cannot be proved. Defendant's recusal motion in *Fie*, however, alleged more than the above hypothetical recusal motion for prior exposure. In *Fie* defendant alleged two separate grounds for recusal: actual prejudice and the appearance of prejudice.[95] It is not clear that either Judge Downs or the court of appeals tested Fie's motion under both of these tests.

Examining Judge Downs' ruling in *Fie*, it is difficult to ascertain exactly what theory he relied on in denying the motion to recuse. There is no explanation of the ruling, only the order that stated:

> In making a request of the District Attorney to have the grand jury consider charges against an individual the then presiding judge has not taken such direct action against such individual so as to warrant a recusal or disqualification of the said judge from presiding at the eventual trial of the said defendant for the same said charges, because the Court is required to instruct the then trial judge that the defendant is innocent until his guilt has been proven beyond a reasonable doubt and further, that the charges against the defendant is no evidence of guilt.[96]

The theory appears to be that because the jury, not the judge, will decide defendant's guilt, a judge should not be recused unless he or she takes direct action which is more serious than that taken against the defendant in *Fie*. Although the jury is the finder of fact in the case, and therefore would provide some protection from a prejudiced judge, an assumption that the jury verdict could not be tainted by the judge is naive. Even if the judge makes no decisions in the case, the judge's instructions to the jury, handling of the litigants, or even body language may influence the jurors' decisions.[97]

It is also difficult to tell what theory the appellate court relied on in affirming Judge Downs' denial of recusal. Two of the justices agreed with Judge Downs' conclusion that the letter did not constitute " 'such direct action against [defendant] so as to warrant a recusal.' "[98] The concurring judge's opinion indicated that he applied the third case-law principle, that a judge's prior exposure to a litigant or event is not disqualifying, absent substantial evidence of prejudice, stating:

> In my view, the burden is upon the party moving for disqualification to demonstrate objectively that grounds for disqualification actually exist. Such a showing must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially. Such bias is not shown by the mere fact that the judge has presided over other proceedings in which evidence tending to incriminate the present defendant was offered, ab-

95. For the text of defendant's motion to recuse in *Fie*, see *supra* note 13.

96. Record at 12, State v. Fie, 80 N.C. App. 577, 343 S.E.2d 248 (1986) (No. 8530SC1236) (order denying motion for recusal).

97. *See generally* Note, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89 (1985) (discussing the way judges' beliefs regarding a defendant's guilt or innocence may be verbally and non-verbally transmitted to the jury and the influence this transmission may have on jury verdicts).

98. *Fie*, 80 N.C. App. at 581, 343 S.E.2d at 252 (quoting Record at 12).

> sent evidence that the prior trial would have a prejudicial effect on the present case.[99]

The use of this test and the manner in which it was applied is fully supported by North Carolina case law in situations in which a motion to recuse is based on prior exposure only. In this limited situation, it would not even be necessary to apply the appearance-of-impropriety test because prior exposure will not be interpreted as giving rise to an appearance of impropriety.[100]

In *Fie*, if defendant's allegation had been that the judge was prejudiced because he had heard testimony which incriminated defendant, and defendant was unable to provide substantial evidence of prejudice, then the third case-law principle would operate to deny recusal.[101] Defendant in *Fie*, however, actually alleged that the judge's letter to the district attorney requesting the grand jury to consider indicting defendant constituted substantial evidence of bias.[102] Whether this constitutes substantial evidence of actual bias is questionable because the cases finding actual bias are rare. Actual bias was found in *Ponder* when the judge had actively campaigned for one of the parties in the election whose outcome was the subject of the litigation.[103] Actual bias was also found in *State v. Swinney*[104] in which the record revealed that the judge had imposed a "sentence for a cause not embraced within the indictment and the plea."[105]

The court of appeals has determined actual prejudice was not present in a variety of cases. For example, in *In re Custody of Cox*[106] the respondent alleged bias because on every discretionary ruling in the case the judge ruled against her.[107] The court of appeals concluded there was not substantial evidence to support respondent's allegations.[108] In *In re Paul*[109] respondent, an attorney charged with contempt of court for outbursts during the course of a trial in which he was acting as defense counsel,[110] moved to disqualify the judge from hearing the contempt charge.[111] The court of appeals affirmed the judge's failure to recuse, noting that when the record indicated a lack of personal reaction to respondent's conduct, there was not prejudice sufficient for recusal.[112]

Another case in which the evidence was deemed insufficient to substantiate bias is *Roper v. Thomas*.[113] In *Roper* a limited partner sued to recover his in-

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99. *Id.* at 584, 343 S.E.2d at 254 (Martin, J., concurring) (citations omitted).
100. *See supra* text accompanying notes 84-85.
101. *Duvall*, 50 N.C. App. at 93-94, 275 S.E.2d at 851.
102. Record, at 7-8, *Fie*. For text of motion to recuse, see *supra* note 13.
103. *Ponder*, 233 N.C. at 706-07, 65 S.E.2d at 361.
104. 271 N.C. 130, 155 S.E.2d 545 (1967).
105. *Id.* at 133, 155 S.E.2d at 548.
106. 24 N.C. App. 99, 210 S.E.2d 223 (1974), *cert. denied*, 286 N.C. 414, 211 S.E.2d 793 (1975).
107. *Id.* at 101, 210 S.E.2d at 224.
108. *Id.*
109. 28 N.C. App. 610, 222 S.E.2d 479, *disc. rev. denied*, 289 N.C. 614, 223 S.E.2d 767 (1976).
110. *Id.* at 611-12, 222 S.E.2d at 480.
111. *Id.* at 616, 222 S.E.2d at 483.
112. *Id.* at 617-18, 222 S.E.2d at 484.
113. 60 N.C. App. 64, 298 S.E.2d 424 (1982), *disc. rev. denied*, 308 N.C. 191, 302 S.E.2d 244 (1983).

vestment from the general partners.[114] The general partners made a motion to recuse alleging bias on the grounds that the judge, after hearing some of the testimony, called the attorneys into a settlement conference at which he stated that defendants were absolutely liable regardless of further evidence.[115] The motion was referred to another judge who concluded there were no grounds for recusal.[116] The court of appeals affirmed.[117]

In addition to the allegation of actual bias discussed above, Fie also alleged that allowing the judge, who had requested that the grand jury consider indicting defendant, to preside over the trial to determine his guilt created an appearance of impropriety.[118] Because Fie alleged an appearance of bias, the court should have applied the appearance test to Fie's motion to determine whether recusal was proper, rather than assuming, as the court did in pure prior exposure cases, that the appearance test would not be met.[119] This approach may explain how Judge Wells, in his dissent, reached the opinion that Judge Downs had used the wrong standard in disposing of defendant's motion.[120] The appropriate standard, according to Judge Wells, was "whether Judge Burroughs by actively seeking the indictment of these defendants [through the letter] had cast a reasonably founded doubt in the minds of defendants as to whether he could give them a fair and impartial trial."[121] Judge Wells cited *Ponder*,[122] which included language to this effect.[123] However, Judge Wells' view that recusal is proper under the appearance-of-impropriety test when the defendants are suspicious of the judge's impartiality differs from the current view in North Carolina, that recusal is proper under the appearance-of-impropriety test when a reasonable person would be suspicious of the judge's ability to rule impartially.[124]

Even though Judge Wells' view of when recusal is proper under the appearance-of-impropriety test differs from the current North Carolina view, the writing of the letter may be significant enough to cause a reasonable person, as well as defendants, to question the judge's impartiality and thus provide grounds for recusal under the current reasonable person test, as well as under Judge Wells' defendants'-suspicion test.

Only a few cases have directly considered whether the appearance-of-bias test has been met.[125] Several of those have determined that the test was met.

114. *Id.* at 65-66, 298 S.E.2d at 425.

115. *Id.* at 75-76, 298 S.E.2d at 431.

116. *Id.* at 76, 298 S.E.2d at 431.

117. *Id.*

118. For the text of defendant's motion to recuse in *Fie*, see *supra* note 13.

119. Neither of the opinions mentions the application of the appearance-of-impropriety test.

120. *Fie*, 80 N.C. App. at 588, 343 S.E.2d at 255 (Wells, J., dissenting).

121. *Id.*

122. *Id.*

123. *Ponder*, 233 N.C. at 706, 65 S.E.2d at 361; *see supra* text accompanying note 53.

124. See *supra* text accompanying note 56.

125. The cases considering this issue have considered it in two contexts: (1) whether the facts gave rise to an appearance of bias such that a recusal motion should have been referred to another judge, and (2) whether the facts gave rise to an appearance of bias such that the trial judge should have been disqualified from deciding the case. *See infra* notes 126-45 and accompanying text.

For example, in *In re Dale*[126] the respondent moved to recuse the judge on the grounds of bias. His allegation was based on the wording of the notice he had received from the judge, informing him that it had come to the judge's attention that probable cause existed for a hearing into Mr. Dale's fitness to practice law.[127] The notice stated:

> On 3 June 1976 you were appointed to represent the defendant in *State v. Kenneth Mathis*, 76 CR 1377 upon appeal from conviction of first degree rape. You have negligently failed to perfect the appeal or to seek appellate review by any other means, in violation of Disciplinary Rule 1-201(1)(5) and Disciplinary Rule 6-101(3) as contained in the Code of Professional Responsibility.[128]

The court of appeals determined that the judge was not actually biased, but that the wording of the notice was sufficient to cause a reasonable person to doubt the judge's ability to rule impartially.[129]

In *McClendon* plaintiff moved to recuse, alleging bias. Plaintiff alleged that, after reading plaintiff's motion to set aside an earlier default judgment revealing that the attorney had had improper contact with a venireman serving jury duty, the judge called the attorney's conduct to the attention of the newspaper.[130] The court of appeals held that a reasonable person would suspect lack of impartiality.

In *State v. Hill*[131] a criminal defendant moved to recuse the trial judge for bias, based on the judge's independent raising of defendant's bond, without reference to whether defendant would appear for trial.[132] The court of appeals again determined that a reasonable person would be suspicious of the judge's ability to preside over defendant's case in an impartial manner.[133]

Nevertheless, courts in other cases have found no appearance of bias. For

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126. 37 N.C. App. 680, 247 S.E.2d 246 (1978).

127. *Id.* at 681, 247 S.E.2d at 247.

128. *Id.*

129. *Id.* at 685, 247 S.E.2d at 249; *see also* Matter of Robinson, 37 N.C. App. 671, 247 S.E.2d 241 (1978) (holding that the wording of a notice of inquiry into fitness to practice law met the appearance-of-bias test). In *Robinson* the attorney received a notice that stated:

> On 2 March 1976 you were appointed by the Superior Court to represent the defendant in State v. Harvey Berry, 74CR9136, in connection with his appeal from a conviction of involuntary manslaughter. *You have negligently and willfully failed to perfect an appeal or to seek appellate review through other permissible means in violation of Disciplinary Rule 1-102(1)(5) and Disciplinary Rule 6-101(3) as set forth in the Code of Professional Responsibility.*

Robinson, 37 N.C. App. at 678, 247 S.E.2d at 245-46 (emphasis in original). The court of appeals noted that this language gave rise to an appearance of bias. The court suggested that the following language should have been used to avoid an appearance of bias:

> The records of this Court indicate that no action has been taken to perfect an appeal or otherwise seek appellate review. This inquiry is to hear evidence bearing upon why no action has been taken and to determine whether discipline should be imposed on you by this Court.

Id. at 679, 247 S.E.2d at 246.

130. *McClendon*, 38 N.C. App. at 354-55, 247 S.E.2d at 785.

131. 45 N.C. App. 136, 263 S.E.2d 14 (1980).

132. *Id.* at 139-41, 263 S.E.2d at 16-17.

133. *Id.* at 141, 263 S.E.2d at 17.

example, in *State v. Poole*[134] defendant orally moved to recuse the judge for bias.[135] Defendant's basis for the recusal motion was that the judge had informed defendant he would not rule favorably on defendant's request for substitute counsel. Defendant also alleged that the judge had made statements outside of his presence.[136] His reply to the judge's question as to what statements the judge had allegedly made was as follows:

> You made the statement the other day during a motion, I think, that you were told something about a knife incident, and you made a statement, something about you were not going to protect criminals in the dark. I haven't been to trial, and I think under due process I am not guilty as of now. I think that is enough.[137]

The supreme court concluded that the judge had not made any such remark and that defendant's accusation was a "hasty response" to the judge's refusal to rule favorably on defendant's substitute counsel request.[138] The court determined that a reasonable man would not have doubts about the judge's ability to rule impartially.[139]

The court of appeals has determined that a judge's action did not give the appearance of bias in two other cases.[140] In *Lowder v. All Star Mills, Inc. (Lowder I)*[141] appellants alleged that multiple actions by the judge gave the appearance of bias:

1. Permitting a layman to appear on behalf of the corporate defendants.
2. Appointing the same receivers for seven corporations.
3. Holding a hearing without notice to defendant where plaintiff's attorneys were appointed attorneys for the receivers.
4. Retaining jurisdiction after the judge rotated out of the district.
5. Making an erroneous ruling.
6. Obtaining documents, orders, and information other than in a judicial proceeding.
7. Expressing displeasure that the corporate defendants were seeking remedies under bankruptcy laws.
8. Having contact with the bankruptcy judge.[142]

The judge against whom these accusations were made referred the recusal motion to another judge for decision on whether recusal was required. In *Lowder v.*

134. 305 N.C. 308, 289 S.E.2d 335 (1982).
135. *Id.* at 320, 289 S.E.2d at 343.
136. *Id.*
137. *Id.*
138. *Id.* at 321, 289 S.E.2d at 343.
139. *Id.*
140. In one of these cases the court of appeals held that the appearance-of-prejudice test was not met, yet the opinion does not reveal what the defendant alleged other than that the judge was biased against both him and his attorney, nor does it explain why the court determined the test was not met. State v. Crabtree, 66 N.C. App. 662, 312 S.E.2d 219 (1984).
141. 60 N.C. App. 275, 300 S.E.2d 230, *modified on other grounds*, 309 N.C. 695, 309 S.E.2d 193 (1983).
142. *Id.* at 292-93, 300 S.E.2d at 240.

All Star Mills, Inc. (Lowder II)[143] the judge, after reviewing the facts of the trial record, concluded that recusal was not proper.[144] The court of appeals upheld this denial of recusal, stating that there was no evidence of bias or prejudice, and that a reasonable person knowing all the facts would not be suspicious of the trial judge's ability to rule impartially in the case.[145]

Comparing the facts of *Fie* with the facts of the cases discussed above it appears that *Fie* is more consistent with the cases in which the appearance test was deemed to be met, than those cases in which it was denied. For example, in *Dale* the judge, once information came to his attention indicating that respondent might have broken an ethical mandate, initiated the disciplinary process that would inquire into Dale's conduct.[146] The court determined that a reasonable person would doubt the judge's impartiality.[147] Likewise, the judge in *Fie*, once information that Fie might be guilty of a crime came to the judge's attention, initiated the process through which Fie's guilt would be determined.[148]

Fie is also similar to *Hill* in which the judge independently raised defendant's bond upon hearing testimony he considered incriminating to defendant.[149] The judge did not wait for the prosecutor to request the increase.[150] This action was determined to give the appearance of bias.[151] Likewise, in *Fie* the judge took over one of the prosecutor's roles when he initiated the indictment process.[152]

Fie can be distinguished from the cases that held that the appearance-of-bias test was not met. In *Fie* the judge's letter requesting the grand jury to consider an indictment[153] is a much more significant indication of bias than the behavior of the judge in *Poole*, who refused to grant defendant's request for substitute counsel prior to trial.[154] Furthermore, although multiple allegations of bias in *Lowder II* did not constitute an appearance of bias,[155] it does not mean the appearance test is a difficult one to meet. Rather, the *Lowder II* opinion and the multiple motions filed in the suit indicate that the corporate defendants were grasping at straws, and that the court of appeals recognized there was no basis to their allegations.[156]

Therefore, the propriety of recusal in this case depends on which rule the court applies. If defendant's situation in *Fie* is classified as falling within the

143. 60 N.C. App. 699, 300 S.E.2d 241 (1983).
144. *Id.* at 702, 300 S.E.2d at 243.
145. *Id.* at 702-03, 300 S.E.2d 243-44.
146. *Dale*, 37 N.C. App. at 681, 247 S.E.2d at 247.
147. *Id.* at 685, 247 S.E.2d at 249.
148. *Fie*, 80 N.C. App. at 581, 343 S.E.2d at 252.
149. *Hill*, 45 N.C. App. at 139, 263 S.E.2d at 16.
150. *Id.*
151. *Id.* at 141, 263 S.E.2d at 17.
152. *See Fie*, 80 N.C. App. at 581, 343 S.E.2d at 252.
153. *Id.*
154. *Poole*, 305 N.C. at 321, 289 S.E.2d at 343. Note also that part of defendant's motion for recusal was based on alleged remarks the judge made out of counsel's presence. *Id.*
155. *Lowder II*, 60 N.C. App. at 702-03, 300 S.E.2d at 243.
156. *See id.*

third case-law principle, that prior exposure is not disqualifying, then defendant's recusal motion should be denied. Likewise, case law indicates that Fie's evidence is probably not sufficient to meet the actual prejudice test. However, if the court applies the appearance-of-bias test, rather than assuming it would not be met, then recusal is proper. Faced with a conflict between these two tests, the court should rely on the appearance test. It always operates in situations when actual bias or other disqualifying factors cannot be proved, yet the situation appears questionable. *Fie* is such a situation. The appearance test safeguards the public's confidence in the integrity of the legal system. The public's faith in the fairness of the legal system cannot be maintained if the application of a rule allows a single individual to make an official inquiry into the defendant's conduct and then preside over the trial that determines the defendant's fate. The North Carolina Supreme Court should make it clear that when the appearance-of-bias test and prior-exposure test conflict, that the appearance-of-bias test prevails. Therefore, Fie's recusal motion should have been granted.

LESLEE DAUGHERTY

ADDENDUM

On September 3, 1987 the North Carolina Supreme Court ordered a new trial for defendant. State v. Fie, 359 S.E.2d 774 (1987). In doing so the North Carolina Supreme Court recognized that North Carolina case law supports the view that a party moving for disqualification must demonstrate objectively that grounds for disqualification exist. The court further noted that Judge Burroughs would not be disqualified under North Carolina General Statutes section 15A-1223. However, the court ruled that the statute does not provide the exclusive grounds for disqualification. Rather, the principle enunciated in *Ponder* that a judge must give the appearance of doing justice could also be the basis for recusal. In addition, the court determined that North Carolina General Statutes section 5A-15, which governs plenary proceedings for criminal contempt, imposes a requirement that another judge issue the contempt order if the acts upon which the charge is based so involve the judge that his objectivity might reasonably be questioned. The court noted that "[t]he standard for a criminal trial should be as high as for a criminal contempt proceeding."