***[Please note: This is a memorandum by a law student intern. It is intended to jump-start your own research. We have not Shepardized the cases or determined that the student’s analysis of the cases or other sources is correct.]***

**Memorandum**

To: CAFL Appellate Panel Support Unit

From: [Intern]

Re: Judicial Impartiality/Bias – Judge’s Personal Conflict of Interest

Date: November 4, 2015

**Facts**

You are seated at counsel table when the judge comes in, eyes the parties, and immediately calls counsel for a lobby conference. The judge alerts counsel that she is a former classmate of the DCF supervisor, a party currently seated in the courtroom, and that they get together for social gatherings “every month or so.” The judge states that she does not feel this prior relationship will in any way bias her view of the proceedings and was only alerting counsel as a courtesy. You feel otherwise.

**Question Presented**

When encountering a judge with a potential conflict of interest, what kind of discretion does the judge have in deciding whether or not to recuse his or herself? What is the standard by which a judge must abide? And when *must* a judge recuse themselves? Put simply, if counsel believes there is a potential conflict of interest, counsel should move for the judge’s recusal, recognizing the difficult threshold where judges must first consider both their subjective and objective biases, and also the circumstances in which the judge must recuse themselves versus when they have discretion.

**Analysis**

**Judicial Discretion to Recuse**

The decision to withdraw from a case at any stage of the proceeding is generally within the judge’s sound discretion. *Commonwealth v. Coyne*, 372 Mass. 599, 602 (1977). Under S.J.C. Rule 3:09, Canon (C)(1), a judge “should disqualify himself in a proceeding in which his impartiality might reasonably be questioned.” However, “[n]ot every contention of bias or partiality is entitled to be honored by a judge, or a hearing officer.” *Police Comm’r of Boston v. Municipal Court of the W. Roxbury Dist.*, 368 Mass. 501, 508 (1975). For example, if a judge had previously participated in a Care and Protection proceeding of the same parent, s/he is not required to recuse him or herself from a proceeding involving a petition to dispense with consent for adoption. *Adoption of Gabrielle*, 39 Mass. App. Ct. 484, 485-87 (1995).

**The Subjective and Objective Inquiries**

In evaluating a Motion to Recuse, what must a judge consider in making his/her decision? “It is not enough that [judges] know [themselves] to be fair and impartial[. Judges must] appear to be so as well.” *In re Brown*, 427 Mass. 146, 149 (1998).

The S.J.C. has fashioned a two-pronged analysis for a trial judge when faced with a Motion to Recuse. The judge must “consult first his own emotions and conscience.” *Haddad v. Gonzalez*, 410 Mass. 855, 862 (1991) (quoting *Lena v. Commonwealth*, 369 Mass. 571, 575 (1976)). And, “[i]f he pass[es] the internal test of freedom from disabling prejudice, he must next attempt an objective appraisal of whether this [is] a proceeding in which his impartiality might reasonably be questioned.” *Lena*, 369 Mass. at 575.

Put plainly, the first part of the test is a subjective appraisal of the judge’s ability to be impartial in the case, while the second part of the test involves an objective assessment of whether there would be any appearance of bias if the judge hears the case.

**When Judges Must Recuse Themselves**

The Supreme Court of the United States has reasoned that when the integrity of the judicial system is at stake, they must “enforce society’s legitimate expectation that judges maintain, in fact and appearance, the conviction and discipline to resolve those disputes with detachment and impartiality.” *Litecky v. United States*, 510 U.S. 540, 564 (1994) (Kennedy, J., concurring, with Blackmun, Stevens, and Souter, JJ.). So important is the appearance of fairness that it may require a judge to disqualify himself even though he has no actual bias or prejudice and would in fact do “his very best to weigh the scales of justice equally.” *In re Murchinson*, 349 U.S. 133, 136 (1955). The standard by which disqualification is to be determined is “whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge’s impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion . . . but rather in the mind of the reasonable man.” *Commonwealth v. Zine*, 52 Mass. App. Ct. 130, 130 n.1 (2001).

Recusal is a matter that rests in the first instance in the judge’s discretion. *Coyne*, 372 Mass. at 602. Bias requiring disqualification must ordinarily arise from an extrajudicial source. Upon an affirmative answer to either the “internal test” or the “appearance test”, the judge must grant the recusal motion regardless of such consequences as trial delay, which are immaterial. S.J.C. Rule 3:09, Canon 3(E)(1) provides, in part, that “[a] judge *shall* disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” (emphasis supplied).

Possible recuse-able reasons include, but are certainly not limited to, if a judge has a personal bias or prejudice concerning a party or a party’s lawyer, or if the judge knows or reasonably should know that s/he has a relationship interest with a party to the proceeding where the party could be substantially affected by the proceeding’s outcome. *See* S.J.C. Rule 3:09, Canon 3(E)(1)(a), (g). The latter instance includes not only the judge, but also any member of his or her family residing in the same household, or the judge’s spouse or child regardless of where they are residing at the time. *See id*. Further, a judge shall recuse him/herself if their spouse or domestic partner, or a person within the third degree of relationship to the judge, judge’s spouse, or judge’s domestic partner, or the spouse or domestic partner of such a person, has any more than a de minimus interest that could be substantially affected by the outcome of the proceeding. *See* S.J.C. Rule 3:09, Canon 3(E)(1)(h). It is also important to note that a relationship interest may include a non-financial interest, which is more likely to be the case in Care and Protection proceedings where a judge may have an extrajudicial relationship with a person or entity that that person represents.

In our set of facts, there is an argument to be made regarding the judge’s extrajudicial social relationship with the DCF supervisor. Courts have noted, “the alleged bias and prejudice to be disqualifying must rise from an extrajudicial source and not from something learned from participation in the case or from a hearing in a related proceeding.” *Gabrielle*,39 Mass. App. Ct. at 486. The fact that a judge knows the parties from an earlier case is of no consequence. *See Demoulas v. Demoulas Super Mkts.*, 424 Mass. 501, 525 (1997) (“Not subject to deprecatory characterization as ‘bias’ or ‘prejudice’ are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.”). Additionally, “a judge’s mere acquaintance with a party or witness is not sufficient to call into question that judge’s’ impartiality.” *In re Cookie*, 160 B.R. 701, 706 (Bankr. D.Conn. 1993).

**Recusal is Routinely Denied When Based on Mere Social Acquaintances**

If a Motion to Recuse is based on the mere fact that the judge has a social acquaintance with an individual connected to the litigation, it is likely to be denied. *See generally Parrish v. Bd. of Comm'rs of the Alabama State Bar*, 524 F.2d 98, 104 (5th Cir. 1975) (holding acquaintance with defendants, witnesses and defense counsel did not require judge’s recusal), cert. denied, 425 U.S. 944 (1976); *TV Commc’ns. Network, Inc. v. ESPN, Inc.*, 767 F. Supp. 1077, 1079-80 (D. Colo. 1991) (holding mere allegation of social relationship between judge and one owning an interest in a party is not sufficient to require disqualification); *United States v. Kehlbeck*, 766 F. Supp. 707 (S.D. Ind. 1990) (recognizing judge socially acquainted with defendant did not require disqualification because they had merely exchanged greetings while waiting for a table at a restaurant); *Miller Indus. Inc. v. Caterpillar Tractor Co.*, 516 F. Supp. 84, 87 (S.D. Ala. 1980) (holding judge who had pooled investments with former law partners need not recuse himself from case where former law partners’ law firm served as plaintiff’s counsel); *United States v. Conforte*, 457 F. Supp. 641, 646, 659 (D. Nev. 1978) (holding disqualification not required despite judge and movant had met and talked on some 28 social occasions), aff’d in relevant part, 624 F.2d 869 (9th Cir.), cert. denied, 449 U.S. 1012 (1980); *Baker v. Detroit*, 458 F. Supp. 374, 375 (E.D. Mich. 1978) (holding friendship with Mayor, who was nominal party to lawsuit, did not require judge’s recusal); *Hunt v. Mobil Oil Corp*., 557 F. Supp. 368, 377 (S.D.N.Y.), aff’d 742 F.2d 1438 (2d Cir. 1983) (holding judge’s friendship with plaintiffs’ former counsel, who had a falling out with plaintiffs, did not prejudice judge against plaintiffs).

Motions to Recuse are routinely denied when the judge’s prior social relationship with a person connected to the litigation has ended years prior to the commencement of the case at hand. *See U.S. v. Lovaglia*, 954 F.2d 811, 817 (2d Cir. 1992) (finding no abuse of discretion where judge had a prior relationship with the victim that ended prior to case and judge lacked personal knowledge of the facts of the case); *In re Allied Signal, Inc*., 891 F.2d 974, 976 (1st Cir. 1989) (recognizing series of social and business relationships including loan to judge from plaintiff’s counsel did not require recusal where relationships had terminated more than eight years earlier).

When denying Motions to Recuse, courts also note that while they may have a current social acquaintance relationship with an individual connected to the litigation, they had not been guests in each other’s homes. *See, e.g., United States v. Dandy*, 998 F.2d 1344, 1349-50 (6th Cir. 1993) (holding judge’s social acquaintance with owners and president of allegedly defrauded company did not require judge's recusal from criminal prosecution due to judge not seeing acquaintance in over two years and neither had ever been to the other’s home); *In re Cooke*, 160 B.R. at 705-06 (judge declining to disqualify himself after movant claimed she and the debtor (her husband) had a social relationship with the judge and his wife, and that the debtor’s counsel was a former law clerk for the judge. The judge considered him and his wife, at most, casual social acquaintances with the parties who have never visited each other’s home, and the debtor’s counsel’s clerkship ended a year prior to the case being heard); *Clay v. Doherty*, 608 F. Supp. 295, 300 (N.D. Ill. 1985) (judge’s acquaintance with witness, consisting of sporadic social encounters and where neither judge nor witness had been a guest in the other's home, did not require recusal).

**Recusal is Routinely Denied When Based on Professional Relationships**

A Motion to Recuse solely based on a judge’s current or prior professional relationship with an individual connected to the litigation, without an outright showing of potential bias, is likely to be denied. *See In re Allied-Signal, Inc.*,891 F.2d at 970 (reasoning that two of the presiding judge’s law clerks having brothers in law firms that represented plaintiffs did not require recusal, especially due it being unlikely a reasonable observer would have questioned the judge’s impartiality due to the massive nature of the litigation); *In re Wolverine Proctor & Schwartz, LLC*, 397 B.R. 179, 183 (Bankr. D. Mass. 2008) (holding that movant failed to meet burden establishing the court’s impartiality as co-chair of a committee with an attorney on the case because several attorneys and judge’s volunteered for said program and the program was rooted in the law); *Smith v. Pepsico, Inc*., 434 F. Supp. 524, 525-26 (S.D. Fla. 1977) (judge refused to recuse from case in which former law clerk served as plaintiff's attorney); *Commonwealth v. Daye*, 435 Mass. 463, 469-70 (2001) (holding judge’s previous work in DA’s office alongside prosecutor on the case and prior initiation of unrelated charges from five years ago against the defendant, did not require recusal); *Zine*, 52 Mass. App. Ct. at 133-34 (reasoning that defendant was charged with assaulting a justice of the Brockton District Court during a proceeding appearing before the alleged victim’s colleague and supervisor did not require recusal); *Commonwealth v. Gogan*, 389 Mass. 255, 258-60 (1983) (holding judge did not err in failing to disqualify himself despite previously representing a party in a civil action against the defendant’s sister, and recently representing one of the Commonwealth’s principal witnesses).

**Recusal Has Been Warranted When Judge Connected Litigiously With a Party**

If there is a link between the judge and a party, where the judge was either an opposing party in prior proceedings, or would directly (or is a member of an organization that would directly) be affected by the ongoing litigation, the motion to should be allowed. *See* *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 850 (1988) (affirming recusal where judge’s position as a board member of the entity seeking to purchase the parcel of land in dispute created appearance of impropriety.); *Commonwealth v. Morgan RV Resorts, LLC*, 84 Mass. App. Ct. 1, 10-14 (2013) (finding judge should have recused herself from hearing cases involving her former law firm whom she sued four years prior for unpaid compensation; no actual bias found, but an objective appraisal of her impartiality warranted recusal).

However, recusal has been denied when a party initiates outside proceedings against the judge after the principal case has already commenced. *See Commonwealth v. Leventhal*, 364 Mass. 718, 721 (1974) (holding party cannot disqualify a judge by bringing an action against him after the principal proceeding has commenced; noting, however, that a lawsuit *pending* between a judge and a party may be a good cause for recusal).

**Appellate Review: Abuse of Discretion**

The decision to withdraw from a case at any stage of the proceeding is within the judge’s sound discretion. *Coyne*, 372 Mass. at 602. To establish that the judge abused his discretion, a defendant ordinarily must show that the judge demonstrated a bias or prejudice arising from an extrajudicial source, and not from something learned from participation in the case. *Commonwealth v. Adkinson*, 442 Mass. 410, 415 (2004).

**Argument for Per Se Reversal**

There is an additional argument to be made that judicial bias is a structural trial defect mandating per se reversal. *See* *Weiss v. United States*, 510 U.S. 163, 178 (1994) (“A necessary component of a fair trial is an impartial judge.”); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (holding judge’s participation where “direct, personal, substantial, and pecuniary” is due process violation); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 & n.2 (1980) (noting that “justice must satisfy the appearance of justice.”); *Ward v. Monroeville*, 409 U.S. 57, 93 (1972) (“it certainly violates the Fourteenth Amendment, and deprives a defendant . . . of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest[.]”); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)(same); *Bracy v. Schomig*, 286 F.3d 406, 414 (7th Cir. 2002) (en banc) (“Our analysis is informed by the principle that there is no harmless error analysis relevant to the issue of judicial bias.”); *see also Commonwealth v. Gilday*, 367 Mass. 474, 499 n.3 (1975) (“We are aware also that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.”). To be sure, all that is required is the possibility or appearance of bias, rather than actual bias. *In re Murchison*, 349 Mass. 133, 136 (1955). And no judge is permitted to try cases where that judge has an interest in the outcome. *Bracy*, 286 F.3d at 410.

**Conclusion**

Counsel should move for the judge’s recusal during trial, recognizing the difficult burden, but building the record to display both the judge’s subjective and objective bias, based on extrajudicial sources.