

WHAT EVERY JUDGE SHOULD KNOW ABOUT THE
APPEARANCE OF IMPARTIALITY

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“[S]uch a delightful surprise” was Justice Ruth Bader Ginsburg’s 2009 reaction to Chief Justice William H. Rehnquist’s abrupt change of view in a 2003 gender discrimination case.¹ Why would he change his mind after years of disfavoring women’s rights? “Justice Ginsburg said the Chief Justice’s ‘life experience’ had played a part in the shift.”² His recently divorced daughter’s demanding job led him to “denounc[e] ‘stereotypes about women’s domestic roles.’”³

A surprise perhaps, but should the Chief Justice have recused himself because his daughter’s situation affected his vote? A judge’s “life experiences” are one reason that his or her disqualification may be appropriate, because his or her “impartiality might reasonably be questioned”⁴ That phrase is the linchpin for judicial disqualification in every state, and is based on the American Bar Association’s Code of Judicial Conduct (“CJC”).

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¹ Adam Liptak, *Another Factor Said to Sway Judges to Rule for Women’s Rights: A Daughter*, N.Y. TIMES (June 16, 2014), <http://www.nytimes.com/2014/06/17/us/judges-with-daughters-more-often-rule-in-favor-of-womens-rights.html>.

² *Id.*

³ *Id.* See also the *Nevada Department of Human Resources v. Hibbs* case, in which the Court held that the Family and Medical Leave Act of 1993 “aims to protect the right to be free from gender-based discrimination in the workplace.” *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003). Upholding a plaintiff’s right to “sue a State for money damages in federal court for violat[ing]” the act, Chief Justice Rehnquist declared:

[Gender s]tereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman’s domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

Id. at 736.

⁴ MODEL CODE OF JUDICIAL CONDUCT r. 2.11 (AM. BAR ASS’N 2011); see Liptak, *supra* note 1.

All states include within their code of judicial conduct a directive for judges to follow regarding disqualification when “his [or her] impartiality might reasonably be questioned.”⁵ The CJC has specific examples presuming that the judge’s impartiality “might reasonably be questioned.”⁶ These rules of presumed or *actual* bias relate to the judge’s personal bias, a close family member as a party, counsel or witness in the case, or a family member in the judge’s household with an economic or other interest in the outcome of the proceeding.⁷ When specific rules of presumed or actual bias do not apply because the facts do not fit the ethical standard, the judge or a moving party still may rely upon the above standard based on *apparent* bias or the appearance of partiality, even though no actual bias exists.⁸ The case law frequently cites the United States Supreme Court statement that the appearance of impartiality is as important as actual impartiality.⁹

Structurally, the “appearance of partiality” standard functions as a residuary clause for judges to apply when the specific examples of presumed bias do not apply. For example, CJC provisions about presumed bias preclude a judge from presiding in a case when the judge’s child or spouse is a party or counsel.¹⁰

A judge should disqualify him or herself, prior to or pursuant to a motion to recuse: 1) when he or she doubts his or her ability to preside impartially; or 2) when a person of ordinary prudence in the judge’s position, knowing all the facts known to the judge, would find a reasonable basis for questioning his or her impartiality.¹¹ The latter standard for assessing the need for the judge’s disqualification is more demanding because:

The disqualification decision must reflect *not only* the need to secure public confidence through proceedings that appear impartial, *but also* the need to prevent parties from too easily obtaining the disqualification of a judge, thereby

⁵ AMERICAN BAR ASS’N, REPORT OF THE JUDICIAL DISQUALIFICATION PROJECT: DRAFT 90–92 (2008).

⁶ MODEL CODE OF JUDICIAL CONDUCT r. 2.11 (2011).

⁷ *See id.*

⁸ A court is to apply the “might reasonably be questioned” phrase when presumptive standards are inapplicable. *See id.* cmt. 1.

⁹ *See, e.g.,* Offutt v. United States, 348 U.S. 11, 14 (1954) (“[J]ustice must satisfy the appearance of justice.”); People *ex rel.* A.G., 262 P.3d 646, 650 (Colo. 2011) (“A judge who is disqualified based on an appearance of impropriety may be able to act impartially, but the judge is disqualified nonetheless because a reasonable observer might have doubts about the judge’s impartiality. This broad standard is intended to protect public confidence in the judiciary rather than to protect the individual rights of litigants.” (citation omitted)).

¹⁰ *See* MODEL CODE OF JUDICIAL CONDUCT r. 2.11 (2011).

¹¹ *See* 28 U.S.C. § 455(a) (2014).

2015/2016]

What Every Judge Should Know

1581

potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.¹²

In either instance, when the trial judge denies a motion to disqualify, the appellate standard of review is whether the trial judge's ruling constituted an abuse of discretion.¹³

This article explores the "appearance of partiality" principle. Part I of the article examines CJC standards relating to the appearance of partiality and the accompanying CJC commentary for all state CJC provisions. Part II examines the common law concepts of a judge's duty to sit and the rule of necessity, both of which can affect the judge's ability and willingness to preside when challenged on ethical grounds. Part III briefly describes the United States Supreme Court cases that interpret and apply the appearance of partiality concept, and continue to explore due process violations for the appearance of partiality.

Part IV looks at violations of other CJC rules that may still lead to judicial disqualification for the appearance of partiality, e.g., ex parte communications, family influences, campaign contributions, and public comments by the judge. Part V describes how judicial decisions sometimes confuse the appearance of partiality with constitutional principles, especially the effective assistance of counsel and issuance of warrants in criminal cases. Part VI discusses judicial decisions applying the "might reasonably be questioned" standard from the past five years. In these cases, a party challenges whether the judge ought to preside in a current case because of his or her current associations, his or her past relationships and experiences, and his or her presiding over related past cases.

I. THE "MIGHT REASONABLY BE QUESTIONED" STANDARD

A. *Background*

The American Bar Association ("ABA") has endorsed four sets of

¹² *In re Allied-Signal, Inc.*, 891 F.2d 967, 970 (1st Cir. 1989) (citation omitted).

¹³ *See, e.g.*, *Phillips v. State*, 271 P.3d 457, 459 (Alaska Ct. App. 2012); *Mo. Dep't of Soc. Servs. v. B.T.W.*, 422 S.W.3d 381, 390 (Mo. Ct. App. 2013); *Lee v. Tenafly Assocs., LLC*, No. A-6180-11T2, 2014 N.J. Super. Unpub. LEXIS 545, at *6 (N.J. Super. Ct. App. Div. Mar. 14, 2014); *Datz v. Dosch*, 2014 ND 102, ¶ 16, 846 N.W.2d 724, 730; *Commonwealth v. Kearney*, 92 A.3d 51, 60–61 (Pa. Super. Ct. 2014); *State v. Madden*, No. M2012-02473-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 208, at *15 (Tenn. Crim. App. Mar. 11, 2014); *Duffey v. State*, 428 S.W.3d 319, 324 (Tex. App. 2014); *State v. Wiggin*, No. 69120-1-I, 2014 Wash. App. LEXIS 535, at *7 (Wash. Ct. App. Mar. 10, 2014).

ethical standards for judges since 1924.¹⁴ Initially, the ABA endorsed more than thirty general canons for judges to consider in assessing their own conduct as judges.¹⁵ Two of the 1924 Canons addressed disqualification—when a near relative is a party and when the judge’s personal interests are involved.¹⁶ Nearly fifty years later, the ABA in 1972 recognized the 1924 Canons’ limited scope and drafted a Code of Judicial Conduct that attempted to remedy the Canons’ language deficiencies and address the myriad issues that the Canons overlooked.¹⁷

B. CJC Black-Letter Standards

A cornerstone of the ABA Code is determining when it is appropriate for a judge to disqualify him or herself from presiding

¹⁴ See MODEL CODE OF JUDICIAL CONDUCT (2011); MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS’N 2007); MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS’N 1990); MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS’N 1972). Chief Justice William Howard Taft chaired the ABA Committee on Judicial Ethics that produced the 1924 Canons, “intended to be a ‘guide and reminder to the judiciary.’” MODEL CODE OF JUDICIAL CONDUCT Preface (2007). The Canons “included both generalized, hortatory admonitions and specific rules of proscribed conduct.” *Id.* While they “were not intended to be a basis for disciplinary action,” many states gave them “the force of law” along with “sanctions for violations.” *Id.* Over time, the Canons were criticized as engaging in “‘moral posturing’ that was more ‘hortatory than helpful in providing firm guidance for the solution of difficult questions[.]’” *Id.*

The first disqualification *statute* in the United States was the Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278–79, which was amended by the Act of March 3, 1821, ch. 51, 3 Stat. 643. The statute was further amended by the Act of March 3, 1911, which provided in pertinent part:

Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, . . . or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court . . .

Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1087, 1090 (1911) (current version at 28 U.S.C. § 455 (2014)). The 1911 statute was amended by the Act of June 25, 1948. See Act of June 25, 1948, ch. 646, § 455, 62 Stat. 869, 908 (1948) (current version at 28 U.S.C. § 455 (2014)). Between 1948 and 1974, the federal statute provided no guidance on the question of how to determine the substantiality of the judge’s interest in a party. The 1948 statute provided:

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest . . . or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

Id.

¹⁵ See CANONS OF JUDICIAL ETHICS (AM. BAR ASS’N 1924).

¹⁶ See *id.* Canons 13, 29; see also E. WAYNE THODE, REPORTER’S NOTES TO CODE OF JUDICIAL CONDUCT 60 (AM. BAR ASS’N 1973) (“Canon 13 states that a judge ‘should not act in a controversy where a near relative is a party’, and Canon 29 provides that a judge ‘should abstain from performing [or taking part in] any judicial act [in which] . . . his personal interests are involved.’”). No definition of a “near relative” accompanied Canon 13, and no definition of “interest” was included in Canon 29.

¹⁷ See MODEL CODE OF JUDICIAL CONDUCT Preface (1972).

further in a proceeding. Whether labeled as Canon 3C(1) (1972), Canon 3E(1) (1990), or Rule 2.11(A) (2007), the black-letter disqualifying principle has remained almost constant:¹⁸ “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to the following circumstances”¹⁹ More than forty years later, the ABA’s 1972 general principle for judicial disqualification endures despite its intrinsic vagueness—avoiding substantive amendments and surviving a 2007 format makeover as well as judicial and academic criticism.²⁰

The term “impartiality” was first defined by the 1990 CJC in its terminology section, as the “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.”²¹ A definition so broad in scope fails to provide a precise formula that is either self-executing or simple to apply.²² Therefore, a case-by-case approach by both challenged and reviewing judges is necessary to decide whether a judge’s impartiality might reasonably be questioned, applying a less-than-

¹⁸ In 1972, 1990, and 2007, the ABA’s House of Delegates adopted increasingly clearer and more demanding standards of judicial conduct. “The 1972 Code was designed to be enforceable and was intended to preserve the integrity and independence of the judiciary.” MODEL CODE OF JUDICIAL CONDUCT Preface (2007). The 1972 Code stated the goal that: “A judge *should* disqualify himself” MODEL CODE OF JUDICIAL CONDUCT Canon 3(C)(1) (1972) (emphasis added). The word “should” is still used in Alabama, Louisiana, New Jersey, and North Carolina. See ALA. CANONS OF JUDICIAL ETHICS Canon 3(C)(1) (1976); LA. CODE OF JUDICIAL CONDUCT Canon 3(C) (1976); N. J. CODE OF JUDICIAL CONDUCT Canon 3(C)(1) (1994); N.C. CODE OF JUDICIAL CONDUCT Canon 3(C)(1) (2006). Mississippi kept the word “should” while adopting most of the 1990 CJC. See MISS. CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (2002). Even while adopting the 2007 CJC, Delaware retained the 1972 precatory standard of “should.” See DEL. CODE OF JUDICIAL CONDUCT r. 2.11(A) (2008). The 1990 and 2007 Codes require that a “judge *shall* disqualify himself or herself.” MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A) (2007) (emphasis added); MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (1990) (emphasis added). Both Oregon and Texas have adopted this “shall” language. OR. CODE OF JUDICIAL CONDUCT r. 3.10(A) (2013); TEX. CODE OF JUDICIAL CONDUCT Canon 3(B)(1) (2002). Maine added to the diversity of language by substituting “may” for “shall” in its 1990 CJC adoption. See ME. CODE OF JUDICIAL CONDUCT r. 2.11(A) (2015).

¹⁹ MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A) (2007). Specific examples of presumed bias follow the general statement calling for judicial recusal. See *id.* r. 2.11(A)(1)–(6) (2007).

²⁰ See, e.g., Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably be Questioned: Moving Beyond a Failed Standard*, 56 ARIZ. L. REV. 411, 438 (2014). While critical evaluation of current and longstanding standards has value, judges are unlikely to apply normative approaches.

²¹ MODEL CODE OF JUDICIAL CONDUCT Terminology (AM. BAR ASS’N 1990).

²² “The mere fact that a party declares a judge partial does not in itself generate a reasonable question as to the judge’s impartiality. . . . Likewise, the fact that a judge avows he is impartial does not in itself put his impartiality beyond reasonable question.” *State v. Burrell*, 743 N.W.2d 596, 601–02 (Minn. 2008).

predictable standard.

Beginning in 1972, as the ABA presented each “new and improved” CJC, the states adopted them faster than corresponding ethical, substantive, or procedural standards.²³ Moreover, states have extended the identical disqualification standard to other participants in the judiciary²⁴ as well as to officials in a variety of executive branch positions.²⁵

²³ As of July 1, 2014, twenty-six states had ratified the 2007 version of the ABA Code of Judicial Conduct. See AM. BAR ASS'N CTR. PROF'L RESPONSIBILITY, *Charts Comparing Individual State Judicial Conduct Rules to ABA Model Code of Judicial Conduct*, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/app_i.authcheckdam.pdf. California, Michigan, Texas and Wisconsin use a different method of formatting than the one recommended by the ABA. California specifies three general grounds for disqualification: “[First,] her recusal would further the interests of justice[;] . . . [second,] there is a substantial doubt as to . . . her capacity to be impartial[;] . . . [and third a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.” CAL. CIV. PROC. CODE § 170.1(6)(A) (2010). Michigan does not use the “might reasonably be questioned” standard instead choosing to rely on the Canon 2, “Appearance of Propriety,” as a source for judicial disqualification. MICH. S. CT. R. 2.003(B) (1995). Texas uses the “might reasonably be questioned” standard, albeit in a court rule that does not include other subjects covered by the CJC. TEX. R. CIV. P. 18b(b)(1) (2011). Wisconsin’s SCR 60.04(4) uses the following standard: “when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge’s ability to be impartial” WISC. CT. R. § 60.04(4) (1997).

²⁴ Several states statutorily use the “might reasonably be questioned” standard to govern the participation of other judicial branch personnel, as well as judicial conduct commission members. States such as Colorado, Georgia, Indiana, New Jersey, Oregon, and West Virginia include the standard in their requirements for disqualifying administrative law judges. See COLO. CODE REGS. § 104-2 (2016); GA. COMP. R. & REGS. 616-1-2-.32 (2016); 24 IND. ADMIN. CODE 1367 § 50 (2001); N.J. ADMIN. CODE § 1:1-14.12 (2013); 43 2 Or. Bull. 284 (Feb. 1. 2004); W. VA. CODE R. § 158-13-4 (2016). Additionally, mediators in Alabama, Arkansas, California, Louisiana, North Dakota, Ohio, Tennessee, and West Virginia also use the same standard. See N.D. CENT. CODE CT. R. ANN. III (2016); OHIO SUP. R. App. F (2016); TENN. LOC. R. App. 1(a) (2016); W. VA. CODE R. § 121-1-94 (2016). In Florida, Illinois, Utah, and Wisconsin, arbitrators are also faced with the same standard. Court martials in New York and hearing officers in Hawaii and South Carolina also use the same “might reasonably be questioned” standard, as do workers’ compensation judges in Illinois and New Jersey, and water-judge administrators in Montana, New Mexico, and Washington. See N.Y. COMP. CODES R. & REGS. tit. 9, § 516.9(b)(1) (2016); N.J. ADMIN. CODE § 12:235-10.7 (2002); MONT. CODE ANN. § 3-7-402(1) (1979). The phrase is also included in standards for judicial employees, law clerks, judicial campaign contributors, and commissions about court clerk conduct dispute resolution judicial qualifications. See, e.g., GA. CODE OF JUDICIAL CONDUCT r. 2.11(A) (2016).

²⁵ Executive branch officials are subject to the appearance of impartiality standard for (1) Boards of Dentistry (e.g., Maryland), Pardons and Parole (e.g., Texas and Washington), and Physicians (e.g., Maryland); (2) Commissions on Public Safety (e.g., New Mexico), Public Utilities (e.g., New Hampshire), and Railroads (e.g., Texas and Washington); (3) Departments of Labor (e.g., New Hampshire), Agriculture (e.g., New Hampshire), and Transportation (e.g., Massachusetts); and (4) investigators for suspected child abuse or neglect (e.g., Maryland).

2015/2016]

What Every Judge Should Know

1585

C. CJC Commentary

Since 1972, the CJC has supplemented black-letter principles with comments to guide judges and moving parties in applying the black-letter principles. The comments provide guidance about the purpose and meaning of the canons, sections, and rules. While it is not intended as a statement of additional binding rules,²⁶ the comments do contain both explanatory material and examples of permitted or prohibited conduct. Like the 1924 Canons, the comments also state “aspirational goals for judges[,]” who should strive to exceed the black-letter principles.²⁷ To surpass those principles enhances “the dignity of [the] judicial office.”²⁸

Following Rule 2.11(A), five comments are relevant.²⁹ Comment [1] makes two statements that have become part of the understanding about the applicability of the appearance of impartiality principle. When the facts of a case do not match the presumptive bias language in Rule 2.11(A)(1)–(6), the first part of Comment [1] in effect states that a court is to apply the “might reasonably be questioned” phrase.³⁰

Relevant factors include the amount of the contribution, the contributor’s involvement in the judge’s campaign, the timing of the campaign in relation to the proceeding, the issues in the case, and other information known to the judge.³¹

²⁶ See MODEL CODE OF JUDICIAL CONDUCT Preamble (1990).

²⁷ See *In re* Ark. Bar Ass’n Petition, No. 08-924, 2008 Ark. LEXIS 536, at *94 (Oct. 2, 2008).

²⁸ MODEL CODE OF JUDICIAL CONDUCT Preamble (1990).

²⁹ See MODEL CODE OF JUDICIAL CONDUCT r. 2.11 cmts. 1–5 (2011). Indiana, Iowa, Kansas, Minnesota, New Hampshire, Tennessee, and West Virginia have adopted all five comments, without additions.

³⁰ See *id.* cmt. 1.

³¹ The comments for Arkansas and North Dakota include this information. Model Rule 2.11(A)(4) identifies campaign contributions of a certain amount from a lawyer or party in a case before the judge as *presumptively* biasing her and requiring her recusal. See MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A)(4) (2011). However, of the more than twenty states that adopted the 2007 CJC, only Arizona, Georgia, Mississippi, Oklahoma, Pennsylvania, Tennessee, Utah, and Washington have adopted that black-letter provision for its CJC. See NAT’L CTR. FOR STATE COURTS, CTR. FOR JUDICIAL ETHICS, JUDICIAL DISQUALIFICATION BASED ON CAMPAIGN CONTRIBUTIONS 3–5, 8, 9 (2015), <http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Disqualificationcontributions.ashx>. Only Utah explicitly recognizes a dollar amount (fifty dollars). *Id.* at 4. The others refer to state statutes about campaign financing or repeat the “might reasonably be questioned” standard. See *id.* at 3–5, 8, 9. Georgia’s comments summarize the presumed bias provisions of the black-letter text:

(1) If contributions made to a judicial candidate or to that candidate’s campaign committee are permitted by the law and do not exceed the maximum allowable contribution, then there is no mandatory requirement that the judge recuse

II. PRINCIPLES AFFECTING THE RECUSAL DECISION

A. *The Duty to Sit*

When a judge believes that his or her impartiality might reasonably be questioned, he or she must recuse him or herself from the case and the denial of a motion to recuse is reversible only for an abuse of discretion. As part of a judge's thought process regarding whether to recuse, a judge has a duty to sit in a case that is as compelling as the duty to disqualify.³² The "duty to sit" relates to not being overly cautious in the face of a challenge to whether he or she should continue to preside.³³ Parties and their lawyers cannot be allowed to think that they can "judge-shop," thereby controlling which judge will decide the case to their advantage. Even if a judge may tire of a particular litigant or the attendant publicity, so that he or she prefers to hand off³⁴ the case to another

(2) If (a) a judicial candidate has knowledge of a contribution made to the candidate or the candidate's campaign committee that exceeds the maximum allowable contribution permitted by law, and, (b) after having such knowledge, the violation is not corrected in a timely manner (i.e., usually accomplished by returning the contribution), then the judge shall recuse.

(3) If a judge has knowledge of a pattern of contributions made by a particular party, party's lawyer, or law firm of a party's lawyer that include contributions (a) made to a judicial candidate or to that candidate's campaign committee and/or (b) made to a third party attempting to influence the election of the judicial candidate, then the judge should consider whether recusal is appropriate in accordance with the considerations in subsection 1(d) of Canon 3E.

Id. at 5–6. Rule 2.11 also is accompanied by comments of more general application. For example, "official communications" received in the course of performing judicial functions and information gained from training programs and experience do not by themselves create a basis for disqualification in Nebraska. *See* NEB. CODE OF JUDICIAL CONDUCT § 5-302.11 cmt. 7 (2011). In Nevada, the filing of a judicial discipline complaint during the pendency of a matter does not require the judge's disqualification. *See* NEV. CODE OF JUDICIAL CONDUCT 6s(6) (2016).

³² *See* Laird v. Tatum, 409 U.S. 824, 837 (1972); ARTHUR GARWIN ET AL., ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 224 (2d ed. 2011). *See also* Press Release, Supreme Court of the United States, Statement of Recusal Policy (Nov. 1, 1993) ("[S]trategizing' recusals [may become a common occurrence], that is, selecting law firms with an eye to producing the recusal of particular Justices.").

³³ More generally, the duty to sit is also relevant to a judge continuing to preside in a case after ruling against one of the parties in the same matter. If a judge were to disqualify herself from hearing the rest of a case, she would never hear the case on the merits. Similarly, when a case is remanded after an appellate reversal, the same judge usually presides, regardless of the first disposition that led to the appeal.

³⁴ *See* Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 820–21 (2009) ("[T]he duty to sit . . . is in large part a duty not to unreasonably burden fellow judges by recusing in response to a weak argument for disqualification."); *see also* Pellegrino v. Ampco Sys. Parking, 789 N.W.2d 777, 777 (Mich. 2010) (Kelly, C.J., concurring) (chastising two colleagues for not participating in a case, when the standards for their disqualification were not met).

judge,³⁵ the duty to sit reminds the judge that withdrawing from a case is appropriate only when grounds to recuse in fact exist.

The CJC incorporates the common law duty to sit into Rule 2.7, entitled: “Responsibility to Decide.” It states that “[a] judge shall hear and decide matters assigned . . .” unless he or she is disqualified.³⁶ Simply, a judge must hear and decide the cases assigned to him or her. Rule 2.11, entitled: “Disqualification,” describes the circumstances requiring a judge to recuse from hearing those assigned cases.³⁷ Together, the two rules comprise a “duty to sit,” whereby a judge is obligated to hear cases unless there is a disqualifying circumstance that persuades him or her to disqualify him or herself from hearing and deciding an assigned case.³⁸ However, the better view is that for public confidence in the judicial system, the “appearance of partiality” is more important than the judge’s duty to sit and decide a specific case.

For example, in *Phillips v. State*³⁹ a trial judge disclosed to the parties that the sexual assault victim’s sister lived in the judge’s neighborhood, her oldest child babysat for the judge’s children, the sister’s younger children played with the judge’s children, and she socialized with the judge’s spouse.⁴⁰ Characterizing his relationship with the sister as an “acquaintanceship” that “would not affect his ability to be fair in”⁴¹ the defendant’s case, the judge “announced that he did not intend to recuse himself, but he invited [the defense] . . . attorney to make a recusal motion” if he wanted to pursue the issue.⁴²

In responding to the motion, the trial judge discussed his duty to sit:

³⁵ In *Feichtinger v. State*, the Alaska Court of Appeals discussed the duty to sit:

Judges will frequently be assigned cases involving unpleasant issues and difficult problems. Often litigants and their attorneys will be particularly vexatious. In many cases, publicity adverse to the judge is virtually certain no matter what decision he or she reaches. In such cases, judges insufficiently attuned to their responsibilities might readily welcome a baseless request for recusal as an escape from a difficult case. To surrender to such a temptation would justly expose the judiciary to public contempt based on legitimate public concern about judicial integrity and courage. While we agree that judges must avoid the appearance of bias, it is equally important to avoid the appearance of shirking responsibility.

Feichtinger v. State, 779 P.2d 344, 348 (Alaska Ct. App. 1989).

³⁶ MODEL CODE OF JUDICIAL CONDUCT r. 2.7 (AM. BAR ASS’N 2011).

³⁷ *See id.* r. 2.11.

³⁸ *See, e.g.*, *State v. Desmond*, No. 91009844DI, 2011 WL 91984, at *8 (Del. Super. Ct. Jan. 5, 2011) (citations omitted).

³⁹ *Phillips v. State*, 271 P.3d 457 (Alaska Ct. App. 2012).

⁴⁰ *See id.* at 459.

⁴¹ *Id.* at 462.

⁴² *Id.*

[I]n Alaska, there is a duty to recuse yourself . . . if reasonable people would feel that . . . you are not going to be, or would not be, fair and impartial. But there first is a duty to sit on the cases that you are assigned to[; it] is the presumption [of] the law that you are going to [sit] on the cases that you are assigned to, and that you only recuse yourself when there is good cause.⁴³

The Alaska Court of Appeals affirmed the trial judge's refusal to recuse, because there was no appearance of partiality.⁴⁴

B. *The Rule of Necessity*

As noted in the discussion of CJC commentary,⁴⁵ the common law rule of necessity enables a judge to sit in a case even though he or she is disqualified from presiding.⁴⁶ The essence of the rule of necessity is that if one judge is disqualified, all similarly situated judges with the same disqualifying condition are disqualified. And if all judges must recuse, none must recuse because otherwise the case could not be heard.⁴⁷ Put another, more jaded way: "a biased judge is better than no judge at all."⁴⁸

The leading modern case is *United States v. Will*, a challenge to a federal statute relating to the cessation or reduction of cost-of-living

⁴³ *Id.* at 463 (citation omitted). In a written order issued later, the trial judge affirmed his earlier oral decision:

I . . . find that the tangential connection between my neighbor . . . and this case does not reasonably create the appearance of bias or partiality on my part. Judges in small communities in Alaska face this decision every day. If the judge has been in the community for any length of time, they frequently will know many of the people involved in the case and yet [they] remain . . . a fair and impartial judge to preside over the trial. I also take into account that judges have a duty to remain on the cases . . . assigned to [them] and [to] only recuse themselves for good cause I do not find that good cause exists [for my disqualification].

Id. at 463 (citation omitted).

⁴⁴ The appellate court first decided that the duty to sit applies under Alaska law only when the material facts are in dispute. *See id.* at 468. In another case, the court held that the duty to sit is subordinate to the party's right to counsel of choice, unless the facts show that the party selected specific counsel in order to set up a motion to disqualify the judge. *See* Millen v. Eighth Jud. Dist. Court of Nev., 148 P.3d 694, 700 (Nev. 2006).

⁴⁵ *See supra* Part I.C.

⁴⁶ *See, e.g.,* *United States v. Will*, 449 U.S. 200, 213 (1980) ("The Rule of Necessity had its genesis at least five and a half centuries ago. Its earliest recorded invocation was in 1430, when it was held that the Chancellor of Oxford could act as judge of a case in which he was a party when there was no provision for appointment of another judge." (citation omitted)).

⁴⁷ *See id.* ("[A]lthough a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise." (citation omitted)).

⁴⁸ *Barker v. Sec'y of State's Office*, 752 S.W.2d 437, 439 (Mo. Ct. App. 1988).

salary increases for all federal judges.⁴⁹ Normally, any federal judge with an interest in the outcome of the case has the duty to recuse from the case.⁵⁰ However, in *Will*, all federal judges had that same disqualifying interest. While all parties were willing to stipulate that the rule of necessity should prevail over the federal statutory disqualification standard and allow the United States Supreme Court to hear the case, they had to first await the opinion of the Court.⁵¹ Because all Justices of the Supreme Court had an interest in the outcome of the case, and there were no federal appeals judges available to hear the case,⁵² the Justices heard the case, holding that the federal disqualification statute “was not intended by Congress to alter the time-honored Rule of Necessity.”⁵³ The rule of necessity therefore triumphed over the federal disqualification statute.

State courts⁵⁴ have grappled with the rule of necessity, typically for salary⁵⁵ and pension⁵⁶ issues similar to the *Will* case, as well as when the legislative branch has tinkered with judicial qualification and selection procedures.⁵⁷ Often, the appellate court has raised judicial recusal on its own⁵⁸ in the absence of any parties briefing the issue.⁵⁹

⁴⁹ See *Will*, 449 U.S. at 202.

⁵⁰ See 28 U.S.C. § 455(b) (2014).

⁵¹ See *Will*, 449 U.S. at 212–13.

⁵² See 28 U.S.C. § 2109 (2014); *Will*, 449 U.S. at 212 (“28 U.S.C. § 2109 authorizes the Chief Justice to remit a direct appeal to the Court of Appeals for final decision by judges not so disqualified.”).

⁵³ *Will*, 449 U.S. at 217 (“And we would not casually infer that the Legislative and Executive Branches sought by the enactment of § 455 to foreclose federal courts from exercising ‘the province and duty of the judicial department to say what the law is.’” (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803))).

⁵⁴ See *Wagoner v. Gainer*, 279 S.E.2d 636, 639 (W.Va. 1981) (collecting cases).

⁵⁵ See, e.g., *Moro v. State*, 320 P.3d 539, (Or. 2014) (challenge to legislation that modified cost-of-living adjustments); *Jorgensen v. Blagojevich*, 811 N.E.2d 652 (Ill. 2004) (Governor’s attempt to block implementation of cost of living adjustment for judges); *Wagoner v. Gainer*, 279 S.E.2d (challenge to refusal of State Treasurer to pay salary increases for judges).

⁵⁶ See, e.g., *Fields v. Elected Officials Retirement Plan*, 320 P.3d 1160 (Az. 2014) (challenge by retired judges to statute that prohibited transfer of investments earnings above a certain level); *DePascale v. State*, 47 A.3d 690 (N.J. 2012) (challenge to 400 percent increase in judicial pension contributions and more than 100 percent increase in health care contributions); *Board of Trustees of Public Employees’ Retirement Fund v. Hill*, 472 N.E.2d 204 (Ind. 1985) (dispute about statutory amendments modifying relevant time frame for calculating judicial pensions).

⁵⁷ See *Reichert v. State ex rel. McCulloch*, 278 P.3d 455 (Mont. 2012).

⁵⁸ See, e.g., *Fields v. Elected Officials Retirement Plan*, 320 P.3d at 1164; *Jorgensen v. Blagojevich*, 811 N.E.2d at 660; *Wagoner v. Gainer*, 279 S.E.2d at 639. In *Reichert v. State ex rel. McCulloch*, 278 P.3d at 464, the court addressed the issue in response to the amici’s discussion.

⁵⁹ Recent decisions, such as *Reichert v. State ex rel. McCulloch*, 278 P.3d at 471, have buttressed the rule of necessity’s use by pointing to Rule 2.7, which requires judges to “hear

While the opinions usually discuss the rule of necessity only when it intends to apply it, occasionally a court rejects its application under the circumstances of the case as it has made its way through the court system.⁶⁰ For example, in *Lorenz v. New Hampshire Admin. Office*,⁶¹ court stenographers sought relief from a state supreme court order to initiate the process of terminating the stenographers' employment.⁶² The state's highest court unanimously granted the plaintiffs' motion to disqualify the entire court, under its appearance of partiality standard.⁶³ To the parties, it must have been perplexing to read the court's opinion in which it conditioned its recusal "upon there being substitute judges available to sit on this case."⁶⁴

III. SUPREME COURT CASES AND THE APPEARANCE OF IMPARTIALITY

During the past fifty years, United States Supreme Court cases have interpreted judicial disqualification and its relation to a fair trial and Due Process. Even before that, the Court had recognized the importance of the appearance of impartiality.⁶⁵ "[J]ustice must satisfy the appearance of justice."⁶⁶ Before deciding *whether* a Due Process violation has occurred, the Court first faced the issue of *when* constitutional Due Process applies in disqualification cases, as

and decide matters assigned to" them, "except when disqualification is required by Rule 2.11 or other law." The 2.7 Comment states in part:

Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification may bring public disfavor to the court and to the judge personally.

MODEL CODE OF JUDICIAL CONDUCT, r. 2.7 cmt [1] (AM. BAR ASS'N 2012). Any dispute about the role of the CJC Commentary—is it binding or merely aspirational, and may it be the basis for judicial discipline—is clearly resolved in Oregon, which is the only state that incorporates the rule of necessity into the black-letter CJC. *See Oregon Code of Judicial Conduct*, Rule 3.10(B) (2014).

⁶⁰ *See, e.g., State ex rel. Bardacke v. Welsh*, 698 P.2d 462, 475 (N.M. Ct. App. 1985) (court rejects application of rule of necessity in case to enjoin litigant from litigating without legal representation). *See also Hooper v. State*, 838 N.W.2d 775 (Minn. 2013) (motion to remove all judges in a judicial district because one judge's law clerk dissuaded a witness from testifying rejected); *In re Hooker*, 340 S.W.3d 389 (Tenn. 2011) (motion to disqualify all justices of state Supreme Court denied; recusal not mandated merely because litigant disagrees with manner the justices were selected).

⁶¹ *Lorenz v. N.H. Admin. Office*, 858 A.2d 546 (N.H. 2004).

⁶² *Id.* at 547.

⁶³ *Id.* at 549.

⁶⁴ *Id.* Shouldn't the court have checked about the availability of substitute judges before entering its order?

⁶⁵ *See, e.g., Offutt v. United States*, 348 U.S. 11, 14 (1954).

⁶⁶ *Id.*

opposed to deciding a case on the basis of the state's CJC.⁶⁷ As the Court had noted, "not 'all questions of judicial qualification . . . involve constitutional validity.'"⁶⁸

*Caperton v. A.T. Massey Coal Co.*⁶⁹ is the most recent Supreme Court statement of constitutional⁷⁰ principles about recusal and a fair trial. *Caperton* described four types of cases when due process requires recusal: 1) a judge has a direct, personal, and substantial pecuniary interest in a case; 2) she has an indirect financial interest in the outcome of the case;⁷¹ 3) she issues a contempt citation and tries the contempt citation; and 4) a party contributes to the judge's election campaign. The recusal cases have "extreme facts."⁷² Even as the Court defined the types of cases where due process requires recusal, its own analysis showed that the list was not exclusive, leading litigants to argue that their case is under the *Caperton* umbrella.⁷³

A. Direct, Personal, and Substantial Pecuniary Interest by a Judge

In *Aetna Life Ins. Co. v. Lavoie*,⁷⁴ an Alabama Supreme Court Justice wrote the court's opinion and cast the deciding vote to uphold a bad faith punitive damage award.⁷⁵ Because at that time he was the lead plaintiff in a similar bad faith lawsuit pending in state court, he also had a "direct, personal, substantial, pecuniary" interest in the case.⁷⁶ The Court held that the justice's participation in *Lavoie* violated the appellant's due process rights, because he had essentially "acted as 'a judge in his own case.'"⁷⁷

⁶⁷ See, e.g., *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1986).

⁶⁸ *Id.*

⁶⁹ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

⁷⁰ *Id.* at 876.

⁷¹ *Caperton*, 556 U.S. at 876 (citing *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)); *id.* at 878 (quoting *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973)) ("[T]he [judge's] financial stake need not be as direct or positive as it appeared to be in *Tumey*"). *Tumey* found a due process violation when the defendant was tried by a judge who was paid only when there was a conviction. *Tumey*, 273 U.S. at 531.

⁷² *Caperton*, 556 U.S. at 887.

⁷³ *Id.* at 890–92, 898 (Roberts, C.J., dissenting) (arguing that the majority's holding leaves open enumerable possibilities for litigants to argue a probability of bias).

⁷⁴ *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

⁷⁵ See *id.* at 816–17.

⁷⁶ See *id.* at 822, 823–24.

⁷⁷ *Id.* at 824–25. The Court rejected a due process challenge to the participation of the other members of the Alabama high court, in part applying the rule of necessity. See *id.* at 825.

B. Contempt Citation Heard by the Offended Judge

*Mayberry v. Pennsylvania*⁷⁸ represents the third example of due process cases listed in *Caperton*. During his trial, defendant Mayberry “cruelly slandered” the judge and engaged in “tactics taken from street brawls.”⁷⁹ After he was convicted, the trial judge sentenced the defendant on the original charge and also found him guilty of multiple counts of criminal contempt.⁸⁰ On appeal, the Supreme Court held that the judge violated Due Process by not transferring the contempt charges to another judge for a public trial.⁸¹ The Court held that “[n]o one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication.”⁸²

C. Contributions to the Sitting Judge’s Election Campaign

The amount and the timing of a campaign contribution attracted the Court’s attention in *Caperton*. A party contributed \$3,000,000 to a committee supporting a candidate for the West Virginia Supreme Court; the amount was 300% more than the candidate’s own committee spent and a million dollars more than the total spent by the combined campaign committees.⁸³ The large contribution occurred prior to the party’s appeal when it was reasonably foreseeable that his case would be heard by the newly elected justice whose failure to recuse violated due process.⁸⁴

The circumstances created such a high risk of actual bias as to be constitutionally intolerable to protect the rights of all the parties:

[T]he Due Process Clause has been implemented by objective standards that do not require proof of actual bias. In defining these standards the Court has asked whether, “under a realistic appraisal of psychological tendencies and human weakness,” the interest “poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.”⁸⁵

⁷⁸ *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

⁷⁹ *Id.* at 462, 465.

⁸⁰ *See id.* at 455.

⁸¹ *Id.* at 466.

⁸² *Id.* at 465. *See also* *Offutt v. United States*, 348 U.S. 11, 14 (1954) (a judge personally embroiled with an attorney during a trial cannot sentence that attorney for contempt).

⁸³ *Caperton*, 556 U.S. at 884.

⁸⁴ *See id.* at 886.

⁸⁵ *Id.* at 868, 883–84 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). To forestall a barrage of campaign contribution cases, the Court categorized the cases of

Later decisions have quickly distinguished *Caperton* based on the amount of the contribution and its proportion of the total donations. Even if the contribution amount dwarfed those by other donors, it still did “not reach the extraordinary level of the sum at issue in *Caperton*.”⁸⁶ The Court noted that the Due Process Clause is the “constitutional floor” in judicial disqualification matters, and described the divide between constitutional analysis and state CJC.⁸⁷ “Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances.”⁸⁸

D. Judicial Connection to a Nonparty

Liljeberg v. Health Servs. Acquisition Corp.,⁸⁹ dealt with recusal because of a trial judge’s connection to a nonparty which would benefit financially from the judge’s decision.⁹⁰ Loyola University was negotiating to sell land to Liljeberg who wanted to build a hospital using a certificate of need.⁹¹ In a dispute over ownership of a certificate of need, Health Services sued Liljeberg for declaratory relief but the judge ruled for Liljeberg.⁹² The judge was a member of the Loyola University Board of Trustees.⁹³ The Supreme Court held that, because the benefit to Loyola depended on Liljeberg prevailing in the declaratory judgment litigation, the judge had a conflict of interest, using the “might reasonably be questioned” standard in the federal judicial disqualification statute.⁹⁴

Liljeberg is also noteworthy because it applied a harm analysis to determine the remedy when a judge has improperly remained in a case. The analytical factors are: “[1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief

constitutional magnitude as “exceptional.” *Caperton*, 556 U.S. at 884.

⁸⁶ See, e.g., *Ivey v. Eighth Judicial Dist. Ct.*, 299 P.3d 354, 358 (Nev. 2013) (The \$5,000 donation amounted to seven percent of the judge’s total campaign contributions; the timing of the contribution was also not suspicious under circumstances).

⁸⁷ *Caperton*, 556 U.S. at 889–90.

⁸⁸ *Id.* at 890.

⁸⁹ *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988). 28 U.S.C. § 455, the federal statutory equivalent to the CJC, became effective in 1974, a year after the ABA first published its CJC. 28 U.S.C. § 455 (2016).

⁹⁰ *Liljeberg*, 486 U.S. at 850.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See *id.*; see also 28 U.S.C. § 455(a).

will produce injustice in other cases, and [3]) the risk of undermining the public's confidence in the judicial process."⁹⁵ *In re M.C.*⁹⁶ is one of the few cases to have applied the factors. A juvenile was charged with firing a gun into a group of people.⁹⁷ During trial, a prosecution witness recanted an earlier identification of the juvenile as the shooter.⁹⁸ The judge then revealed that she had inadvertently received an email from another judge regarding the recantation.⁹⁹ After the defendant moved for her disqualification based on the appearance of partiality, the judge denied the motion, stating that she could keep outside knowledge separate from the trial evidence.¹⁰⁰ Ruling that the judge should have recused herself, the appellate court then applied the *Liljeberg* factors to decide if her failure to recuse required reversal of the conviction or whether it was harmless error.¹⁰¹

The first *Liljeberg* factor favored reversal because the judge, as the only factfinder, had knowledge of a disputed fact that had not been subject to cross-examination.¹⁰² The juvenile could reasonably question whether the judge's verdict had been influenced by the extrajudicial information. Applying the second factor, relief for the juvenile would be beneficial in future cases in two ways: 1) encouraging judges to be cautious in exchanging emails that might

⁹⁵ *Liljeberg*, 486 U.S. at 864.

⁹⁶ *In re M.C.*, 8 A.3d 1215, 1232–33 (D.C. Cir. 2010). Several other courts have applied the factors. See, e.g., *Duffey v. State*, 428 S.W.3d 319, 327 (Tex. Ct. App. 2014) (outlining the basis for the appearance of partiality conclusion was an ex parte conversation); *Vent v. State*, 288 P.3d 752, 757 (Alaska Ct. App. 2012) (same). *Duffey's* discussion of the *Liljeberg* factors follows:

The risk of injustice to the parties in this particular case is significant. The meeting at issue was undeniably ex parte. . . . Two days before the ex parte meeting (when Duffey entered his guilty plea), the trial judge strongly indicated he would approve the plea agreement. Two weeks after that meeting—just days before Duffey was scheduled to be officially sentenced—the trial judge notified counsel for both sides that he would reject the plea agreement. After having the jury assess punishment, Duffey's fate went from six months of confinement under shock probation followed by ten years of standard community supervision to a jury-imposed sentence of twelve years' incarceration. . . . Allowing this trial judge, even if he were to sit mute, to meet privately with a crime victim's family and pastor regarding sentencing and unfinalized plea agreements would create a dangerous precedent that could produce injustice in other cases. Characterizing this behavior by a jurist as harmless would undermine public confidence in the judicial system.

See also *State v. Pratt*, 813 N.W.2d 868, 879–80 (Dietzen, J., concurring) (applying the factors, the concurring opinion concluded that vacating the conviction was appropriate).

⁹⁷ *In re M.C.*, 8 A.3d at 1217.

⁹⁸ *Id.* at 1219.

⁹⁹ *Id.* at 1218.

¹⁰⁰ *Id.* at 1220.

¹⁰¹ *Id.* at 1232–1233.

¹⁰² *Id.* at 1232.

2015/2016]

What Every Judge Should Know

1595

contain information about parties or witnesses, and 2) stressing that her subjective confidence in being able to set aside a disputed fact is irrelevant to whether her conduct created an appearance of bias.¹⁰³ Lastly, the court found that it was “nearly axiomatic” that the violation would erode the public’s confidence in the judicial process.¹⁰⁴

In *State v. Schlien*,¹⁰⁵ in violation of the state CJC, the judge initiated a conversation with the prosecutor to suggest specific objections that the latter should raise to an anticipated plea withdrawal motion.¹⁰⁶ In reversing the defendant’s conviction, the Minnesota Supreme Court held that the ex parte communication “reasonably called the judge’s impartiality into question.”¹⁰⁷

For other courts, an improper ex parte communication does not automatically require disqualification, due to the circumstances. *In re Tapply*¹⁰⁸ found that improper contact with the judge did not require judicial disqualification, finding its purpose was merely to obtain copies of a judicial orders instead of any 1) discussion of the merits of the case, 2) showing that the contact adversely affected the case, and 3) proof that the judge relied on the improper communications in his rulings.¹⁰⁹ Hence, despite the improper ex parte communications, recusal was not required because the judge’s impartiality was not reasonably questioned.

¹⁰³ *In re M.C.*, 8 A.3d at 1233.

¹⁰⁴ *Id.* at 1233.

¹⁰⁵ *State v. Schlien*, 774 N.W.2d 361, 361 (Minn. 2009); see, e.g., *In re Boothe*, 110 So.3d 1002, 1014 (La. 2013) (discussing judge’s acceptance of ex parte communications designed to influence his decisions which required the judge to step aside); *In re Naranjo*, 303 P.3d 849, 853 (N.M. 2013) (“The [ex parte contacts] not only created the appearance of impropriety [requiring recusal], it was clearly prohibited by [state law].”); *State v. Dussault*, 245 P.3d 436, 439 (Alaska Ct. App. 2011) (discussing how the ex parte communications created an appearance of partiality requiring disqualification); *Dussault*, 245 P.3d at 443 (“[Judge’s improper] communications created a reasonable appearance of partiality [requiring recusal].”); see *Tyson v. State*, 622 N.E.2d 457, 458, 459 (Ind. 1993) (discussing how a judge’s non-lawyer spouse told defense counsel that he should practice his client’s case differently; judge recused because of the appearance of impropriety).

¹⁰⁶ *Schlien*, 774 N.W.2d at 367.

¹⁰⁷ *Id.* at 365, 367. While the state court of appeals had found the error to be harmless, the Minnesota held that it was plain error, requiring a different judge to hear the plea withdrawal motion.

¹⁰⁸ *In re Tapply & Zukatis*, 27 A.3d 628, 628 (N.H. 2011); see, e.g., *In re Estate of Robertson*, 611 S.E.2d 680, 686 (Ga. Ct. App. 2005) (explaining improper ex parte contact did not show sufficient bias for judicial recusal).

¹⁰⁹ *In re Tapply*, 27 A.3d at 643.

IV. MISTAKING THE APPEARANCE OF PARTIALITY FOR CONSTITUTIONAL PRINCIPLES

A. *Effective Assistance of Counsel*

Is counsel ineffective when he fails to file a timely recusal motion? To succeed on a Sixth Amendment claim that counsel was ineffective, the aggrieved client must prove that: 1) counsel's performance was outside the wide range of professionally competent assistance, and 2) counsel's errors prejudiced the client.¹¹⁰ Reviewing courts often focus on whether the client suffered prejudice. The test of prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."¹¹¹

Ineffective assistance for counsel's failure to file a recusal motion requires proof of *actual* bias by the judge, who cannot treat counsel's client fairly.¹¹² By contrast, although a judge can act impartially, a reasonable observer might nevertheless have doubts about her impartiality. Thus, when an ineffective assistance claim is based on the failure to file a timely disqualification motion, prejudice must be based upon an allegation that the judge was actually biased.¹¹³ The appearance of partiality standard is inapplicable.

B. *Search Warrants*

From time to time, appellate courts review a perennial question asked by law students—should a judge review the propriety of the issuance of a search warrant that she signed? Might the judge's impartiality reasonably be questioned when she presides over a suppression hearing and may be a witness at that hearing? The importance of that issue relates both to the ethics of the issuance of a search warrant¹¹⁴ and to the admissibility of evidence obtained

¹¹⁰ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¹¹¹ *Id.* at 694.

¹¹² *See People ex rel. A.G.*, 262 P.3d 646, 651 (Colo. 2011).

¹¹³ *Id.* at 652 (alleging only an appearance of impropriety). Rule 2.11(C), like its predecessor CJC Canon 3F, permits the parties to waive any conflict of interest *other than* for bias or prejudice. Thus, "there is no provision to waive disqualification when actual bias is the concern." *Id.* at 651.

¹¹⁴ Courts and lawyers sometimes confuse the proper standards for reviewing search warrants. The Fourth Amendment requires that a search warrant be issued by a neutral and detached judge. *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971). The neutral and detached requirement centers on whether the judge is a member of the judicial branch rather than another branch, *see id.*, or whether the issuing judge has monetary incentives to issue warrants, regardless of their merit. *See Connally v. Georgia*, 429 U.S. 245, 250 (1977).

during the warrant's execution.

The majority rule is that a judge is not automatically required to recuse, despite having signed the search warrant, i.e., there is no appearance of impropriety and no due process violation.¹¹⁵ However, disqualification *is* appropriate when the proof shows that the judge was actually biased¹¹⁶ or had an extrajudicial source of knowledge.¹¹⁷

*Brent v. State*¹¹⁸ is unique, having declared that a trial judge cannot issue a search warrant and later review the propriety of the warrant at a suppression hearing.¹¹⁹ Applying the “might reasonably be questioned” standard from the CJC, “[n]ot only might a reasonable person harbor doubts about the impartiality of the judge in this situation, we find that any reasonable person should have such doubts.”¹²⁰

Brent may be distinguishable, because the judge as a prosecutor earlier in his career previously had prosecuted the defendant.¹²¹

Judicial opinions have described the differences between disqualification standards and Fourth Amendment principles. Disqualification standards “are designed not to protect individual defendants, but to protect the judiciary from charges of partiality.” *State v. Fremont*, 749 N.W.2d 234, 242 (Iowa 2008). *People v. Gallegos*, 251 P.3d 1056, 1061 (Colo. 2011), explained notable differences between a motion for disqualification and a motion to suppress evidence.

Aimed at protecting public confidence in the judiciary, disqualification standards are concerned with the mere appearance of impartiality. . . . [T]he grant of a motion for disqualification does not result in a loss of evidence, but merely a substitution of the judge. On the other hand, the Fourth Amendment strives to protect the rights of individual defendants, and therefore has as its concern the manifestation of impartiality. . . . [R]ules of judicial ethics vary widely by jurisdiction. Consequently, importing these rules into a constitutional analysis would make the scope of a defendant's constitutional protection dependent upon the ethical considerations of the jurisdiction where the warrant was issued.

Id. at 1063. The last point overlooks that possibility that a court may decide both the neutral and detached judge issue under the Constitution of the same state as has adopted the state's judicial ethics standards.

¹¹⁵ *See, e.g.*, *Minks v. Commonwealth*, 427 S.W.3d 802 (Ky. 2014); *State v. Cotham*, No. M2012-01150-CCA-R3-CD, 2014 WL 3778613, at *24, *25 (Tenn. Crim. App. July 31, 2014); *Hirning v. Dooley*, 679 N.W.2d 771, 781 (S.D. 2004); *Trussell v. State*, 506 A.2d 255, 256 (Md. Ct. Spec. App. 1986).

¹¹⁶ *See, e.g.*, *United States v. Jones*, 801 F.2d 304, 312 (8th Cir. 1986); *United States v. Lawson*, No. 3:08-21-DCR, 2009 WL 1702073 (E.D. Ky. June 17, 2009) (citing *Disqualification of Justice, Judge, or Magistrate Judge*, 28 U.S.C. § 455 (1988)).

¹¹⁷ *See, e.g.*, *United States v. Slay*, 714 F.2d 1093, 1095 (11th Cir. 1983). “[T]he formation and expression of an opinion based on information acquired by the Court in the course of judicial proceedings is almost never a basis for recusal.” *Commonwealth v. Prieto*, 84 Va. Cir. 567, 572 (Va. Cir. Ct. 2010).

¹¹⁸ *Brent v. State*, 929 So. 2d 952, 952 (Miss. Ct. App. 2005).

¹¹⁹ *Id.* at 955.

¹²⁰ *Id.*

¹²¹ *See State v. Chamberlin*, 162 P.3d 389, 393 (Wash. 2007) (citing *Brent v. State*, 929 So.2d 952, 955 (Miss. Ct. App. 2005)).

The assumption underlying the *Brent* rationale is that the judge's decision to issue the warrant included attesting to the validity of the information provided by a law enforcement person in the affidavit. However, the *Illinois v. Gates*¹²² "totality of the circumstances" test for determining probable cause does not require the judge to attest to the validity of the information provided in the warrant, but rather "to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." In turn, the reviewing court "ensure[s] that the [warrant-issuing judge] had a substantial basis for concluding that probable cause existed." The process prescribed in *Gates* . . . does not, therefore, place a warrant-issuing judge or a reviewing judge in an adversarial position that would automatically draw his or her impartiality into question.¹²³

Even if it is assumed the issuing judge *did* make decisions about the validity of the information in an affidavit, "opinions held by judges as a result of what they learned in earlier proceedings"¹²⁴ are not considered examples of bias or prejudice requiring her recusal. However, those opinions may indicate an appearance of partiality to a reasonable person, i.e., a trial court judge is reviewing whether she "had a substantial basis for concluding that there was a fair probability that contraband or evidence of crime would be found on the premises to be searched."¹²⁵

V. RECENT "MIGHT REASONABLY BE QUESTIONED" CASES

Appellate decisions within the past five years provide a sample of courts decisions in appearance of impartiality cases. What follows is a snapshot discussion of several categories: the judge's past relationships, the judge presiding related current and past cases, and the judge's current associations.

A. *The Judge's Current Associations*

1. Who the Judge Knows

Judges know many people, both in and out of the legal profession,

¹²² See *Illinois v. Gates*, 462 U.S. 213, 230 (1983).

¹²³ See *Minks*, 427 S.W.3d at 808 (first quoting *Illinois*, 462 U.S. at 238; then quoting *Chamberlin*, 162 P.3d at 393–94).

¹²⁴ See *Liteky v. United States*, 510 U.S. 540, 551 (1994).

¹²⁵ See *Brent*, 929 So.2d at 955, 957 (remanding the case for trial with a different judge).

as a result of practicing law for the minimum time to qualify as a judge and campaigning for election in approximately half the states.¹²⁶ The benefits of professional,¹²⁷ civic,¹²⁸ and social¹²⁹ relationships may become burdensome when litigants and their counsel attempt to disqualify a judge because those associations continue while the judge is presiding over a proceeding.

Recognizing degrees or levels of friends and acquaintances, courts use a case-by-case approach. Appellate decisions look at the record to determine the “precise nature of the judge’s relationship with that person, and the way in which that person is connected to the litigation.”¹³⁰ From there, the court measures “whether someone who was apprised of the situation would reasonably suspect that the judge’s ability or willingness to decide the case fairly would be compromised by the judge’s feelings about, or toward, the other person.”¹³¹ For some courts, an acquaintance is a person with whom the judge has no personal or social relationship; by itself an acquaintance is inadequate for disqualification.¹³²

While the case law suggests levels of friendship in assessing the appearance of impropriety, it is no defense that the judge treated her friend the same as anyone else.¹³³ In *Camp v. Camp*,¹³⁴

¹²⁶ See *infra* Section VI.B.

¹²⁷ See *infra* text accompanying notes 200–07.

¹²⁸ See *id.*

¹²⁹ See *infra* text accompanying notes 181–83.

¹³⁰ See *Phillips*, 271 P.3d at 469.

¹³¹ See *id.* The record in *Phillips*, for example, did not support the allegation that the trial judge’s relationship with the victim’s sister was more than a social acquaintance. *Id.* at 470.

¹³² See *State v. Rutherford*, 2014 WL 2013395 (Minn. 2014) (deputy sheriff testified for the prosecution; the judge’s knowledge was limited to knowing that she provided security in the courthouse, and he “had no idea” that she was the victim in the case; no recusal required, because a reasonable person with full knowledge of the facts would not question his impartiality); *Lee v. State*, 44 So.3d 1145, 1171 (Ala. Cr. App. 2009) (one of the defendant’s victims was a bail bondsman who worked at the courthouse; characterized as a mere acquaintance of the trial judge, recusal was not necessary). Compare *Van Duyn v. Electronic Innovations*, 2013 WL 2639344 (Tenn. Ct. App. 2013) (the judge and a party served together on a church home board of directors but never attended more than three of the same meetings and did not socialize or know about each other’s job interests; no appearance of partiality necessitating recusal), with *Olerud v. Morgan*, 2011 WL 607113 (Tenn. Ct. App. 2011) (the judge served on a hospital board, was a lifetime member of the Friends of the Hospital group, and received an award from the hospital).

¹³³ *In re George*, 3 N.E.3d at 1142. For example, when a judge’s friend is a court employee, her assessment of the employee’s child’s credibility as a witness is likely to be affected by her assessment of the clerk’s credibility. See *People ex rel. A.G.*, 264 P.3d 615, 619 (Colo. Ct. App. 2010) (absent disclosure of the situation, the judge should have recused when the court clerk’s daughter-caseworker testified). See also *Soto v. State*, 2012 WL 1380362 (Minn. Ct. App. 2012) (recusal of trial judge not required under the appearance of partiality standard, when his church was the victim of a burglary; the judge was not required to assess credibility of church members or officers and was not himself a trustee, director or officer).

¹³⁴ *Camp v. Camp*, 361 S.W.3d 539, 548 (Tenn. Ct. App. 2011).

although the trial judge's friendship with *both* parties did not require recusal in a rural area, the judge should have ruled consistently, i.e., the judge recused from the initial divorce proceedings, but four years later declining to step aside with the same parties created an appearance of partiality.¹³⁵

The friendship issue of the moment is whether a judge must recuse when someone else in the case is her "Facebook friend." Despite support for judicial participation in electronic social networking from the American Bar Association¹³⁶ and state judicial ethics committees,¹³⁷ recusal motions to disqualify judges continue. Facebook friendship without more does not require recusal¹³⁸ when the "friend" participates in a case.

Merely designating someone as a "friend" on Facebook "does not show the degree or intensity of a judge's relationship with a person." ABA Op. 462. One cannot say, based on this designation alone, whether the judge and the "friend" have met; are acquaintances that have met only once; are former business acquaintances; or have some deeper, more meaningful relationship. Thus, the designation, standing alone, provides no insight into the nature of the relationship Further context is required.¹³⁹

¹³⁵ The judge may know someone who is not his friend or not *yet* his friend. If the trial judge is presiding a lawyer or party are adversaries in an unrelated, pending case, she does not have to recuse. See *State v. McCabe*, 987 A.2d at 574. The court distinguished situations when the judge and a lawyer were opponents in a closed case, discussing relevant factors as "any history of animosity," the recency of the case, and the timing of the recusal motion. *Id.*

In a homicide case, after the trial judge followed a stranger's (the victim's sister's) request for a long sentence, he then contacted the sister and asked her to write a letter to the local newspaper endorsing his candidacy in the next election. The appellate court reversed the sentence, noting that "the appearance of impropriety supported the conclusion that the trial judge's personal or political reasons may have prejudiced the Defendant at her sentencing hearing." *State v. Warren*, 2009 WL 4282052 (Tenn. Cr. App. 2009).

¹³⁶ ABA Standing Comm. On Ethics & Prof. Responsibility, Formal Op. 462 (2013).

¹³⁷ See, e.g., Comm. on Jud. Ethics, State Bar of Tex. Op. 39 (1978):

Allowing judges to use Facebook and other social media is . . . consistent with the premise that judges do not "forfeit [their] right to associate with [their] friends and acquaintances nor [are they] condemned to live the life of a hermit. In fact, such a regime would . . . lessen the effectiveness of the judicial officer.

¹³⁸ Compare *Youkers v. State*, 400 S.W.3d 200, 206 (Tex. Ct. App. 2013) (recusal not required), with *Domville v. State*, 103 So.3d 184 (Fla. Dist. Ct. App. 2012) (criminal defendant's allegation that a judge was a Facebook friend of the prosecutor assigned to his case would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial, requiring disqualification).

¹³⁹ *Youkers v. State*, 400 S.W.3d at 206. See, e.g., Utah Advisory Opinion 12-01, www.utcourts.gov/resources/ethadv/index.asp; California Judges Association Advisory Opinion 66 (2010), www.caljudges.org/files/pdf/Opinion%2066FinalShort.pdf; Kentucky Advisory Opinion JE-119 (2010), http://courts.ky.gov/commissions_committees/JEC/JEC_Opinions/JE_119.pdf; New York Advisory Opinion 08-176, www.nycourts.gov/ip/judicialethics/opinions/08-176.htm.

2015/2016]

What Every Judge Should Know

1601

As the quoted suggests, other issues are relevant to the appearance of impropriety issue, including whether 1) the Facebook friends have met, and if so, how often; 2) the nature of the relationship is personal or business, and 3) the relationship is deeper than the Facebook connection.

Two cases of “current associations” merit special attention for conduct unbecoming a judge, one involving judicial enmity and the other about judicial promiscuity. The first is In *Ohio State Bar Assn. v. Evans*.¹⁴⁰ By the time a defendant decided to accept a plea agreement after waffling, Judge Evans refused to accept the plea.¹⁴¹ Public Defender Bright filed a motion, characterizing the refusal as an “abuse of discretion” and criticizing other courtroom practices by the judge.¹⁴² After Judge Evans denied the motion and removed Bright from the defendant’s case, he removed Bright from all sixty-three of his other cases, citing a “conflict” that “compromise[d] the Court’s ability to avoid any appearance of bias [or] prejudice, or to be fair and impartial . . . regardless [of] how hard it tries.”¹⁴³ Saying that he had “no other options,” Bright’s boss fired him because he could not practice in Judge Evans’s courtroom.¹⁴⁴

The Ohio Supreme Court observed that Judge Evans’s “language indicates . . . at the very least, the existence of an appearance of bias or partiality.”

Contrary to the plain language of [Rule] 2.11, Judge Evans cured the conflict by removing Bright as counsel in 64 cases, rather than by disqualifying himself. . . . Judge Evans’s actions erode the public confidence in the integrity and impartiality of our judiciary. But his misconduct resulted in a more concrete injury to Bright, who lost his job as a public defender. . . . [t]he judge’s misconduct also likely harmed Bright’s clients, who did not request his removal as their counsel.¹⁴⁵

The other example of bad conduct is *State v. Wakefield*,¹⁴⁶ where the Judge English and a public defender engaged in an ongoing sexual relationship while the judge presided over five unaware defendants’ trials represented by the public defender.¹⁴⁷ The

¹⁴⁰ *Ohio State Bar Ass’n v. Evans*, 999 N.E.2d 674 (Ohio 2013).

¹⁴¹ *Id.* at 675.

¹⁴² *Id.* at 676.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 677. As a sanction, the court imposed a one-year suspension, overriding the consent-to-discipline agreement of a public reprimand. *Id.* at 675.

¹⁴⁶ *State v. Wakefield*, 751 S.E.2d 199 (Ga. Ct. App. 2013).

¹⁴⁷ *Id.* at 201.

appellate court concluded that Judge English's impartiality might reasonably be questioned because he "failed to disclose his relationship . . . or to recuse himself from the trials . . ." ¹⁴⁸

[T]he record before us supports a reasonable inference that Judge English's ongoing and intimate relationship . . . during each of the five trials at issue . . . could lead to "a reasonable perception of lack of impartiality by the judge, held by a fair-minded and impartial person based upon objective fact or reasonable inference." ¹⁴⁹

2. The Judge's Relative's Employer

With more two-lawyer marriages, the chances increase that a judge's spouse is affiliated with a party in a proceeding before the judge-spouse. ¹⁵⁰ Is an appearance of partiality created when the judge's spouse works in a lawyer's office but is *not* counsel of record in the case at bar? The cases find a Rule 2.11(A) disqualifying interest when the lawyer-spouse has an equity "interest" in her law firm and thus an interest in outcome of the proceeding before the judge-spouse. By contrast, the non-financial good will of being in the winning firm is deemed insufficient if the judge's relative is an associate attorney or a non-equity partner. ¹⁵¹

B. The Judge's Past Relationships and Experiences

Recent cases reveal a general unwillingness by appellate courts to find an appearance of impropriety when the judge 1) used to practice with counsel of record, 2) represented a current party in an unrelated ¹⁵² case before becoming a judge, 3) was represented by current counsel, 4) was threatened by a party, or 5) had some other relationship with a party or witness. ¹⁵³

¹⁴⁸ *Id.* at 205.

¹⁴⁹ *Id.* (quoting *Jones County v. A Mining Group*, 678 S.E.2d 474, (Ga. 2009)).

¹⁵⁰ See Ana Swanson, *Why Farmers, Fishers and Lawyers are more Likely to Find True Love Among Their Own*, WASH. POST (Sept. 21, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/09/21/these-are-the-jobs-where-people-are-most-likely-to-marry-each-another/>.

¹⁵¹ See *In re Jacobs*, 802 N.W.2d 748, 754 (Minn. 2011) ("[Case law] represent[s] a consensus that a familial relationship between a judge and a prosecutor who is not involved with the case before the judge is not enough to create a reasonable question about the judge's impartiality."). The court also rejected the claim that the judge's failure to disclose his spouse's job created an appearance of partiality. *In re Jacobs*, 802 N.W.2d at 754 (citing MINN. CODE JUDICIAL CONDUCT r. 2.11 cmt. 5).

¹⁵² See *infra* text accompanying notes 202–210, 211–12.

¹⁵³ See *infra* text accompanying notes 215–17, 218.

2015/2016]

What Every Judge Should Know

1603

1. Past Professional Relationship with an Attorney in Current Case

In *Tyus v. Pugh Farms, Inc.*,¹⁵⁴ the judge's former law firm appeared as counsel of record, prompting a motion to disqualify the judge by opposing counsel.¹⁵⁵ Thirteen years prior to the current case, the judge had concluded any professional relationship with his former firm and had sold his interests in that firm two years later.¹⁵⁶ The judge "for many years" after his judicial appointment had avoided hearing cases involving the former law firm.¹⁵⁷ Upholding the judge's denial of the motion to recuse, the reviewing court unfortunately fell back on the fact that in rural areas, judges' knowledge and friendships do not require the conclusion that the judge's impartiality might reasonably be questioned.¹⁵⁸ Reliance on that approach opens another issue—what is a rural area, where a multiplicity of judicial friendships may be more likely to be tolerated and less likely to lead to recusals?¹⁵⁹

When the trial judge does not have a quiet departure from her former firm, disqualification may be appropriate. In *Commonwealth v. Morgan RV Resorts*,¹⁶⁰ the judge's former firm was counsel of record in the judge's court, four years after she had sued her former firm for unpaid partner compensation.¹⁶¹

Reversing the trial judge's denial of the recusal motion, the court pointed out that the trial judge was not a nominal party or a passive participant in the completed litigation, and that her decisions on other recusal motions filed in the case before her were inconsistent.¹⁶²

¹⁵⁴ *Tyus v. Pugh Farms, Inc.*, No. W2011-00826-COA-R3CV, 2012 WL 938509 (Tenn. Ct. App. 2012); *see, e.g.*, *Landry v. Sycamore Networks, Inc.*, No. 09-P-195, 2009 Mass. App. Unpub. LEXIS 1339, at 10–11 (Mass. App. Ct. 2009) (Upholding a trial court's determination that a judge's decision not to recuse was proper, even though the judge had formerly practiced law with a material witness, where the judge did not realize that the witness was, in fact, his former colleague and had not socialized with that person since leaving his former law firm).

¹⁵⁵ *Tyus*, 2012 WL 938509, at *4.

¹⁵⁶ *Id.* at *11–12.

¹⁵⁷ *Id.* at *12.

¹⁵⁸ *Id.*

¹⁵⁹ *See, e.g.*, *Lee v. State*, 44 So.3d 1145, 1173 (Ala. Crim. App. 2009) ("The Cannons [of judicial ethics] do not require a judge to recuse him or herself when the judge knows a victim. If this were true judges in small rural counties would seldom, if ever, be qualified to preside over a criminal case.").

¹⁶⁰ *Commonwealth v. Morgan RV Resorts, LLC*, 992 N.E.2d 369 (Mass. Ct. App. 2013).

¹⁶¹ *Id.* at 370.

¹⁶² *Id.* at 369, 371.

2. Past Representation of a Current Party by the Judge

Must the presiding judge recuse, based on appearance of partiality, when she represented a party in an unrelated case before becoming a judge? In *Ohi-Rail v. Barnett*,¹⁶³ the court affirmed the judge's denial of a motion to recuse, relying upon lack of relation between the facts of the prior and current cases.¹⁶⁴ Otherwise, the judge would be disqualified from hearing any cases involving past clients, regardless of their connection with the current proceeding. Without any showing of personal bias by the trial judge, reliance upon the "might reasonably be questioned" was inapplicable.

3. Past Representation of the Judge by Current Attorney

Should the judge recuse based on appearances when the judge's lawyer appears before his former client in an unrelated case? Analysis of whether the judge's impartiality might reasonably be questioned focuses on several factors: 1) the extent of the prior attorney-client relationship, 2) the type of representation, 3) the frequency, volume and quality of the contact between the attorney and the judge-client, and 4) any special circumstances that limit or expand the significance of the attorney to the judge or the appearance of impropriety to the public.¹⁶⁵

The representation may have related to the judge's personal life or to her professional work. For example, if the judge's uncontested divorce was more than a decade before, the case did not last for a prolonged period, and there is no continuing benefit from the prior attorney-judge relationship, a reviewing court is likely to affirm the trial judge's denial of a recusal motion.¹⁶⁶ On the other hand, if the divorce involved multiple issues, took a long time to litigate, and was completed within the last several years, a reasonable observer

¹⁶³ *Ohi-Rail Corp. v. Barnett*, No. 09-JE-18, 2010-Ohio-1549 (Ohio Ct. App. Mar. 31, 2010); *see also* *State v. Gamble*, 225 P.3d 973, 988 (Wash. 2010) (where the judge's refusal to recuse was upheld, she represented the murder defendant's ex-spouse in her dissolution action against him fourteen years earlier. As counsel, the judge obtained a restraining order and protected the marital assets. The appellate court relied on the time since the divorce case and that she did not recall the case).

¹⁶⁴ *Ohi-Rail Corp.*, 2010-Ohio-1549 at ¶¶ 56–58.

¹⁶⁵ *Powell v. Anderson*, 660 N.W.2d 107, 118 (Minn. 2003).

¹⁶⁶ *See, e.g., In re Bridgestone Corp.*, No. 06-MD1, 2013 Tenn. App. Lexis 310, at *27 (Tenn. Ct. App. Apr. 26, 2013) (affirmed denial of motion to recuse); *Costley v. Verchota*, No. A09-1592, 2010 WL 2732449, at *7 (Minn. Ct. App. Apr. 13, 2010). In *Ozanne v. Fitzgerald*, 822 N.W.2d 67, 69, 75 (Wis. 2012), an appellate judge was disqualified, in a challenge to the State's new collective bargaining law for state employees, because a law firm representing the parties in a case pending before the judge had provided the judge with free legal services.

2015/2016]

What Every Judge Should Know

1605

knowing all the facts is more likely to question the judge's ability to be impartial as the divorce attorney represents another client.

4. Threats against the Judge

When someone threatens the judge, even if it remains only a threat, should she disqualify herself because her impartiality might reasonably be questioned? Whether the judge hears the threat does not seem to affect appellate review of denied recusal motions, as long as a credible person relayed the threat to the judge. Indeed, *State v. Blanchard*¹⁶⁷ did not take a second-hand threat seriously, commenting that the defendant was “just unhappy” that he had been charged with a crime.¹⁶⁸ Most reviewing courts hold that a party cannot create the grounds for disqualifying the trial judge by suing her in a separate case.¹⁶⁹

5. Some Other Past Relationship with Judge

If the judge's doctor is a witness in a case, should the judge recuse herself? Eight years before trial, a defendant-doctor's “standard of care” expert performed “uneventful, uncomplicated” surgery on the trial judge after the case at bar was filed and assigned to a different judge.¹⁷⁰ On appeal from the judge's denial of the motion to recuse, the appellate court reversed because of the judge's duty as a thirteenth juror to approve or disapprove the jury's verdict based on her evaluation of the evidence. “At the very least, an appearance of

¹⁶⁷ *State v. Blanchard*, No. M2010-01186-CCA-R3-CD, 2011 Tenn. Crim. App. Lexis 474 (Tenn. Crim. App. June 24, 2011). Desperate parties have unsuccessfully characterized the threats to the judge as giving her a disqualifying “interest” in the case. *Id.* at *19; *see, e.g.*, *Malmquist v. Malmquist*, 415 S.W.3d 826, 840 (Tenn. Ct. App. 2011) (No evidence that the judge had a pecuniary or property interest in the case; no abuse of discretion in denying the motion to recuse).

¹⁶⁸ *Blanchard*, 2011 Tenn. Crim. App. Lexis 474, at *17–18.

¹⁶⁹ *See, e.g.*, *State v. Zorn*, 88 A.3d 1164, 1167 (Vt. 2013) (the trial judge can fairly preside over the case even after being sued by a party to the case); *State v. Desmond*, No. 91009844DI, 2011 WL 91984, at *7 (Del. Super. Ct. Jan 5, 2011) (no recusal when defendant had filed judicial complaints and lawsuits against the judge). One of the few exceptions to the majority rule is *United States v. Greenspan*, 26 F.3d 1001 (10th Cir. 1994), because the proof showed that the judge's awareness of the threat influenced the judge's decision to accelerate the sentencing phase. *Id.* at 1006; *see also* *State v. Hauge*, 829 N.W.2d 145, 154 (S.D. 2013) (defendant posted sign disparaging trial judge does not justify the latter's recusal, using the appearance of impropriety standard); *Commonwealth v. Hernandez*, 2013 Mass. Super. Lexis 129, No. 124653, at *11 (Mass. Super. Ct. Oct. 24, 2013) (No recusal after prosecutor criticized judge for bias against him); *Mo. Dept. of Soc. Servs. v. B.T.W.*, 422 S.W.3d 381, 391 (Mo. Ct. App. 2013) (suing judge does not require recusal).

¹⁷⁰ *Hall v. Randolph*, No. W2013-02571COAT10BCV, 2014 WL 127313, at *3 (Tenn. Ct. App. Jan. 14, 2014).

partiality arises where the trial judge was a patient of a key expert witness in a medical malpractice action during the pendency of the action. . . .¹⁷¹

6. Past Experiences of the Judge

In *Lopez v. State*,¹⁷² the defendant moved to disqualify the trial judge, because the judge had recently been a victim of a crime in an unrelated case a year earlier.¹⁷³ The basis of the motion was that the judge both was and would appear biased in favor of the prosecutor who had successfully prosecuted the case when the judge and his spouse were the victims.¹⁷⁴ The appellate court rejected those grounds for recusal, as had the trial judge-victim, observing that the prosecutor was doing his job of advocating for all crime victims.¹⁷⁵ Therefore, no special relationship existed between the two public officials.¹⁷⁶

7. The Judge Presiding over Related Past Cases

When a judge presides over a case that is reversed on appeal, may she ethically preside over the retrial of the case? Similarly, if multiple charges arising from a set of facts are severed for trial purposes, is the judge permitted to continue her involvement by presiding over the later cases? “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.”¹⁷⁷ “[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of . . . prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make a fair judgment impossible.”¹⁷⁸ Under this extra-judicial source doctrine,

¹⁷¹ *Id.*; see *In re George*, 3 N.E.3d 1139 (N.Y. 2013). A part-time judge’s employment for a party-friend ended a day before the employer appeared in the judge’s court. *Id.* at 1140. Without notifying the prosecutor or the arresting officer, the judge dismissed the charges. *Id.* at 1141. The discipline authority removed the judge from office because ten years earlier he had presided several cases of the party-friend’s relative. *Id.* at 1143, 1144.

¹⁷² *Lopez v. State*, 993 N.E.2d 1199 (Ind. Ct. App. 2013).

¹⁷³ *Lopez*, 993 N.E.2d at 1199.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Commonwealth v. Kearney*, 92 A.3d 51, 62 (Pa. Super. 2014) (quoting *Liteky v. United States*, 510 U.S. 540, 551 (1994)). See, e.g., *Commonwealth v. Prieto*, 84 Va. Cir. 567, 571 (Va. Cir. 2010).

¹⁷⁸ See *Liteky*, 510 U.S. at 555–56.

2015/2016]

What Every Judge Should Know

1607

alleged bias stemming from facts gleaned from the judicial proceeding are rarely grounds for recusal.¹⁷⁹

8. Presiding after Prosecuting a Defendant for Other Crimes

If a judge previously prosecuted a defendant before becoming a judge, can she now preside over his case? A former prosecutor who assumes the bench sees some of the same people she prosecuted. Litigants move to disqualify the judges who sent them to prison as prosecutors years before, arguing that the cumulative effect of the judge's prior experiences with the defendant is sufficient to show that the judge's impartiality "might reasonably be questioned."¹⁸⁰ As long as the current charges are not based on the same course of conduct¹⁸¹ or the movant cannot identify specific misconduct or remarks by the judge to show bias, there is no *per se* rule disqualifying a judge because she has prosecuted the defendant in the past.¹⁸²

When the connection is more attenuated, recusal would seem to be unnecessary when the judge was a prosecutor in the same office but was *not* the person who actually prosecuted the defendant's case.¹⁸³ However, that result is not always predictable. For example, *In re Bulger*¹⁸⁴ held that the judge's "particular background in the federal prosecutorial apparatus in Boston" during a period relevant to the criminal case against a defendant required his disqualification and reassignment of the case "to a judge whose curriculum vitae does not implicate the same level of institutional responsibility. . . ."¹⁸⁵ The appellate court required:

[I]ndependent support for a challenge to impartiality with the potential to produce bias[.] [O]fficial reports and conclusions predating [the] proceedings, and already largely

¹⁷⁹ When a party appears before the same judge on a matter unrelated to the prior case, the ethical question is easy to resolve. No presumption of bias arises merely because a judge has increased knowledge about the person from already presiding in his unrelated case. *See, e.g., State v. Hauge*, 829 N.W.2d 145, 153–54 (S.D. 2013); *Lemming v. State*, 663 S.E.2d 375, 378 (Ga. Ct. App. 2008).

¹⁸⁰ *Hauge*, 829 N.W.2d at 153–54.

¹⁸¹ *See, e.g., Patterson v. State*, 926 N.E.2d 90, 96 (Ind. Ct. App. 2012) (holding that a judge could not serve as judge in the same matter for which he had prosecuted him earlier).

¹⁸² *See, e.g., People v. Flockhart*, 304 P.3d 227, 238 (Colo. 2013); *In re Swenson*, 244 P.3d 959 (Wash. Ct. App. 2010); *State v. Byington*, 2009 WL 5173773 (Tenn. Cr. App. 2009). *See also Cooper v. State*, 2011 WL 222493 (Nev. 2011) (the prosecutor now judge assisted the lead prosecutor to enhance the instant conviction).

¹⁸³ *See, e.g., Brown v. State*, 704 S.E.3d 227, 233 (Ga. Ct. App. 2010).

¹⁸⁴ *In re Bulger*, 710 F.3d 42, 42 (1st Cir. 2013).

¹⁸⁵ *Id.* at 43, 49.

in the public domain, . . . disclosed disquieting links between the [g]overnment and the criminal element during the years in question, and that [could] fairly stimulate a critical attitude on the part of an independent observer. . . . Given the institutional ties described here, the reasonable person might well question whether a judge who bore supervisory responsibility for prosecutorial activities during some of the time at issue could suppress his inevitable feelings and remain impartial when asked to determine how far to delve into the relationship between defendant and Government, On this record, that question could not reasonably be avoided.¹⁸⁶

9. Presiding After Hearing the Victim's Case

Different interests arise when the judge presides over a case after hearing a matter when the current victim was a party. For example, in *Dunlap v. Com.*,¹⁸⁷ the same judge presiding over the defendant's murder trial had already presided over the rape victim's divorce and custody case, including awarding custody of her son who was a murder victim of the defendant two weeks later.¹⁸⁸ The appellate court affirmed the denial of the recusal motion, observing that the victim's credibility was not at stake in the murder case and noting:

[T]he practical reality of judicial life in a rural, single-circuit-judge setting spanning four counties. Individuals appear before the court in different roles on a regular basis. A trial judge cannot be expected to recuse . . . whenever he or she has previously presided over [a] past dispute of a present party, victim, complaining witness, testifying witness, or accused. Without some appearance of impartiality [sic], recusal is unnecessary.¹⁸⁹

C. Family Influences

Rule 2.4(B) that prohibits a judge from "permit[ting] family . . . or other interests or relationships to influence the judge's judicial

¹⁸⁶ *Id.* at 47, 48–9.

¹⁸⁷ *Dunlap v. Commonwealth of Ky.*, No. 2010–SC–00026–MR, 2013 WL 3121689 (Ky. 2014).

¹⁸⁸ *Id.* at *588, *589–90.

¹⁸⁹ *Id.*

conduct or judgment.”¹⁹⁰ *In re Rowe*,¹⁹¹ a judge’s son faced charges of driving under the influence.¹⁹² The judge presided at his son’s initial appearance, continued the arraignment for several days, and then disposed of the case with his son as the only other person in the courtroom.¹⁹³ Defending a disciplinary charge, the judge asserted that he was angry, embarrassed, and wanted to ensure that his son understood the seriousness of the offense.¹⁹⁴ Regardless of whether the judge felt he could be impartial in resolving his son’s case, he was suspended for six months for failure to recuse himself because his “impartiality might reasonably be questioned.”¹⁹⁵

Canon 2A of the 1972 CJC advises a judge to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,” and applies to family situations that raise the appearance of impropriety.¹⁹⁶ For example, *In the Matter of Advisory Letter No. 7-11 of the Supreme Court Advisory*

¹⁹⁰ MODEL CODE OF JUDICIAL CONDUCT r. 2.4(B) (AM. BAR ASS’N 2010). Specific portions of Rule 2.11 presume bias and require recusal 1) when a judge’s or judge’s spouse’s or partner’s relative within the third degree of relationship is a party, counsel of record, a likely material witness, or has a more than *de minimis* interest that could be substantially affected by the proceeding, and 2) when a judge or her spouse, partner, parent child or other member of the her family residing in the judge’s household has an economic interest in the subject matter that is in controversy or is a party. MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A)(2)–(3) (AM. BAR ASS’N 2010).

¹⁹¹ *In re Rowe*, 566 A.2d 1001, 1001 (Del. 1989). The pertinent judicial principle was the former Canon 2B in the 1990 CJC. As it relates to improper family influences, Canon 2B is very similar to Rule 2.4(B). Compare *In re Rowe*, 566 A.2d at 1002–03, n. 2, with MODEL CODE OF JUDICIAL CONDUCT r. 2.4(B). See, e.g., *In re Henriksen*, 2012 WL 1672242, at *2, *3 (Del. May 3, 2012) (the judge was removed from office; despite rebuffed overtures, the judge continued to pursue a relationship with a lawyer and to preside over cases in which she appeared); *Scogin v. State*, 227 S.E.2d 780, 780, 782 (Ga. Ct. App. 1976) (discussing how a judge should have recused himself from presiding over the criminal case against the father of a friend’s child after giving the friend advice about how to obtain support for child from father).

¹⁹² *In re Rowe*, 566 A.2d at 1003.

¹⁹³ See *id.* at 1003, 1008.

¹⁹⁴ *Id.* at 1005.

¹⁹⁵ “Other . . . relationships” under Rule 2.4(B) may also require discipline and recusal. See, e.g., *In re Perskie* 24 A.3d 277 (N.J. 2011) (judge was censured for (1) failing to recuse himself from a case despite a conflict of interest with a witness, and (2) inappropriately appearing in the back of another judge’s courtroom while that case was being tried); *Interest of McFall*, 617 A.2d 707 (Pa. 2002) (a state judge had agreed to serve as an undercover agent for federal authorities after accepting an illegal gift; judge continued to hear cases while cooperating with federal authorities, in exchange that her cooperation would be made known to the state prosecutor who appeared daily in the judge’s court and who later might prosecute her; new proceedings ordered for any criminal case in which the judge had presided). See also *State v. McCabe*, 987 A.2d 567 (N.J. 2010) (part-time judge should not have presided over case in which counsel was an adversary of the judge in an unrelated case; conviction reversed).

¹⁹⁶ MODEL CODE OF JUDICIAL CONDUCT Canon 2A (1972).

*Committee on Extrajudicial Activities*¹⁹⁷ posed the issue of a chief judge's child being a police officer in the jurisdiction and the extent of the judge's obligation to recuse: in cases 1) in which the child is a witness, 2) in which anyone serving in the same police department employing the child is a witness, 3) presided over the by chief judge's other judges.¹⁹⁸ The court chose option two, which had the effect of forcing the judge to resign as chief judge and raised concerns about whether he should resign.¹⁹⁹

D. Campaign Contributions

Formerly, the conventional wisdom was that judicial disqualification was unnecessary when a lawyer contributed to the judge's campaign, without more. As long as the lawyer-contributor's involvement with the campaign did not include further participation, e.g., being the judge's campaign manager or treasurer, distributing campaign literature, or other examples of active support, the judge's relation with the lawyer was no different than with other members of the bar.²⁰⁰

By adding an explicit, presumed recusal provision to the 1990 CJC when campaign contributors appear before the judge,²⁰¹ the ABA signaled a change in the thinking about actual bias and the perception thereof. Even though the CJC addition did not attract state support, it remains in the current 2007 CJC. Rule 2.11(A)(4) presumes actual impropriety and recusal when a lawyer appears before the judge after contributing to the judge's campaign, within the defined time frame and in excess of the defined threshold set by the state.²⁰² A judge may also be subject to disqualification for the

¹⁹⁷ *In re* Advisory Letter No. 7-11 of the Supreme Court Advisory Comm., 213 N.J. 63, 61 A.3d 136 (2013).

¹⁹⁸ *See id.*

¹⁹⁹ The New Jersey Supreme Court held that the judge's "involvement in cases involving either his son or his son's colleagues on the police force might raise 'reasonable questions in the minds of litigants and the public about the fairness of the proceedings and the overall integrity of the process.'" *In the Matter of* Advisory Letter No. 7-11 of the Supreme Court Advisory Committee on Extrajudicial Activities, 61 A.3d 136, 144 (N.J. 2013).

²⁰⁰ *See, e.g.,* MacKenzie v. Super Kids Bargain Store, Inc. So.2d 1332, 1335 n.5 (Fla. 1990)

²⁰¹ Canon 3E(1)(e) required disqualification when:

[H]e knows or learns by means of a timely motion that a party or a party's lawyer has within the previous [***] years made aggregate contributions to the judge's campaign in an amount that is greater than [\$ ***] for an individual or [\$ ***] for an entity.

MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(e) (1990), as amended. No state adopted this CJC amendment. "Aggregate" denotes all contributions in cash or in kind directly to a candidate's committee or treasurer to support the candidate or oppose the election of the candidate's opponent. MODEL CODE OF JUDICIAL CONDUCT Terminology (1990), as amended.

²⁰² MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A)(4) (AM. BAR ASS'N 2007).

appearance of partiality when a lawyer appearing before her has managed or otherwise assumed a major nonfinancial role in her campaign, i.e., the lawyer's role would influence the judge's judicial conduct or judgment.²⁰³

In addition, Rule 2.4(C) prohibits a judge from conveying "the impression that any person or organization is in a position to influence the judge."²⁰⁴ In *Rocha v. Ahmad*,²⁰⁵ counsel filed motions to disqualify two appellate judges because two of their campaign contributors were opposing counsel, alleging political favoritism.²⁰⁶ Opposing counsel also previously hosted victory parties for the judges after their election.²⁰⁷ The court denied the motion, finding that no ethical violation had occurred because the judges received no contributions from a party to the litigation and because attorneys are the primary source of contributions in judicial elections.²⁰⁸ The court's next statements probably are more controversial now than when they were written more than thirty

²⁰³ Prior to adopting Rule 2.11(A)(4) in 2011, to assist any judge facing an election campaign, the Oklahoma Supreme Court prescribed helpful standards for determining when a campaign contribution would cause a judge's impartiality to reasonably be questioned: (1) a lawyer makes a campaign contribution to that judge in the maximum amount allowed by statute, and (2) a member of that lawyer's immediate family makes a comparable maximum contribution, and (3) that lawyer further assists the judge's campaign by soliciting funds on behalf of the judge, and the contributions and solicitations occur during a pending case in which the lawyer is appearing before that judge. *See Pierce v. Pierce*, 39 P.3d 791, 798 (Okla. 2001) (counsel's and counsel's father's total contribution of \$10,000 satisfied the court's new standard).

²⁰⁴ MODEL CODE OF JUDICIAL CONDUCT r. 2.4(C) (AM. BAR ASS'N 2007).

²⁰⁵ *Rocha v. Ahmad*, 662 S.W.2d 77, 77 (Tex. Crim. App. 1983). In *Aguilar v. Anderson*, the trial judge telephoned Mr. Calhoun and solicited campaign contributions from his law firm. Calhoun's firm gave the campaign \$300, \$100 from each partner (the judge's self-imposed limit on contributions). . . . [T]here is a sound basis in law for the presiding judge's decision denying recusal, where the sole ground was that the judge solicited and accepted campaign contributions from a lawyer representing parties in his court. Here, the contribution was small, the trial judge maintained a voluntary policy of accepting only very limited contributions from any single source and the contributing lawyer was not even lead attorney for defendants. We cannot say, under these circumstances, that the presiding judge acted without reference to guiding principles. . . . We simply hold that, under these facts, the presiding judge did not act outside the bounds of discretion in deciding the recusal motion." *Aguilar v. Anderson*, 855 S.W.2d 799, 801–02 (Tex. Ct. App. 1993). In another case, the judge received campaign contributions over thirteen years, totaling "at least \$8,300" from a defense counsel firm. *See Jones v. Baker & Hostetler, L.L.P. (In re Burnside)*, 863 N.E.2d 617, 618 (Ohio 2006). The court found that the judge "appears to have done her best to separate her judicial duties from her campaign activities, and in a state in which judges are elected, that is the most we can ask of those who seek and secure judicial office." *Id.* at 619. In addition, her statement that she raised more than \$1 million in a statewide campaign in 2002 alone, her alleged receipt of 'at least \$8,300' from the . . . firm does not call into serious doubt the judge's ability to preside fairly and impartially in this case." *Id.*

²⁰⁶ *Rocha*, 662 S.W.2d at 77.

²⁰⁷ *Id.* at 78.

²⁰⁸ *Id.* at 78–79.

years ago.

A candidate for the bench who relies solely on contributions from nonlawyers must reconcile himself to staging a campaign on something less than a shoestring. If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts.²⁰⁹

E. Judge's Public Comments

A judge is supposed to avoid public statements that expresses prejudgment of an issue or could affect the outcome or fairness of a pending or impending case,²¹⁰ but the CJC prohibition does not extend to public statements made in the course of the judge's official duties, or to the explanation of court procedures.²¹¹ In the course of their duties, judges frequently express opinions about specific laws, the obligation to obey and the consequences of disobedience. Given that such judicial expressions of opinion do not disqualify judges from sitting on later cases involving the same legal issues, it is difficult to perceive why judges' general, extra-judicial comments concerning legal issues disqualify them from hearing later cases involving those issues.²¹²

Still, "[j]udges are generally loath to discuss pending proceedings with the media, even when litigants may have engaged in misrepresentation."²¹³

When the judge defends her actions or responds to misrepresentations, she creates an appearance of partiality by taking on the role of an advocate.²¹⁴ In *In re Boston's Children*

²⁰⁹ *Id.* at 78.

²¹⁰ See MODEL CODE OF JUDICIAL CONDUCT r. 2.10(A) (AM. BAR ASS'N 2007); MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(9) (AM. BAR ASS'N 1990). See also MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A)(5), applying its recusal standards to a judge or judicial candidate who makes a public statement outside a court proceeding, decision or opinion that "commits or appears to commit [her] to reach a particular result or rule in a particular way in the proceeding or controversy." MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A)(5) (2007).

²¹¹ See MODEL CODE OF JUDICIAL CONDUCT r. 2.10(D) (2007); MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(9) (1990).

²¹² *Papa v. New Haven Federation of Teachers*, 444 A.2d 196, 206 (Conn. 1982).

²¹³ *In re Boston's Children First*, 244 F.3d 164, 169 (1st Cir. 2001). Perhaps for that reason, the First Circuit found "little guidance on when public comments, even those on the merits of a pending action, create an appearance of partiality for which . . . recusal is . . . appropriate." *Id.* at 169–70. See *United States v. Cooley*, 1 F.3d 985, 995 (10th Cir. 1993).

²¹⁴ *Broadman v. Comm'n on Judicial Performance*, 959 P.2d 715, 727 (Cal. 1998). A judge's responses to allegations that she has ruled erroneously do not, without more, justify disqualification. See *In re M.K.K.*, 781 N.W.2d 132, 144 (Mich. Ct. App. 2009); *Alley v. State*, 882 S.W.2d 810, 821 (Tenn. Cr. App. 1994). In *United States v. Ciavarella*, following a plea

2015/2016]

What Every Judge Should Know

1613

First,²¹⁵ after the trial judge did not certify a class action, a Boston newspaper editorially criticized her decision.²¹⁶ Two days later, she wrote a letter to the editor about the editorial's inaccuracies and in the following week she was quoted in the newspaper based on a telephone interview.²¹⁷ A motion to disqualify the trial judge followed. Denying the motion to disqualify the trial judge, she stated that she had complied with the federal CJC statute that allowed judges to explain "for public information the procedure of the court."²¹⁸

What is the nature of the appearance of partiality when judges offer their views to the media? As the First Circuit stated:

Interested members of the public might consider [the judge's] actions as expressing an undue degree of interest in the case, and thus pay special attention to her comments. With such public attention to a matter, even ambiguous comments may create the appearance of impropriety that [ethics standards are] designed to address. In fact, the rarity of such public statements, and the ease with which they may be avoided, make it more likely that a reasonable person will interpret such statements as evidence of bias.²¹⁹

In addition, the judge's statements may be "open to misinterpretation so as to create the appearance of partiality."²²⁰ A reasonable person might perceive bias on her part, and a range of viewpoints suggests continuation of case-by-case analysis.²²¹

colloquy where the judge had questioned a defendant's response to his question, a news article implied that a reporter overheard the judge "casually discuss[ing] what had just happened." *United States v. Ciavarella*, 716 F.3d 705, 718 (3d Cir. 2013). Despite the implication that the judge's statements were made outside the courtroom, the judge had made each of the statements in his judicial opinion rejecting plea agreements. *Id.* at 719. The court held that, no reasonable person informed of all of the facts would believe that the judge's impartiality could be questioned based on the statements reported in the article, because those statements were based on what he learned as he presided over the case. *Id.* "[O]pinions formed by the judge on the basis of . . . prior proceedings[] do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994).

²¹⁵ *In re Boston's Children First*, 244 F.3d 164 (1st Cir. 2001).

²¹⁶ *Id.* at 165–66.

²¹⁷ *Id.* at 166.

²¹⁸ The trial judge cited Canon 3(B)(9): "A judge shall not, while a proceeding is pending . . . make any public comment that might reasonably be expected to affect its outcome or impair its fairness This Section does not prohibit judges from . . . explaining for public information the procedures of the court." Model Code of Jud. Conduct, Canon 3(B)(9) (2007). *See also* *Mack v. Suffolk County*, 191 F.R.D. 16, 36 (Mass. 2000).

²¹⁹ *In re Boston's Children First*, 244 F.3d 164, 170 (2001).

²²⁰ *Id.* at 170.

²²¹ *See* *Alley v. State*, 882 S.W.2d 810, 821 (Tenn. Ct. App. 1994) (commenting that

F. Retired Judge Acting as Arbitrator or Mediator

Rule 3.9(A) permits a retired judge to serve as an arbitrator or mediator, but not “during the period of any judicial assignment.”²²² In *State v. Pratt*,²²³ a retired judge was retained as an expert witness for the county attorney’s civil division while simultaneously acting as a judge in cases where the county attorney was the prosecutor.²²⁴ The state Supreme Court reversed the defendant’s conviction, based on the appearance of partiality.²²⁵ It characterized the judge as “not unlike an employee” of the county attorney because as an expert witness “he was to act in a way that was aligned with the [county attorney’s] interests.”²²⁶ The court concluded “the public cannot have trust and confidence in a judicial system that permits the presiding judge in a case to be simultaneously retained as an expert witness by one of the parties appearing before the judge. Moreover, reversing in this case will have prophylactic value.”²²⁷

VI. CONCLUSION

If the litigants had known about Chief Justice Rehnquist’s daughter’s situation, they might have sought his recusal. Perhaps they would have been more successful than the lawyers who had tried unsuccessfully to disqualify him thirty years earlier when he refused to disqualify himself in a case involving a statute about which he had testified before a congressional committee and written a legal memorandum.²²⁸ The Chief Justice’s dilemma would have required him to consider whether his impartiality “might reasonably be questioned.”

The appearance of impartiality standard is the most frequently

statements made by the trial judge must be taken in the context of all the facts and circumstances to determine whether a reasonable person would construe those remarks as indicating partiality on the merits of the case).

²²² MODEL CODE OF JUDICIAL CONDUCT r. 3.9(A) (AM. BAR ASS’N 2007).

²²³ *State v. Pratt*, 813 N.W.2d 868 (Minn. 2012).

²²⁴ *Id.* at 872.

²²⁵ *Id.* at 873.

²²⁶ *Id.* at 877 (citing *Scott v. United States*, 559 A.2d 745, 755(1989)).

²²⁷ *Id.* at 878. The concurring opinion advocated adoption of the *Liljeberg* factors in determining whether to vacate a judgment, when there is a CJC violation: “(1) ‘the risk of injustice to the parties in the particular case,’ (2) ‘the risk that the denial of relief will produce injustice in other cases,’ and (3) ‘the risk of undermining the public’s confidence in the judicial process.’” *Id.* at 879 (Dietzen, J., concurring) (quoting *Liljeberg v. Health Service Acquisition Corp.*, 486 U.S. 847, 864 (1988)). In applying the factors, the concurring opinion concluded that vacating the conviction was appropriate. *Id.*

²²⁸ See *Laird v. Tatum*, 409 U.S. 824, 824, 824–25 (1972).

2015/2016]

What Every Judge Should Know

1615

invoked provision, due to the structure of every state's code of judicial conduct. While the presumed bias situations are specific and clear, they are few in number. That leaves most recusal cases to be decided under the "might reasonably be questioned" standard. As the aforementioned sections demonstrate, that it is a challenging standard does not excuse judges from becoming as familiar as possible with it and the relevant facts. Justice Brandeis said almost one hundred years ago: "Knowledge is essential to understanding; and understanding should precede judging."²²⁹

²²⁹ Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 520 (1924) (Brandeis, J., dissenting).