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Judicial Disqualification: Recusal and Disqualification of Judges

Richard E. Flamm, Esq.

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Originally published by Little Brown (Boston), *Judicial Disqualification* is a comprehensive and intensively-researched Guide to the law which governs motions to disqualify judges in the Federal courts, as well as in every American state. The imposing Volume has been authoritatively relied on by a host of courts – Including the United States Court of Appeals for the District of Columbia Circuit in United States v. Microsoft Corp., 346 U.S. App. D.C. 330 (2001) —as well as by the highest courts of a of Host states. (Supplemented annually)

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Mr. Flamm is the author of two highly-acclaimed treatises: Lawyer Disqualification: Conflicts of Interest and Other Bases, and Judicial Disqualification: Recusal and Disqualification of Judges, which has been widely relied on by state and federal courts throughout the country. Both works are published by Banks and Jordan Law Publishing: **www.banksandjordan.com**. He has also authored numerous scholarly articles on conflicts of interests, disqualification and related subjects for law reviews and other publications.

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6:28 Talmudic origins, Roman Law, Common Law
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CHAPTER 2

Bases for Disqualification

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§2.1 Introduction

A judge may ordinarily be removed from presiding over a matter in one of three ways. First, judges sometimes recuse themselves, without waiting for any party to seek such relief. This phenomenon is sometimes called voluntary disqualification, but is more commonly referred to as "recusal." Second, in some jurisdictions a judge may be ousted on application of a party on a near automatic basis, without any showing of cause. This process is alternately referred to as "peremptory disqualification," a "peremptory challenge," or simply as a "change of judge." Finally, in every jurisdiction a judge may be removed, on motion of a party or its counsel, for good cause shown.

§2.2 Voluntary Disqualification

Judges have a self-enforcing obligation to evaluate whether they possess any bias, or if other mandatory grounds for recusal exist.[i] There is, thus, little disagreement that a judge who is conscious of any bias that

might influence her ability to impartially preside over a proceeding,[ii] or is aware of other mandatory grounds for her disqualification, has both the authority and the duty to disqualify herself on her own motion, sua sponte,[iii] whether she has been challenged by a party or not.[iv] This goes for both federal judges,[v] and for judges in state court.[vi]

Even where the applicable law does not require a judge to voluntarily recuse herself,[vii] a judge who concludes that her ability to be impartial has been compromised,[viii] or that her impartiality might reasonably be questioned,[ix] is generally permitted to do so,[x] as long as another judge is available to hear the matter.[xi] In certain circumstances it may be the better practice for a judge to recuse in the interest of maintaining an appearance of absolute impartiality.[xii] Perhaps the best known example of spontaneous recusal occurred when Justice Felix Frankfurter – a self-described "victim" of bus background music – voluntarily stepped away from a case challenging the broadcasting of such music on city buses [xiii]

In a situation where a judge does not voluntarily recuse herself, a party who believes that the judge should step aside may file a disqualification motion.[xiv] Once a timely request that the matter not be heard by that judge has been made, many judges will not presume to preside over a proceeding,[xv] as long as that request has been predicated on a modicum of reason[xvi] – even when they do not believe that recusal is warranted under the circumstances.[xvii] It is generally agreed that no opprobrium should result because a judge, in good conscience, chooses not to sit in a case – even when the bias claim is legally insufficient.[xviii] But a judge's obligation to recuse herself sua sponte in an appropriate case is not intended to be used as a guise for avoiding difficult or unpleasant decisions.[xix]

§2.3 Peremptory Disqualification

At common law a judge could be disqualified from presiding over a proceeding to which he had been duly assigned only when good cause for doing so was shown. Efforts have been made to modify this rule in federal practice,[xx] but the "for cause" requirement has been almost universally adhered to by federal courts.[xxi] Likewise, the requirement that a party must allege and demonstrate good cause before a judge will be disqualified is still the rule in most American states.[xxii] But a substantial minority of mostly midwestern[xxiii] and western[xxiv] states have adopted automatic substitution,[xxv] change-of-judge,[xxvi] or peremptory disqualification provisions.[xxvii] Regardless of how they are denominated, the underlying purpose of such provisions is the same – to permit a party to remove a judge from presiding over a proceeding without demonstrating good cause for believing that the judge is biased or otherwise incompetent to sit.

It has been suggested that peremptory disqualification is a modern jurisprudential anomaly.[xxviii] But the idea that litigants should be permitted to remove judges they suspect of being biased is actually an ancient principle which predates the common law notion that a judge may be disqualified only when good cause for such a course of action can be shown.[xxix] The subject of peremptory disqualification is discussed in detail in Chapters 27 and 28.

§2.4 Constitutional Disqualification Provisions

In most jurisdictions there is no constitutional right to disqualify a judge, except insofar as such a right may be implicit in the right to a fair trial.[xxx] But several states have adopted constitutional provisions that govern certain aspects of the judicial disqualification remedy.[xxxi] In most such jurisdictions the relevant constitutional provisions are applied in harmony with whatever disqualification statutes or court rules are in force.[xxxii] In a few, however, constitutional disqualification provisions may be deemed to provide the paramount[xxxiii] or even exclusive[xxxiv] means for seeking to remove a judge for cause.

§2.5 Due Process

Apart from discrete constitutional provisions which govern specific disqualification situations, both the United States Constitution[xxxv] and those of various states,[xxxvi] guarantee that litigants will receive "due process" of law,[xxxvii] which entitles a person to an impartial tribunal in both civil and criminal cases.[xxxviii] The United States Supreme Court has indicated that, in some circumstances, a biased tribunal may violate due process.[xxxix] In fact, the Court has consistently found that a decision maker who has a pecuniary interest in the outcome of a case or is otherwise interested in it is constitutionally unacceptable.[xl]

The leading case on this subject is Tumey v. Ohio,[xli] in which a judge's income was derived solely from fines he recovered from convictions. The Court held that his direct, personal, and substantial interest in convicting defendants was sufficient to rebut the presumption of his impartiality.[xlii] Similarly, in Ward v. Village of Monroeville[xliii] the Court presumed bias and found that due process was violated where the defendant was convicted by the mayor of a village because much of the village's revenues were generated by fines from his court, even though the mayor himself did not share in the revenues. The Court held, in words that have frequently been quoted since, that the test is whether the situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict, or which might lead him not to hold the balance nice, clear and true between the State and the accused."[xliv]

Other cases in which a judge's neutrality was found to have been intolerably compromised by non-pecuniary considerations include In re Murchison,[xlv] which held that a judge who acts as a one-man grand jury cannot try an indicted defendant;[xlvi] Johnson v. Mississippi,[xlvii] in which the Court found that a judge who lost a civil rights suit to defendant could not try defendant for contempt;[xlviii] and Offutt v. United States,[xlix] where it was held that a judge who had become "personally embroiled" with a lawyer could not try that lawyer for contempt.[l]

Because the existence of a biased tribunal is repugnant to the concept of due process,[li] an argument may be made that the constitutional due process guarantee implicitly supplies litigants with an additional basis for seeking judicial disqualification; and, indeed, parties have occasionally chosen to base their claims of partiality on alleged violations of the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution,[lii] or corresponding provisions of a state constitution.[liii] Likewise, where a biased judge has already rendered a decision, reversal of that decision may occasionally be sought on due process grounds.[liv] A due process claim is particularly likely to be made in a criminal case[lv] because, while due process entitles litigants to an impartial and disinterested tribunal in every type of proceeding,[lvi] the entitlement to due process may be particularly compelling in those cases in which a person's liberty – and perhaps even his life – may be at stake.[lvii]

§2.5.1 Defining Due Process

Every person who appears in court expects to receive a determination of his case based on the merits of the case – rather than on extrinsic circumstances – and there is no question that the right to a fair trial includes the right to be tried by an impartial and unbiased judge.[lviii] Due process is, therefore, a necessary incident of a fair and impartial trial.[lix] It is not, however, a right that lends itself to a fixed and immutable definition;[lx] and, indeed, there has often been disagreement as to the proper scope of the term.[lxi] Nevertheless, elementary notions of what constitutes the procedural process that is due require that a judge must not only be qualified to preside over a matter, but must be sufficiently free of predisposition to be able to render an impartial decision in it.[lxii] Thus, due process minimally requires the opportunity to be fully and fairly heard before a judge without actual bias or an interest in the outcome of the case.[lxiii]

§2.5.2 Why Disqualification Is Not Usually Ordered on Due Process Grounds

A litigant who has been forced to submit his case to a judge who is unfairly biased against him has clearly been denied the fundamental fairness to which he is constitutionally entitled.[lxiv] The Due Process Clause would, thus, seem to provide a logical basis for seeking disqualification in any case in which a party is able to demonstrate that a fair disposition by the challenged judge is in doubt.[lxv] But because both Congress and state legislatures are free to impose judicial disqualification standards that are more rigorous than those mandated by the Due Process Clause[lxvi] – and because, with few exceptions, they have done just that[lxvii] – judicial disqualification determinations are rarely made on due process grounds.[lxviii]

In most jurisdictions, every judicial act that would violate the Due Process Clause would almost certainly constitute a violation of state and federal statutory law as well,[lxix] but the converse is not necessarily true.[lxx] For example, the Due Process Clause has often been interpreted to require only an absence of actual bias on the judge's part[lxxi] – not the total lack of any conceivable appearance thereof.[lxxii] But under the ABA Code of Judicial Conduct – as well as the judicial disqualification jurisprudence that is in force in many states – an appearance of bias alone may suffice to warrant disqualifying a judge.[lxxiii] Thus, where only an appearance of bias is involved, both Congress and the majority of states afford a standard for seeking judicial disqualification that is much less stringent than the standard imposed by the Due Process Clause.[lxxiv]

A great many disqualification claims involve situations in which the proffered ground for the application is an appearance of bias, rather than bias in fact. It is, therefore, often much easier for a party who seeks to disqualify a state court judge to satisfy the requirements of a disqualification statute or court rule than to establish a due process violation.[lxxv] The same is true in federal court. Though the right to an unbiased federal judge derives from the Due Process Clause,[lxxvi] any conduct impinging on due process would more readily violate §455.[lxxvii] It is apparent, therefore, that §455 – like many state judicial disqualification provisions – provides a less stringent standard for seeking judicial disqualification than the Due Process Clause does.[lxxviii]

Several federal circuit courts – including the Second,[lxxix] Third,[lxxx] Fourth,[lxxxi] Fifth,[lxxxii] Seventh,[lxxxiii] and District of Columbia[lxxxiv] Circuit Courts of Appeal – have held that the inquiry commanded by §455 and that commanded by the Due Process Clause are not the same; and, specifically, that the appearance of bias provision set forth in §455 establishes a statutory disqualification standard that is more rigorous than that required by the due process.

The United States Supreme Court has recognized as much. Though concern for the public's confidence in the impartiality of judges has been said to rise to constitutional dimensions,[lxxxv] the Court has observed that the Due Process Clause demarcates only the "outer boundaries of judicial disqualification,"[lxxxvi] and establishes a "constitutional floor, not a uniform standard."[lxxxvii]

While courts have been reluctant to say that a judge's disqualification may never be mandated by the Due Process Clause[lxxxviii] without also being mandated by a statute, except in jurisdictions which have no judicial disqualification provisions on the books it is difficult to envision a situation where a bias claim that was sufficient to warrant disqualification under the due process standard would not also call for disqualification under other provisions.[lxxxix] Consequently, questions regarding the propriety of judicial disqualification are, in most cases, answered by reference to the common law, statutes, or the professional standards of the bench and bar;[xc] and it is only in extreme circumstances that it is necessary for courts to address the constitutional dimensions of judicial disqualification.[xci]

The logic of declining to find due process violations where less stringent bases for disqualification exist appears to be unassailable. Still, due process-based violations sufficient to warrant this remedy have occasionally been found;[xcii] not only where it can be shown that the challenged decision-maker has a personal stake in the outcome of a proceeding, but where he has become personally embroiled with a party,[xciii] or involved in the litigated incidents.[xciv] It should be borne in mind, too, that not every jurisdiction has statutory provisions or court rules that provide a lower threshold for disqualification than the Due

Process Clause. Thus, due process does serve the function of providing protection against inadequate state remedies.[xcv]

§2.6 Statutory Disqualification

Many states have adopted constitutional provisions to deal with various aspects of the disqualification remedy, but the right to disqualify a judge is more commonly found in a jurisdiction's statutory law than in its constitution.[xcvi] In fact, statutes governing the general subject of judicial disqualification have been adopted by the federal government[xcvii] and by the legislatures of most states.[xcviii] Some states have also enacted statutory disqualification provisions that pertain only to particular types of judges, such as probate judges.[xcix]

In jurisdictions that have adopted judicial disqualification statutes, a judge will ordinarily not be disqualified on the motion of a party unless the moving party establishes that the judge is mandatorily disqualified under one of the statutorily prescribed grounds for disqualification.[c] For example, while the fact that a judge has been indicted for a crime, or suffers from a physical or mental infirmity, may provide grounds for his removal from office,[ci] this may not constitute enumerated grounds for disqualification from a particular case, or relief from any judgment entered by such judge.[cii]

The first federal judicial disqualification statute was adopted in 1792,[ciii] and certain states had similar disqualification schemes on the books even earlier.[civ] Like the majority of disqualification statutes in force today, these early disqualification statutes were all "for cause" provisions. These types of provisions permit a judge to be removed only when the moving party is able to demonstrate legally sufficient cause for requiring the judge to step down.[cv] "For cause" judicial disqualification statutes are to be contrasted with "peremptory" disqualification statutes, which do not require the moving party to make such a showing. See Chapters 27 and 28.

§2.7 Court Rules

In most jurisdictions the right to seek a judge's disqualification is a substantive right afforded by the legislature, not a court-made rule.[cvi] In such jurisdictions, the applicable judicial disqualification statutes ordinarily provide the primary legal basis for seeking such relief. But the mere fact that a judge may be subject to disqualification under a statute may not dispose of the matter because, in many jurisdictions, a judge may be disqualified for reasons other than those expressly enumerated in a statute.[cvii] For example, many states and the District of Columbia[cviii] have adopted court rules dealing with the subject of judicial disqualification.[cix]

Court rules may be introduced in order to adopt the Code of Judicial Conduct,[cx] to enumerate grounds that may properly be alleged in support of a legally sufficient disqualification motion,[cxi] to deal with specific judicial disqualification issues,[cxii] or merely to augment the jurisdiction's operative disqualification statutes;[cxiii] for example, by prescribing the proper procedure for invoking the substantive right afforded by the state legislature,[cxiv] or the time period within which a judicial disqualification motion may properly be made.[cxv] In many jurisdictions, court rules have been expressly adopted in order to provide an independent basis for seeking judicial disqualification.[cxvi] In some jurisdictions these rules may be the most important disqualification provisions,[cxvii] or even the only ones.[cxviii]

§2.8 The Code of Judicial Conduct

In addition to the various constitutional, statutory, and judicially created bases for disqualification, there are a host of ethical edicts that may provide a substantive basis for seeking judicial disqualification in certain circumstances – or at least inform a court's disqualification decision. These include Informal Opinions of the American Bar Association and corresponding state and local bar association ethics opinions.[cxix]

Unquestionably, however, the primary ethical basis for questioning a judge's impartiality is the American Bar Association Code of Judicial Conduct. Since the advent of the Code, disqualification motions have frequently been predicated, at least in part, on alleged Code violations, both in state[cxx] and in federal[cxxi] court.

The American Bar Association ratified its original Canons of Judicial Ethics in 1924.[cxxii] Though dutifully adopted by most states,[cxxiii] the original Canons set forth only very general standards for proper judicial conduct.[cxxiv] As such, they proved not to be very helpful in informing judges on how to behave.[cxxv] The limited scope of the original Canons – coupled with public awareness regarding several prominent cases of questionable judicial conduct that had not been inhibited by the Canons[cxxvi] – prompted Justice Lewis F. Powell, Jr., who was then president of the American Bar Association, to propose that a new code be formulated. This proposal was first made in 1964, but appointment of a committee to draft a new Code did not occur until 1969. During that year a controversy over the Supreme Court nomination of Clement Haynsworth – who had been accused of improperly failing to recuse himself from presiding over several cases in which disqualification may have been warranted – combined with dissatisfaction with the federal disqualification statutes, as then constituted, to persuade the ABA that a full-scale revision of the Code of Judicial Conduct was necessary.[cxxvii]

In 1972 Justice Powell appointed former California Chief Justice Roger J. Traynor to chair a Special Committee on Standards of Judicial Conduct.[cxxviii] Three years later, the new Code of Judicial Conduct was finally completed. In 1973 the Judicial Conference of the United States adopted the Code,[cxxix] with only minor modifications,[cxxx] as the governing standard of conduct for all federal judges,[cxxxi] except the Justices of the United States Supreme Court.[cxxxii]

The current version of the ABA Model Code of Judicial Conduct was adopted by the House of Delegates of the American Bar Association on August 7, 1990, as amended in 1997, 1999 and 2003. The Code has been adopted both by the federal judiciary and by the courts or legislatures of the majority of states. Few jurisdictions have, however, enacted the Code in its pristine form[cxxxiii] – most have made at least minor changes to meet actual or perceived special situations.[cxxxiv] On September 23, 2003 then-American Bar Association President Dennis W. Archer, Jr. announced the appointment of a Joint Commission to Evaluate the Model Code of Judicial Conduct. The Commission released its Final Draft Report in late 2005. At the time of publication of this treatise, the ABA was awaiting public comment from the judiciary, the legal profession and the public.

§2.8.1 Enforceability of Code Provisions

In some jurisdictions today the Code is accorded the status and force of law,[cxxxv] such that it may be rigorously enforced notwithstanding the lack of a litigant's specific demand.[cxxxvi] Courts in such jurisdictions have tended to find that the fact that a judge who presides over a case has violated the Code may redound in judicial disqualification[cxxxvii] – or even in reversal of a judgment she has rendered[cxxxviii] – as well, perhaps, as in discipline of the offending judge.[cxxxix] In other jurisdictions, the Code is not deemed to provide a vehicle for private redress by unhappy litigants,[cxl] but rather serves merely as a set of hortatory principles to which judges should aspire.

In these jurisdictions the Code is generally not considered to have the force of law;[cxli] but, rather, is merely intended to establish advisory standards for judges. In such jurisdictions, disqualification motions predicated exclusively on Code provisions are unlikely to be favorably received.[cxlii] Therefore, the mere fact that a judge has committed a Code violation does not necessarily mean that the moving party can make out a legally cognizable reason for removing him from a case,[cxliii] or for reversing a judgment rendered by him[cxliv] – particularly where the judge who allegedly committed the Code violation participated in rendering that decision as a member of a panel.[cxlv] Thus, even though litigants have the right to expect that judges will dutifully abide by the applicable canons of ethics,[cxlvi] where a challenged judge fails to step down of his own free will the Code of Judicial Conduct is, in many states, of little utility as a means for seeking redress. The Code is also of dubious value as a basis for seeking the disqualification of federal judges. While, on occasion, various Code provisions have been cited in support of disqualification motions filed in federal

court,[cxlvii] since the passage of the 1974 amendments to 28 U.S.C. §455 it has generally been held that the statute, not the Code, governs the disqualification of federal judges.

It may be that statutory provisions govern most disqualification motions, but the Code – by calling for self-recusal in certain circumstances[cxlviii] – arguably establishes a higher standard than that imposed by any of the disqualification statutes passed by Congress,[cxlix] or the various state legislatures.[cl] In an exceptional case, a judge who is not obligated to disqualify himself under any statute may nonetheless take himself out of the case consistent with the higher standard enunciated in the Code.[cli] Judges have often determined to recuse themselves even when not legally disqualified under any specific statutory provision.[clii] In fact, claims have occasionally been made that, because of the higher standard imposed on judges by the Code, a judge may err by not recusing himself even when no motion to disqualify was ever made to that judge.[cliii] Such claims have occasionally met with success.[cliv]

§2.8.2 Disqualification Under The Code

The Code of Judicial Conduct is divided into three main parts: canons, text, and commentary. The canons and text establish mandatory standards, while the commentary is meant to elaborate on the standards set forth in the text, provide a policy basis for canon or text, and offer specific examples. For judicial disqualification purposes, the most significant Code section by far is Canon 3E (which, in the original Code and today still in some jurisdictions, is designated as Canon 3C or Canon 3D). Pursuant to this Canon, a judge is expected to disqualify herself in a proceeding whenever her "impartiality might reasonably be questioned."[clv] Neither bias in fact nor actual impropriety is required to violate this canon.[clvi]

There has been a good deal of debate about whether Canon 3E was intended to be mandatory or advisory.[clvii] On the one hand, it has been argued that Canon 3E, which, on its face, is intended to be self-enforcing, does not have the force of substantive law, but rather imposes standards of conduct a judge can refer to in his self-appraisal of whether he should volunteer to recuse from a matter pending before him.[clviii] Thus, the argument goes, the rule does not give standing to others to seek compliance with or enforcement of the Code.[clix]

Although the Canons of Judicial Conduct are expressly intended only to guide a judge's decision on disqualification,[clx] it has generally been considered that any conduct that would lead a reasonable person, knowing all of the relevant facts and circumstances, to conclude that a judge's impartiality might reasonably be questioned, provides a proper basis for seeking judicial disqualification.[clxi]

While most versions of Canon 3E contain some guidelines for a judge's self-disqualification,[clxii] the Canon is not a "catch-all" provision;[clxiii] that is, it does not attempt to provide a comprehensive recitation of all the possible circumstances in which a judge's impartiality might "reasonably be questioned."[clxiv] Indeed, no guidelines or canons could set forth standards that would deal with every conceivable motion that might be filed by a party.[clxv] On the contrary, the Canon recites only certain such instances[clxvi] – the occasions where a judge should recuse herself in a proceeding includes, but is not limited to, them.[clxvii] Consequently, where the circumstances alleged to warrant disqualification are other than those specifically enumerated in the Canon, a judge may or may not be required to recuse herself.[clxviii]

The vast majority of disqualification motions predicated on alleged Code violations have been based on Canon 3E.[clxix] But other Code provisions have occasionally been invoked in support of disqualification applications.[clxx] Litigants have, for example, sometimes sought disqualification on the basis of Canons 2, 3B(7), and 3B(9). Canon 2, which codifies the duty of a judge to determine whether his decision to sit may reasonably present even an appearance of impropriety,[clxxi] has occasionally been discussed in the context of judicial disqualification proceedings.[clxxii] But because Canon 3E expressly prescribes when a judge should be disqualified on the basis of an appearance of impropriety, and because Canon 2's duty was clearly intended to be self-enforcing, disqualification has rarely, if ever, been predicated on this provision. Canon 3B(7) provides that a court should provide all parties a right to be heard and that it should not initiate, permit, or consider ex parte communications.[clxxiii] Parties have sometimes sought disqualification under this provision, with mixed results.[clxxiv] As for Canon 3B(9) – which mandates that a judge abstain from public comment

about a proceeding in any court[clxxv] – this provision allows a judge to explain the procedures of the court for public information, but is clear in indicating that a judge may not discuss the merits of a pending matter in a non-judicial forum, especially when he has reason to believe that the parties to the litigation may appear before him in the case again.[clxxvi]

§2.9 Other Bases for Seeking to Remove a Judge

At first blush it might appear that the Code of Judicial Conduct – together with the many constitutional provisions, statutes and court rules which deal with the subject – provides a comprehensive basis for bringing virtually any judicial disqualification motion. But a number of other possible bases for seeking such relief exist.[clxxvii] For example, in certain situations an administrative directive prescribing grounds for judicial disqualification may be accorded the force of law.[clxxviii] Similarly, judges may be guided in deciding judicial disqualification questions by state or federal advisory opinions.[clxxix] Another disqualification mechanism may be available in those cases in which the person sought to be removed is not a judge but a magistrate, master, or other quasi-judicial officer. A party who wishes to force the ouster of one of these individuals may seek to accomplish the desired end, not by moving the challenged judicial officer for an order of disqualification, but by moving the court to vacate the order that referred the matter to that judicial officer in the first place.
A similar strategy has occasionally been attempted in bankruptcy proceedings – that is, an attempt to remove a bankruptcy judge has sometimes been made not by moving the unwanted bankruptcy judge for disqualification but by moving the district court to vacate the reference to that judge pursuant to 28 U.S.C. §157.[clxxx] In addition, a number of state appeals courts,[clxxxi] as well as federal circuit court panels, have determined that they have the inherent power to remove lower court judges as part of their supervisory authority over the courts within their purview. See Chapter 33.

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[i] *See, e.g.*, Chase Manhattan Bank v. Affiliated FM Ins. Co., 343 F.3d 120, 130-131 (2d Cir. 2003) (noting that §455 is "not a provision that requires judicial action only after a party to the litigation requests it. The relevant provisions are directive and require some reasonable investigation and action on a judge's own initiative"), cert. denied, 124 S.Ct. 1652 (2004); S.W. Bell Tel. Co. v. FCC, 153 F.3d 520, 520 (8th Cir. 1998) ("it is the fundamental ethical duty of every judge to police [her] own disqualification status"). *Cf.* Cmwlth. v. King, 576 Pa. 318, 839 A.2d 237, 240-241 & n.8 (2003) ("both the [Code] and our case law allow a judge, of his own volition, to decide that recusal is appropriate for reasons other than those advanced by [a party]...we believe that our judges should sua sponte raise concerns that they believe might warrant their recusal"); Graham v. City of Findlay Police Dept., 2002 WL 418969, *4 (Ohio App. 2002) ("A judge may, of course, recuse himself when he recognizes his conflict of interest in a particular case, or when such is brought to his attention"); People v. Julien, 47 P.3d 1194, 1197 (Colo. 2002) ("If a judge has a bias that in all probability will prevent him or her from dealing fairly with a party, the judge must not preside...A judge must also consider the [Code] sua sponte").

[ii] *See, e.g.*, Johnson v. State, 278 Ga. 344, 602 S.E.2d 623, 2004 Ga. LEXIS 601, *7-9 (Ga. 2004) ("Judges...have an ethical duty to disqualify themselves from any matter in which they have a personal bias...concerning a party or an attorney"); In re Adoption of Reams, 52 Ohio App. 3d 52, 557 N.E.2d 159, 166 (1989) (a judge is under an independent obligation to disqualify himself in a situation where she harbors a personal bias concerning a party).

[iii] *See, e.g.*, Phillips v. State, 275 Ga. 595, 598 (Ga. 2002) ("Judges have an ethical duty to disqualify themselves...whenever they have a personal bias...concerning a party appearing before them"); Flowers v. State, 738 N.E.2d 1051, 1060 (Ind. 2000) ("A judge has the discretionary power to disqualify [herself] sua sponte whenever any semblance of judicial bias or impropriety comes [to her] attention. In addition, where a judge harbors actual prejudice in a case, justice requires that a sua sponte judicial disqualification...be made"); People v. Harmon, 3 P.3d 480, 482 (Colo. App. 2000) ("A judge may recuse...herself sua sponte if...she knows of circumstances that would be grounds for disqualification"); Tennant v. Marion Health Care Found., Inc., 459 S.E.2d 374, 385 (W. Va. 1995).

[iv] *See, e.g.*, Vautrot v. West, 272 Ga. App. 715, 613 S.E.2d 19, 2005 Ga. App. LEXIS 183, *12 (2005); Pool Water Prods. v. Pools by L.S. Rule, 612 So. 2d 705 (Fla. App. 1993); Newville v. State, 566 N.E.2d 567, 570 (Ind. App. 1991) (when a judge has actual bias justice requires that a sua sponte disqualification be made). *Cf.* Little Rock Sch. Dist. v. Ark. Bd. of Ed., 902 F.2d 1289 (8th Cir. 1990); In re Initial Pub. Offering Sec. Litig., 174 F. Supp.2d 70, 75 (S.D.N.Y. 2002); Metzger v. Sebek, 892 S.W.2d 20, 50 (Tex. Civ. App. 1994); State v. Foster, 854 S.W.2d 1, 7 (Mo. App. 1993); Boyd v. State, 321 Md. 69, 581 A.2d 1, 3 (1990). *But see* People v. Thoro Prods. Corp., 45 P.3d 737, 2001 Colo. App. LEXIS 575, *29 (2001) ("Defendants...claim they were relieved of their duty to file a timely motion because the judge had a duty to recuse on his own motion. We reject that claim. To hold otherwise would obviate the time limit...and encourage litigants to shop for judges").

[v] *See, e.g.*, In re McCarthey, 368 F.3d 1266, 1269 (10th Cir. 2004) ("The statute... places the judge under a self-enforcing obligation to recuse himself where the proper legal grounds exist"); In re Martinez-Catala, 129 F.3d 213, 220 (1st Cir. 1998) ("[under §455] the judge is expected to recuse sua sponte, where necessary, even if no party has requested it").

[vi] *See* Keller v. State, 84 P.3d 1010, 1011 (Alaska App. 2004) ("When judges conclude that it is impossible for them to be...impartial in a particular case they have a duty to recuse...even when no party to the litigation has raised the issue"). Cf. Pannell v. State, 71 S.W.3d 720, 725 (Tenn. Crim. App. 2001) (a judge "should recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case"); Cobo v. Pepper, 779 So. 2d 599, 600 (Fla. App. 2001) ("the judge's spontaneous offer to recuse herself evidences her awareness of being biased...The judge should have declined to officiate any further"); Johnson v. Bd. of Govs. of Reg'd Dentists, 41, 913 P.2d 1339, 1348 (Okla. 1996) (when the circumstances surrounding a litigation are of such a nature that they might reasonably cast doubt as to the impartiality of any judgment a judge may pronounce, she should certify her disqualification); In re Antonio, 612 A.2d 650, 653 (R.I. 1993); People v. Bradshaw, 171 Ill. App. 3d 971, 525 N.E.2d 1098, 1101 (1988); Willis v. State, 512 N.E.2d 871, 877 (Ind. App. 1987) (where a judge concludes that he is biased, justice requires that he recuse).

[vii] *See, e.g.*, Dunn v. County of Dallas, 794 S.W.2d 560, 562 (Tex. App. 1990).

[viii] Winslow v. Williams, 107 B.R. 752, 754 (D. Colo. 1989) (irrespective of the filing of any motion, a judge necessarily must consider his ability to be impartial in a given case); Dixie Carriers, Inc. v. Channel Fueling Serv., Inc., 669 F. Supp. 150, 152 (E.D. Tex. 1987).

[ix] State v. Hubbard, 267 Neb. 316, 673 N.W.2d 567 (Neb.2004) (noting that when a party shows that a reasonable person who knew the circumstances would question a judge's impartiality the judge should recuse, even though no actual bias is shown); Julien, *supra* note 1, at 1203, Bender, J., dissenting ("whenever possible, a judge must consider whether her impartiality might reasonably be questioned before trial begins. If so, then the judge must take action sua sponte"). *Also compare* In re Estate of Carlton, 378 So. 2d 1212, 1220 (Fla. 1980) (even when a suggestion of disqualification is legally insufficient, a judge may still recuse voluntarily if she believes it would be in the best interests of judicial administration, but cautioning that voluntary recusal has limited efficacy when disqualification has been sought by the losing party after the judge's participation in the case) *with* Adams v. Smith, 884 So. 2d 287, 2004 Fla. App. LEXIS 11860, *6-7 (Fla. App. 2004). *But see* Brinson v. State, 789 So. 2d 1125, 1126 (Fla. App. 2001) (the court lacked jurisdiction to recuse itself from proceedings once a petition for writ of prohibition was filed).

[x] Amerivend Corp. v. RCA Invests., Inc., 589 So. 2d 1006 (Fla. App. 1991); In re Turney, 311 Md. 246, 533 A.2d 916, 920 (1987) (a judge's duty to recuse does not end with the mandatory provisions of a constitution, statute, or rule; the judge must also consider whether her participation would give the appearance of impropriety). *Cf.* U.S. v. Kimberlin, 781 F.2d 1247, 1259 (7th Cir. 1985), *cert. denied*, 479 U.S. 938; In re Horton, 621 F.2d 968, 970 (9th Cir. 1980) (whether it is wise for a judge to withdraw when legally sufficient reasons for recusal cannot be presented is left to the judge's discretion); U.S. v. Parrilla Bonilla, 626 F.2d 177, 179 n.3 (1st Cir. 1980) (considerations other than those raised by a statutory recusal motion may make it appropriate for a judge to grant a motion for a new trial yet decline to sit as trier of fact at the trial); Brine v. Dubinsky, 115 Misc. 2d 572, 454 N.Y.S.2d 421, 423 (1982) (a judge's decision to disqualify will generally be upheld even if a motion for disqualification would be unsuccessful under the identical circumstances).

[xi] U.S. v. Harris, 542 F.2d 1283 (7th Cir. 1976), *cert. den.*, Clay v. U.S., 430 U.S. 934.

[xii] *See, e.g.*, Corradino v. Corradino, 48 N.Y.2d 894, 895, 400 N.E.2d 1338 (1979).

[xiii] *See* U.S. v. Snyder, 235 F.3d 42, 46 n.3 (1st Cir. 2000) (and citation therein).

[xiv] *See, e.g.*, Advocacy Org. v. Auto Club Ins. Assn., 472 Mich. 91, 97 (2005), Weaver, J., concurring ("A justice's nonparticipation in a case may arise in one of two ways. A justice may decide, on his own initiative, not to participate...and be shown as not participating. Alternatively, a party may request the recusal of a justice from a case").

[xv] *See* U.S. v. McKinlay, 543 F. Supp. 462 (D. Or. 1980).

[xvi] *See, e.g.*, Nateman v. Greenbaum, 582 So. 2d 643, 648 (Fla. App. 1991) (Baskin, J., dissenting); State v. Cruz, 517 A.2d 237, 240 (R.I. 1986) (a judge should disqualify himself in the event that he is unable to render a fair and impartial decision in any case).

[xvii] Roberts v. Ace Hardware, Inc., 515 F. Supp. 29, 31 (N.D. Ohio 1981) ("[t]he justice system would be impaired in its functioning if a party's counsel were forced to trial before a judge that he is convinced, however wrongly, is biased").

[xviii] U.S. v. Wolfson, 558 F.2d 59, 64 n.17 (2d Cir. 1977).

[xix] *See, e.g.*, Goodheart v. Casey, 523 Pa. 188, 565 A.2d 757, 763 (1989).

[xx] *See, e.g.*, United States v. Balistieri, 779 F.2d 1191, 1199 (7th Cir. 1985) ("[i]t was clearly not the intent of Congress to make recusal under §144 a discretionary determination"), *cert. denied sub nom.* DiSalvo v. United States, 475 U.S. 1095.

[xxi] In re WHET, Inc., 33 B.R. 424, 435 (Bankr. D. Mass. 1983) (Congress has not yet prescribed that parties be given peremptory judge challenges). *But see* United States v. Escobar, 803 F. Supp. 611 (E.D.N.Y. 1992) (permitting such a challenge in a capital case).

[xxii] Wamser v. State, 587 P.2d 232 (Alaska 1978) (no peremptory disqualification right existed at common law, and it is not afforded in the federal courts or in many states today).

[xxiii] *See, e.g.*, Wis. Stat. Ann. §801.58.

[xxiv] *See, e.g.*, Or. Rev. Stat. 14.250.

[xxv] *See, e.g.*, People v. Redisi, 188 Ill. App. 3d 797, 544 N.E.2d 1136, 1139 (1989). *Cf.* Vilas County v. Danber, 316 N.W.2d 346 (Wis. 1982) ("a request for substitution of judge is not a motion because it is not an application for an order").

[xxvi] *See* Alaska Stat. §22.20.022. *Cf.* In re Estate of Russell, 888 P.2d 489, 492 (N.M. App. 1994) (referring to a challenge as a "Notice of Excusal"), *cert. denied*, 888 P.2d 466.

[xxvii] *See, e.g.*, Cal. Code Civ. Proc. §170.6.

[xxviii] Note, Disqualification of Federal District Court Judges for Bias or Prejudice: Problems, Problematic Proposals, and a Proposed Procedure, 46 Alb. L. Rev. 229 (1981).

[xxix] *Compare* 6 Bracton, Legibus et Consuetudinibus Anglie 249 (Twiss ed., 1883) *with* 3 William Blackstone, Commentaries, *361.

[xxx] Margoles v. Johns, 660 F.2d 291 (7th Cir. 1981), *cert. denied*, 455 U.S. 909, State v. Hollingsworth, 160 Wis. 2d 883, 467 N.W.2d 555, 560 (Wis. App. 1991) (a party is not deprived of the fundamental fairness guaranteed by the Constitution by the appearance of bias or by circumstances that might lead one to speculate as to the judge's bias, but only if the judge, in fact, treats the litigant unfairly); State v. Iverson, 364 N.W.2d 518 (S.D. 1985).

[xxxi] Ark. Const., art. VII, §20; N.H. Const., pt. 1, art. 35; §18; Tenn. Const., art. 6, §11

[xxxii] *See, e.g.*, Jenkins v. State, 570 So. 2d 1191 (Miss. 1990).

[xxxiii] *See, e.g.*, Tex. Const., art. 5, §11.

[xxxiv] *See, e.g.*, N.H. Const., pt. 1, art. 35.

[xxxv] U.S. v. Ala., 828 F.2d 1532, 1540 n.22 (11th Cir. 1987) (per curiam) (the right to a trial before an impartial judge is a basic requirement of due process), *cert. denied sub nom.* Bd. of Trs. of Ala. State Univ. v. Auburn Univ., 108 S. Ct. 2857 (1988); U.S. v. Navarro-Flores, 628 F.2d 1178, 1182 (9th Cir. 1980); U.S. v. Sciuto, 531 F.2d 842 (7th Cir. 1976).

[xxxvi] *See, e.g.*, Garcia v. Super. Court, 156 Cal. App. 3d 670, 676 (1984).

[xxxvii] *See* Mallett v. Mallett, 323 S.C. 141, 147, 473 S.E.2d 804, 808 (S.C. App. 1996); People v. Williams, 124 Ill. 2d 300, 529 N.E.2d 558, 561 (1988).

[xxxviii] Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980), Marshall, J. ("The neutrality requirement...preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done' by ensuring that no person will be deprived of his interests [absent] a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him").

[xxxix] *See* Bigby v. Dretke, 402 F.3d 551, 554 (5th Cir. 2005) ("the cornerstone of the American judicial system is the right to a fair and impartial process...any judicial officer incapable of presiding in such a manner violates the due process rights of the party who suffers the resulting effects of that...bias"). *Cf.* State v. Dorsey, 701 N.W.2d 238, 2005 Minn. LEXIS 469, *25-26 (Minn. 2005) (though "the right to a trial before an impartial judge is not specifically enumerated in the Constitution, this principle has long been recognized by the U.S. Supreme Court"); Welsh v. Commissioner, 416 S.E.2d 451, 459 (Va. App. 1992).

[xl] See Bigby, *supra* note 5, at 554 (and citations therein).

[xli] 273 U.S. 510, 47 S. Ct. 437 (1927).

[xlii] Tumey, *supra* note 7, at 523.

[xliii] 409 U.S. 57, 93 S. Ct. 80 (1972).

[xliv] *See* 409 U.S. at 60.

[xlv] 349 U.S. 133, 75 S. Ct. 623 (1955) .

[xlvi] *Id.* at 136-137.

[xlvii] 403 U.S. 212, 91 S. Ct. 1778 (1971).

[xlviii] *Id.* at 215-216.

[xlix] 348 U.S. 11, 75 S. Ct. 11 (1954).

[l] *Id.* at 17.

[li] In re Antar, 71 F.3d 97, 102 (3d Cir. 1995). *Also compare* N. Dak. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021 (D.N.D. 2005) ("[t]here is no question that an impartial judge is critical to due process") *with* Alaska Right to Life Political Action Comm. v. Feldman, 380 F. Supp. 2d 1080 (D. Alaska 2005) (echoing *Bader*).

[lii] *See, e.g.*, U.S. v. Wilson, 77 F.3d 105, 110 (5th Cir. 1996); U.S. v. Mapco Gas Prods., Inc., 709 F. Supp. 900, 901 (E.D. Ark. 1989).

[liii] *See, e.g.*, State v. Thomas, 268 Neb. 570, 685 N.W.2d 69, 2004 Neb. LEXIS 150, *12 (Neb. 2004) ("The right to an impartial judge is guaranteed under the Due Process Clause of the 14th Amendment to the U.S. Constitution and the Due Process Clause of the Nebraska Constitution"); Murray v. Murray, 128 Wis. 2d 458, 383 N.W.2d 904, 906 (1986).

[liv] Walberg v. Israel, 766 F.2d 1071, 1076 (7th Cir. 1985) (where a judge is actually biased, there can be a violation of due process even when the judge is neither the trier of fact nor has conveyed his bias to the jury that is); Daye v. Attorney General, 696 F.2d 186, 197 (2d Cir. 1982) (en banc); U.S. v. Holland, 655 F.2d 44, 47 n.5 (5th Cir. Unit B 1981).

[lv] *See, e.g.*, State v. Millsap, 704 N.W.2d 426, 2005 Iowa Sup. LEXIS 117, *11 (Iowa 2005) ("There are...constitutional overtones to a recusal decision in a criminal case).

[lvi] Marshall, *supra* note 4, at 243. *See also* Sandstrom v. Butterworth, 738 F.2d 1200 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 787.

[lvii] *See, e.g.*, People v. Campbell, 129 Ill. App. 3d 819, 473 N.E.2d 129, 130 (1984) (unquestionably, an accused has a due process right to be tried before an unbiased judge).

[lviii] *See* S. Pac. Comms. v. AT&T, 740 F.2d 980 (D.C. Cir. 1984) ("[t]he determination that a judge is not disqualified necessarily includes a [finding] that the right to a fair trial is not violated by the judge's presiding over the case"), *cert. denied*, 105 S. Ct. 1359. *Also compare* Colonial Pipeline Co. v. Weaver, 310 N.C. 93, 103, 310 S.E.2d 338, 344 (1984) *with* State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294, (1984).

[lix] People v. Lydell, 37 Cal. 4th 310, 2005 Cal. LEXIS 9546, *61-62 (Cal. 2005); State v. Biddle, 652 N.W.2d 191, 198 (Iowa 2002); State v. O'Neill, 261 Wis.2d 534, 543, 663 N.W.2d 292 (Wis. App. 2002); State v. Pizzuto, 119 Idaho 742, 810 P.2d 680 (1991); Easter House v. Dept. of Children and Family Servs., 561 N.E.2d 1266, 1268 (Ill. App. 1990).

[lx] Garcia v. Super. Court, *supra* note 2, at 675.

[lxi] Catchpole v. Brannon, 36 Cal. App. 4th 237, 42 Cal. Rptr. 2d 440, 443 (1995).

[lxii] *See, e.g.*, Gardiner v. A.H. Robins Co., Inc., 747 F.2d 1180 (8th Cir. 1984) (the essence of due process is a fair trial before a tribunal free from bias); Sandstrom v. Butterworth, 738 F.2d 1200 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 787; People v. Flanagan, 201 Ill. App. 3d 1071, 559 N.E.2d 1105, 1111 (1990) (procedural due process requires a fair trial in a fair tribunal with an absence of any actual bias on the part of the judge); Collins v. Dixie Transport, Inc., 543 So. 2d 160, 162 (Miss. 1989); Murray v. Murray, 128 Wis. 2d 458, 383 N.W.2d 904, 906 (1986); Washington County Cease, Inc. v. Persico, 120 Misc. 2d 207, 465 N.Y.S.2d 965, 980, *aff'd*, 64 N.Y.2d 923 (1983).

[lxiii] *See, e.g.*, Bracy v. Gramley, 117 S. Ct. 1793, 138 L. Ed. 2d 97, 100-101 (1997).

[lxiv] Margoles v. Johns, 660 F.2d 291, 296 (7th Cir. 1981), *cert. denied*, 455 U.S. 909.

[lxv] State v. Hollingsworth, 160 Wis. 2d 883, 467 N.W.2d 555, 559 (Wis. App. 1991).

[lxvi] Repub. Party v. White, 536 U.S. 765, 794 (2002), Kennedy, J., concurring (a state "may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards"); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986); People v. Del Vecchio, 129 Ill. 2d 265, 544 N.E.2d 312 (1989), *cert. den.*, 110 S. Ct. 1540.

[lxvii] S. Pac. Comms. v. AT&T, *supra* note 24 (§§144 and 455 establish a more stringent disqualification standard than is required by the Due Process Clause), *cert. denied*, 105 S. Ct. 1359. *Cf.* Tumey, *supra* note 7, at 523 (matters of kinship, personal bias, state policy, and remoteness of interest would generally seem to be matters merely of legislative discretion).

[lxviii] Lavoie, *supra* note 32, at 820. *Cf.* U.S. v. Mansoori, 304 F.3d 635, 667 (7th Cir. 2002) ("Conflicts arising from the judge's familial relationships normally do not mandate recusal under the Due Process Clause"); Public Citizen Inc. v. Bomer, 274 F.3d 212, 217 (5th Cir. 2001) ("only in the most extreme cases does the Due Process Clause require disqualification); York v Civil Serv. Comm'n, 263 Mich. App. 694, 699, 689 N.W.2d 533 (2004) ("Judicial disqualification on the basis of due process is required only in the most extreme cases"). *But see* U.S. v. Galin, 222 F.3d 1123, 1128 (9th Cir. 2000) ("Due process requires recusal of a judge who has become personally embroiled in a controversy").

[lxix] In re Parr Meadows Racing Assn., 5 B.R. 564, 566 (Bankr. E.D.N.Y. 1980).

[lxx] U.S. v. Couch, 896 F.2d 78, 81 (5th Cir. 1990) (every act that would violate the Due Process Clause would also violate §455, but conduct violative of §455 does not necessarily rise to the level of a due process deficiency: "the conundrum is in blazing the parameters of each"); U.S. v. Haldeman, 559 F.2d 31, 130 n.276 (D.C. Cir. 1976) (anything impinging on the due process right to an impartial trial would more readily violate §455), *cert. denied*, Ehrlichman v. U.S. and Mitchell v. U.S., 431 U.S. 933 (1977); Baker v. Miller, 75 F. Supp.2d 919, 925 (N.D. Ind. 1999) ("not every situation, arguably appropriate for judicial disqualification, would be a due process violation"); In re Extrad'n of Singh, 123 F.R.D. 140 (D.N.J. 1988) (a federal court generally need not consider any constitutional implications).

[lxxi] Phelps v. Hamilton, 122 F.3d 1309, 1323 (10th Cir. 1997); Del Vecchio v. Ill. Dept. of Corrs., 31 F.3d 1363, 1373 (7th Cir. 1994) ("judges are subject to a myriad of biasing influences [but] are presumptively capable of overcoming [them] and rendering evenhanded justice...only a strong, direct interest in the outcome of a case is sufficient to overcome that presumption"); State v. Alderson, 260 Kan. 445, 922 P.2d 435, 444 (1996); Thomas v. State, 808 S.W.2d 364, 367 (Mo.banc 1991) (when a movant faces a judge who is actually biased, the right to disqualify no longer proceeds from the grace of our rules but from a command of the Constitution). *See also* Sandstrom v. Butterworth, 738 F.2d 1200 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 787; People v. Williams, 124 Ill. 2d 300, 529 N.E.2d 558, 561 (1988). *Cf.* Lavoie, *supra* note 32, at 820 (where the ground for the application is the appearance of bias, not bias in fact, the matters does not rise to a constitutional level).

[lxxii] United States v. Nickl, 427 F.3d 1286, 1298 (10th Cir. 2005) (to show a due process violation "a claimant must show either actual...or an appearance of bias"); In re Throneberry, 754 S.W.2d 633, 636 (Tenn. Crim. App. 1988). *But see* Del Vecchio, *supra* note 37, at 1371 (due

process sometimes requires a judge to recuse "without a showing of actual bias, where a sufficient motive to be biased exists...[but the] Supreme Court has never rested the vaunted principle of due process on something as subjective and transitory as appearances").

[lxxiii] *See* Cal. Code Civ. Proc. §170.6(2); Tenn. Code Ann. Rule 10. *Cf.* Hirning v. Dooley, 2004 SD 52, 679 N.W.2d 771, 781 (S.D. 2004) ("Because the right to disqualify is statutory, because the decision to disqualify is discretionary, and because Hirning does not assert actual bias...his constitutional right to due process is not implicated here"); Turner v. State, 573 So. 2d 657, 676 (Miss. 1990) (where the issues of a judge's qualifications do not rise to a federal constitutional level, perusal of relevant state law and regulations is in order).

[lxxiv] *See* Walberg v. Israel, 766 F.2d 1071, 1077 (7th Cir. 1985). *Cf.* U.S. v. Heffington, 952 F.2d 275, 279 (9th Cir. 1991).

[lxxv] *See* In Interest of McFall, 383 Pa. Super. 356, 556 A.2d 1370, 1375 (1989). *Cf.* Fero v. Kerby, 39 F.3d 1462, 1478-1479 (10th Cir. 1994) (disqualification under the Code is not deemed to imply impermissible bias under the Due Process Clause because, if it did, "federal courts would be assuming supervisory control over issues of judicial disqualification in the state courts"); Martin v. Farley, 872 F. Supp. 551, 556 (N.D. Ind. 1993) ("the federal standards are not written in constitutional stone"), *aff'd*, 45 F.3d 432 (7th Cir. 1994).

[lxxvi] In re Murchison, *supra* note 11, at 136; In re Extrdn. of Singh, *supra* note 36, at 147.

[lxxvii] U.S. v. Haldeman, *supra* note 36, at 130 n.276.

[lxxviii] *See* U.S. v. Mansoori, 304 F.3d 635, 667 (7th Cir. 2002) ("the Constitution demands recusal in a narrower range of circumstances than does the statute"). *See also* U.S. v. Wade, 931 F.2d 300, 304 n.5 (5th Cir. 1991) (the due process test is whether a reasonable judge would find it necessary to step aside; §455(a) has a lower threshold); Couch, *supra* note 36, at 82 (§455 requires disqualification when others would have reasonable cause to question the judge's impartiality; it is this additional systemic concern for avoiding the appearance of impropriety that makes the §455 standard more demanding than that imposed by the Due Process Clause); Aiken Cty. v. BSP Div. of Envirotech Corp., 866 F.2d 661 (4th Cir. 1989); U.S. v. Ala., *supra* note 1. *Cf.* Del Vecchio, *supra* note 37, at 1378 (due process requires an interest that "we can conclusively presume would cause the average judge to be biased").

[lxxix] Hardy v. United States, 878 F.2d 94, 97 (2d Cir. 1989) (concluding that §455(a)'s appearance of impropriety standard is not "mandated by the Due Process Clause").

[lxxx] Johnson v. Carroll, 369 F.3d 253, 2004 U.S. App. LEXIS 10166, *26 (3d Cir. 2004) ("Our sister Courts...have rejected arguments [that an appearance of bias constitutes a violation of due process]...We agree"), cert. denied, 2005 U.S. LEXIS 2507 (2005).

[lxxxi] Aiken Cty. , *supra* note 44.

[lxxxii] Couch, *supra* note 36 ("§455 and the Due Process Clause are not coterminous," and conduct "violative of §455 may not [necessarily] constitute a due process deficiency").

[lxxxiii] In Del Vecchio, *supra* note 37 at 1371-1372.

[lxxxiv] S. Pac. Comms. v. AT&T Co., *supra* note 24.

[lxxxv] *Compare* U.S. v. Larsen, 427 F.3d 1091, 2005 U.S. App. LEXIS 23696, *7-8 (8th Cir. 2005) (because we have found "that the relevant statute did not require the district judge to recuse himself, Mr. Larsen cannot prevail on his related contention that he was denied his due process right to an impartial judge") *with* U.S. v. Sypolt, 346 F.3d 838, 840 (8th Cir. 2003) ("the recusal statute is concerned largely with insuring that the federal judiciary appears to be impartial...It thus reaches farther than the Due Process Clause, which is concerned primarily with [parties' individual rights...Since Mr. Sypolt's] claim fails to pass muster under § 455...it cannot survive the more rigorous [Due Process standard]").

[lxxxvi] Lavoie, *supra* note 32, at 828. *Cf.* Marshall, *supra* note 4, at 243 (at some point the biasing influence will be "too remote and insubstantial" to violate the constitution).

[lxxxvii] Bracy v. Gramley, *supra* note 29, at 104. Baker v. Miller, 75 F. Supp.2d 919, 925 (N.D. Ind. 1999) ("most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard...").

[lxxxviii] Lavoie, *supra* note 32, at 825; Cain v Dept. of Corrs., 451 Mich. 470, 503, 512 n 48, 548 N.W.2d 210 (1996).

[lxxxix] *See, e.g.*, In re IBM Corp., 618 F.2d 923, 932 n.11 (2d Cir. 1980) (since recusal statutes were required to protect the due process guarantee, it would be anomalous to hold that a claim under the statutes, insufficient on its merits, could nevertheless satisfy the constitutional standard); United Nuclear Corp. v. Gen. Atomic Co., 96 N.M. 155 n.164, 629 P.2d 231 (1980), *cert. denied*, 451 U.S. 901. *But see* Sciuto, *supra* note 1, at 845 (the constitutional fair trial requirement is independent from those conferred by statute, and may well force recusal in instances where the statutes do not technically apply).

[xc] *See* Bracy, *supra* note 29, at 104.

[xci] *See* In re Extrdn. of Singh, *supra* note 36, at 140 n.5. *Cf.* In re IBM Corp., *supra* note 55, at 932 n.11. *See also* U.S. v. Ala., *supra* note 1, at 1540 n.22; Lavoie, *supra* note 32, at 821 (only in extreme cases would disqualification for judicial bias be constitutionally required); Aiken Cty. , *supra* note 44, at 678; Meagher v Wayne State Univ, 222 Mich. App. 700, 726, 565 N.W.2d 401 (1997); Boyd v. State, 321 Md. 69, 581 A.2d 1, 3 (1990).

[xcii] Tumey, *supra* note 7, at 523. *Cf.* Lavoie, *supra* note 32 (J. Brennan, concurring).

[xciii] *See, e.g.*, Mayberry v. Pennsylvania, 400 U.S. 455, 91 S. Ct. 499 (1971).

[xciv] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

[xcv] Plumer v. Maryland, 915 F.2d 927, 932 (4th Cir. 1990).

[xcvi] *See* State v. Purdy, 766 S.W.2d 476, 478 (Mo. App. 1989). *But cf.* State v. Fie, 320 N.C. 626, 359 S.E.2d 774, 775 (1987) (the fact that a judge should not have been disqualified under the relevant statute may not settle the matter because, in most jurisdictions, a judge may be disqualified for reasons other than those set forth in a statute).

[xcvii] *See* 28 U.S.C. §§47, 144, and 455.

[xcviii] *See, e.g.*, Ala. Code §12-1-12; Alaska Stat. 22.20.020-22.20.022; Conn. Gen. Stat. §51-39; Fla. Stat. §38.01; La. Code Civ. Proc. art. 671; Texas Code Crim. Proc. art. 30.01.

[xcix] *See, e.g.*, Mo. Stat. §472.060. *Cf.* State ex rel. York v. Kays, 916 S.W.2d 859 (Mo. App. S.D. 1996).

[c] *See* U.S. v. State of Washington, 98 F.3d 1159, 1164 (9th Cir. 1996), Kozinski, J., concurring ("there is no residual common law authority for judicial disqualification").

[ci] *See* 28 U.S.C. §372(c).

[cii] State of Wash., *supra* note 5, at 1164, Kozinski, J., concurring. *But see* Cal. Const. Art. 6, §18 (providing for disqualification of judges who have been indicted or recommended for removal or retirement by the state's Commission on Judicial Performance).

[ciii] Act of May 8, 1792, ch. 36, §11, 1 Stat. 278.

[civ] For example, Connecticut enacted a statute requiring disqualification for certain familial relationships in 1672. *See* Conn. Gen. Stat. of 1672, p.42.

[cv] *See, e.g.*, Alaska Stat. §22.20.022; Cal. Code Civ. Proc. §170.1-6; N.M. Stat. §38-3-9. *Cf.* Curle v. Super. Court, 24 Cal.4th 1057, 1070 (2001) (noting that statutes governing disqualification for cause are "intended to ensure public confidence in the judiciary and to protect the right of the litigants to [an] impartial adjudicator").

[cvi] *See* Martinez v. Carmona, 624 P.2d 54, 60 (N.M. App. 1980) (Lopez, J., dissenting).

[cvii] *See* State v. Fie, 320 N.C. 626, 359 S.E.2d 774, 775 (1987).

[cviii] D.C. Code, Court Rule 63-I.

[cix] *See, e.g.*, Alaska Crim. Rule 25; Ariz. Crim. Rule 10; Minn. R. Civ. P. 63.03.

[cx] *See, e.g.*, Md. Rule P4 (constructive contempt).

[cxi] *See, e.g.*, N.J. Rule 1:12-1.

[cxii] *See, e.g.*, Tenn. Code Ann., Rule 10.

[cxiii] *See, e.g.*, Ariz. Crim. Rule 10.

[cxiv] State ex rel. Stidham v. County Court of Clark County, 523 N.E.2d 429 (Ind. 1988).

[cxv] *See, e.g.*, Idaho Crim. Rule 40(d).

[cxvi] *See, e.g.*, Wis. Supreme Court Rule 60.03.

[cxvii] *See, e.g.*, Colo. R. Civ. P. 97.

[cxviii] *See, e.g.*, Idaho R. Civ. P. 40(d).

[cxix] *See Surratt* v. Prince George's Cty., Md., 320 Md. 439, 578 A.2d 745, 757 (1990).

[cxx] *See* Baier v. Hampton, 440 N.W.2d 712, 714 (N.D. 1989); Ross v. Luton, 456 So. 2d 249 (Ala. 1984). *Cf.* State v. Gardner, 789 P.2d 273, 278 (Utah 1989) (the Code establishes standards that, if violated, may subject a judge to discipline, but does not establish the parameters of a defendant's right to a fair trial), *cert. denied*, 110 S. Ct. 1837.

[cxxi] *See, e.g.*, In re Demjanjuk, 584 F. Supp. 1321, 1322 (N.D. Ohio 1984).

[cxxii] *See* Winslow v. Lehr, 641 F. Supp. 1237, 1238 (D. Colo. 1986).

[cxxiii] Shaman, The Impartial Judge: Detachment or Passion, 45 DePaul L. Rev. 605, 607 (1996) (some version of the Code "has been officially adopted in [48] states...and the federal court system"; only Montana and Wisconsin "remain as hold-outs").

[cxxiv]The original Canons contained only two disqualification provisions. Canon 13 said that a judge "should not act in a controversy where a near relative is a party," while Canon 29 stated that a judge "should abstain from performing any judicial act when his personal interests were involved." *See* In re City of Houston, 745 F.2d 925, 927 n.4 (5th Cir. 1984).

[cxxv]For example, while the original Canons enjoined judges from manifesting hostility to parties or attorneys, they provided little guidance for judges faced with claims that they failed to do so. *See* Idaho v. Freeman, 507 F. Supp. 706 (D. Idaho 1981).

[cxxvi]*See* Bloom, Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges, 35 Case W. Res. L. Rev. 662, 672 n.53 (1985).

[cxxvii]*See* ABA Special Comm. on Standards of Judicial Conduct, Preface to Code of Judicial Conduct (1972).

[cxxviii]Thode, Reporter's Notes to Code of Judicial Conduct 99 (1973).

[cxxix]Report of Procs. of the Jud'l Conference of the U.S. 10 (1973). *Cf.* U.S. v. Microsoft Corp., 253 F.3d 34, 111 (D.C. Cir. 2001) ("The Code of Conduct...was adopted by the Judicial Conference of the United States in 1973. It prescribes ethical norms for federal judges as a means to preserve the actual and apparent integrity of the federal judiciary").

[cxxx]*See* Atkins v. U.S., 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009.

[cxxxi]*See* SCA Servs., Inc. v. Morgan, 557 F.2d 110, 113 (7th Cir. 1977) (per curiam).

[cxxxii]*See* Thode, *supra* note 10.

[cxxxiii]State v. Thompson, 150 Ariz. 554, 724 P.2d 1223, 1226 (Ariz. App. 1986).

[cxxxiv]Thode, *supra* note 10, at 396.

[cxxxv]Buchanan v. Buchanan, 587 So. 2d 892, 895 (Miss. 1991) (when a judge's conduct is being examined according to the dictates of a canon of the Code of Judicial Conduct, the canon enjoys the status of law). *Cf.* Sargent Cty. Bank v. Wentworth, 500 N.W.2d 862, 877 (N.D. 1993) (the disqualification directions in the Code are not mere guidelines – they are mandatory); Surratt v. Prince George's Cty., Md., 320 Md. 439, 578 A.2d 745, 757 (1990).

[cxxxvi]Collins v. Dixie Transport, Inc., 543 So. 2d 160, 166 (Miss. 1989).

[cxxxvii]*See, e.g.*, Foster v. U.S., 618 A.2d 191, 192 (D.C. App. 1992); Collins v. Dixie Transport, Inc., 543 So. 2d 160, 162 (Miss. 1989). *But see* Las Vegas Downtown Redev. Agency v. Hecht, 940 P.2d 134, 140 (Nev. 1997), Sullivan, D.J., concurring ("judicial ethics rules...are irrelevant for the court's consideration in disqualifying a supreme court justice").

[cxxxviii]*See, e.g.*, Sargent Cty. Bank, *supra* note 17, at 879-880.

[cxxxix]*See, e.g.*, In re Cooks, 694 So. 2d 892 (La. 1997).

[cxl]*See, e.g.*, In re Marriage of Lemen, 113 Cal. App. 3d 769, 791 n.8 (1980) ("leaving no vagrom stone unturned, appellants urged that judge should have disqualified himself pursuant to Canon 3C(1)(a) of the CJC").

[cxli]Councell v. Stafford, 626 N.E.2d 577, 579 (Ind. App. 1993). *Cf.* Reg'l Sales Agency, Inc. v. Reichert, 830 P.2d 252, 261 (Utah App. 1992) (Howe, Associate C.J., dissenting).

[cxlii]Beharry v. Mascara, 101 Pa. Commw. 582, 516 A.2d 872 (1986) (the Code imposes standards of conduct on the judiciary to be referred to by a judge in his self-assessment of whether he should recuse himself from a matter pending before him; it does not give standing to others, including a court, because its provisions merely set a norm of conduct). *Cf.* Lozano v. State, 752 P.2d 1326, 1328 (Wyo. 1988) (assuming arguendo that a canon of ethics is a clear and unequivocal rule of law, there must be proof that the judge was biased).

[cxliii]*See* State v. Am. TV and Appliance of Madison, Inc., 151 Wis. 2d 175, 443 N.W.2d 662 (1989). *See also* State v. Carviou, 154 Wis. 2d 641, 454 N.W.2d 562, 563 (1990).

[cxliv]*See, e.g.*, Kemp v. State, 846 S.W.2d 289, 305 (Tex. App. 1992).

[cxlv]*See, e.g.*, Reichert, *supra* note 23, at 260 (Howe, Associate C.J., dissenting).

[cxlvi]See, e.g., Reed v. Rhodes, 179 F.3d 453, 486 (6th Cir. 1999), Cole, J., dissenting ("Although § 455(a) sets forth the statutory requirement for recusal, federal judges must also abide by a Code of Judicial Conduct for United States Judges"); S.E. Bank, N.A. v. Capua, 584 So. 2d 101, 103 (Fla. App. 1991). *Cf.* In re Hill, 152 Vt. 548, 568 A.2d 361, 373 (1989) (a judge can never avoid the prestige and authority of the office he holds).

[cxlvii]*See, e.g.*, In re Va. Elec. & Power Co., 539 F.2d 357 (4th Cir. 1976); In re MGM Grand Hotel Fire Litig., 570 F. Supp. 913 (D. Nev. 1983).

[cxlviii]*See* In re Barry, 946 F.2d 913, 917 (D.C. Cir. 1991) (Edwards, J., dissenting) (the Code standards of conduct are generally not directly enforced through §455(a); rather, for the most part, the Code is enforced through self-regulation by individual judges).

[cxlix]*See, e.g.*, Sch. Dist. of Kansas City v. Mo., 438 F. Supp. 830 (D. Mo. 1977).

[cl]State ex rel. Wesolich v. Goeke, 794 S.W.2d 692, 698 (Mo. App. 1990) (noting that former Canon 3C is broader than the applicable Missouri judicial disqualification statute).

[cli]*See* Kelley v. Metro. Cty. Bd. of Educ. of Nashville, 479 F.2d 810 (6th Cir. 1973).

[clii]*See* U.S. v. Kimberlin, 781 F.2d 1247, 1259 (7th Cir. 1985), *cert. denied*, 479 U.S. 938; Dixie Carriers, Inc. v. Channel Fueling Serv., 669 F. Supp. 150, 152 (D. Tex. 1987).

[cliii]*See, e.g.*, Scott v. U.S., 559 A.2d 745, 755 (D.C. App. 1989) (the fact that a party does not claim that his trial was unfair or that the judge was actually biased against him is not dispositive); State v. McKinney, 358 S.E.2d 596 (W. Va. 1987).

[cliv]*See, e.g.*, Korolko v. Korolko, 33 Ark. App. 194 (1991) (finding that former Canon 3C applied even though there was no request to disqualify); Reilly v. S.E. Pa. Transp. Auth., 330 Pa. Super. 420, 479 A.2d 973, 987 (1984), *vacated on other grounds*, 507 Pa. 204 (1985). *See also* Graley v. Workman, 341 S.E.2d 850, 851 (W. Va. 1986) (judges have an affirmative duty to recuse within a reasonable time following cognizance of good cause therefore). *Cf.* Madsen v. Prudential Fed. Sav. and Loan Assn., 767 P.2d 538, 544 (Utah 1988) (addressing whether the judge should have disqualified himself on his own motion).

[clv]*See* State ex rel. Wesolich v. Goeke, 794 S.W.2d 692, 698 (Mo. App. 1990); In re Yandell, 244 Kan. 709, 772 P.2d 807, 812 (1989); Postemski v. Landon, 9 Conn. App. 320, 518 A.2d 674, 675 (1986); Stamper v. Cmwlth., 228 Va. 707, 324 S.E.2d 682 (1985).

[clvi]*See, e.g.*, Scott v. U.S., *supra* note 35, at 749.

[clvii]*Compare* City of Cleveland v. Willis, 63 Ohio Misc. 40, 410 N.E.2d 823, 826 (1980) (any judge has the authority and, in fact, the duty to recuse when his impartiality might reasonably be questioned) *with* Pierce v. Charity Hosp. of La., 550 So. 2d 211, 215 (La. App. 1989). *See also* Hall v. Small Bus. Admin., 695 F.2d 175, 178 (5th Cir. 1983) (a judge must recuse in any proceeding in which his impartiality might reasonably be questioned). *Cf.* Los v. Los, 595 A.2d 381, 384 (Del. 1991) (the Canon provides certain bright-line standards for mandatory disqualification where a judge's bias would be unquestionable).

[clviii]*See, e.g.*, State ex rel. Bardacke v. Welsh, 102 N.M. 592, 698 P.2d 462 (N.M. App. 1985); Forsmark v. State, 349 N.W.2d 763 (Iowa 1984).

[clix]Reilly v. S.E. Pa. Transp. Auth., 507 Pa. 204, 489 A.2d 1291, 1298 (1985).

[clx]Baier v. Hampton, 440 N.W.2d 712, 714 (N.D. 1989).

[clxi]*See, e.g.*, Cellcom v. Sys. Comm. Corp., 939 P.2d 185, 195 & n.12 (Utah App. 1997); State v. Maluk, 10 Conn. App. 422, 523 A.2d 928, 930 (1987) (where the disqualification of a judge is based on bias, his conduct is governed by former 3C); Scott v. Brooklyn Hosp., 93 A.D.2d 577, 462 N.Y.S.2d 272, 274 (1983).

[clxii]*See, e.g.*, City of Kansas City v. Wiley, 697 S.W.2d 240, 244 (Mo. App. 1985); Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983). *Cf.* Patterson v. Council on Probate Judicial Conduct, 215 Conn. 553, 577 A.2d 701, 708 (1990).

[clxiii]State v. Brown, 776 P.2d 1182, 1187 (Haw. 1989) (no one would argue seriously that the disqualification of judges on grounds of actual bias, kinship, pecuniary interest, and prior involvement prevents unfairness in all cases).

[clxiv]Reilly, *supra* note 41, at 981.

[clxv]State v. Cruz, 517 A.2d 237, 241 n.1 (R.I. 1986).

[clxvi]*See, e.g.*, Grant v. State, 700 S.W.2d 170, 171 (Mo. App. 1985).

[clxvii]Reilly, *supra* note 41, at 981.

[clxviii]*See, e.g.*, Bryars v. Bryars, 485 So. 2d 1187, 1189 (Ala. Civ. App. 1986). *Cf.* Poorman v. Cmwlth., 782 S.W.2d 603, 606 (Ky. 1989) (the questions presented by (former) Canon 3C are of such infinite factual variety that blind application of a general rule to all cases would, in some instances, work an injustice on the persons the rule is designed to protect); McKeague v. Talbert, 3 Haw. App. 646, 658 P.2d 898, 905 (1983).

[clxix]Weber v. State, 547 A.2d 948, 951 (Del. Super. 1988).

[clxx]*See* In re Antonio, 612 A.2d 650, 654 (R.I. 1993) (respondent argued that the judge violated Canon 8 of the Canons of Judicial Ethics, which requires judges to be courteous to and display respect to other persons). *Cf.* ABA Code, Canon 3B(4) (1990).

[clxxi]*See* Sch. Dist. of Kansas City , *supra* note 31 ("that duty is a judicially imposed duty and has as its source principles in experience which are quite independent of duties which may be imposed by legislative action").

[clxxii]*See, e.g.*, U.S. v. Mapco Gas Prods., Inc., 709 F. Supp. 900, 901 (E.D. Ark. 1989); U.S. Term Limits, Inc. v. Hill, 315 Ark. 685, 870 S.W.2d 383, 385 (1994). *Cf.* Goebel v. Benton, 830 P.2d 995, 998 n.1 (Colo. 1992).

[clxxiii]*See* In re Wirebound Boxes Antitrust Litig., 724 F. Supp. 648, 651 (D. Minn. 1989).

[clxxiv]*See, e.g.*, In re MGM Grand Hotel Fire Litig., 570 F. Supp. 913 (D. Nev. 1983).

[clxxv]*See, e.g.*, State v. Mincey, 687 P.2d 1180, 1199 (Ariz. 1984).

[clxxvi] In re Barry, *supra* note 30. *Cf.* U.S. v. Yonkers Bd. of Ed., 946 F.2d 180, 185 (2d Cir. 1991) (statements a judge makes in public, even to members of the media, that do no more than restate what the court said in open court do not warrant disqualification). *Cf.* U.S. v. Haldeman, 559 F.2d 31, 136 (D.C. Cir. 1976) (a judge's responses during an interview to questions about whether defendants could get a fair trial did not warrant recusal), *cert. denied*, Ehrlichman v. U.S. and Mitchell v. U.S., 431 U.S. 933 (1977).

[clxxvii] *See, e.g.*, Offutt v. U.S., 348 U.S. 11, 16-18 (1954); O'Rourke v. City of Norman, 875 F.2d 1465, 1475 (10th Cir. 1989); U.S. v. Sears, Roebuck & Co., 785 F.2d 777, 780 (9th Cir.), *cert. denied*, 479 U.S. 988 (1986).

[clxxviii] *See, e.g.*, State v. McNamara, 212 N.J. Super. 102, 514 A.2d 63 (1986) (there can be no doubt that an administrative directive concerning judicial disqualification promulgated by the Administrative Director of the Courts that embodies guidelines promulgated by the Supreme Court has the full force of law), *cert. denied*, 108 N.J. 210, 528 A.2d 30 (1987).

[clxxix] *See* York v. U.S., 785 A.2d 651, 656 (D.C. 2001) ("the Committee's opinion is not binding on this court, [but] we find its reasoning persuasive"); Bernofsky v. Admin'rs of the Tulane Educ. Fund, 2000 U.S. Dist. LEXIS 8091 (E.D. La. 2000) ("Advisory Opinions are given great credence by courts when faced with real scenarios") *Also compare* In Re Cabletron Sys., 311 F.3d 11, 71 (1st Cir. 2002) (noting that the Chief Judge had weighed the advice of the Committee on Codes) *and* In re Hatcher, 150 F.3d 631, 638 (7th Cir. 1998) (noting that the Advisory Committee on Judicial Activities concluded that "[a] judge whose child is an [AUSA] need not for that reason alone recuse from all cases in which the U.S. Attorney appears as counsel") *and with* Draper v. Reynolds, 369 F.3d 1270, 1280 (11th Cir. 2004) ("This Court is not bound by the opinions of the Committee on Judicial Codes ...In the past, however, courts have considered those opinions to some extent") *and with* Ex parte City of Dothan Personnel Bd., 831 So. 2d 1, 7 (Ala. 2002) (noting that advisory opinions are not binding). *Cf.* U.S. v. Edwards, 39 F. Supp.2d 692, 713 (M.D. La. 1999) ("the Fifth Circuit and [written advisory opinions of the Committee on Codes do not require a judge to recuse] where his son is an associate in a law firm which is counsel of record for a party").

[clxxx] In re Mem. Estates, Inc., 90 B.R. 886 n.8 (N.D. Ill. 1988) (noting that an argument can be made that the reasons for withdrawal of a reference under §157(d) are broader than those for disqualification under §455). *See also* In re M. Ibrahim Khan, P.S.C., 751 F.2d 162, 164 (6th Cir. 1984). *Cf.* In re Abijoe Realty Corp., 943 F.2d 121, 126 (1st Cir. 1991) (a party submitted to the district court a Rule 60(b) motion to vacate a bankruptcy court order of dismissal on the ground that the bankruptcy judge should have recused herself).

[clxxxi] *See, e.g.*, In re Marriage of Miller, 778 P.2d 888, 892 (Mont. 1989).