Recusal Standards for Judges in Pennsylvania: Cause for Concern

Kenneth S. Kilimnik
RECUSAL STANDARDS FOR JUDGES IN PENNSYLVANIA: CAUSE FOR CONCERN

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I. INTRODUCTION

Changes are afoot in the regulation of judicial conduct on a national and state level.1 Nationally, the American Bar Asso-

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1. In most state courts and in the federal courts, judges' committees issue advisory opinions in response to questions about ethics from individual judges. In Pennsylvania, the Judicial Ethics Committee of the Pennsylvania Conference of State Trial Judges issues such opinions upon request. Additionally, in the federal system, the Judicial Conference Committee concerned with Ethical Standards in the Federal Judiciary answers requests from judges. See Review of the Activities of Judicial Conference Committees Concerned with Ethical Standards in the Federal Judiciary, 75 F.R.D. 247 (1977). The American Bar Association's Center for Professional Responsibility issues advisory opinions concerning the Judicial Code of Conduct, a code which has been adopted by 48 jurisdictions.

As for judicial discipline, all fifty states and the District of Columbia have a commission, board or committee that investigates allegations of judicial misconduct. In many instances, but not in Pennsylvania, such groups also issue guidance on ethical questions in advisory format. Summaries of cases and empirical studies on the topic of judicial misconduct can be found in the JUDICIAL CONDUCT REPORTER, published quarterly by the American Judicature Society (AJS) and in the JUDICIAL DISCIPLINE AND DISABILITY DIGEST, supplemented annually by AJS. For literature on judicial discipline and in particular on judicial recusal, see Abramson, Judicial Disqualification under Canon 3C of the Code of Judicial Conduct (1986) (monograph published by AJS concerning judicial disqualification); Begue & Goldstein, How Judges Get Into Trouble, 26 JUDGES' J. 8 (1987) (review of judicial misconduct such as bias and appearance of partiality); Browning, Evaluating Judicial Performance and Related Matters, 90 F.R.D. 197 (1981) (describing Judicial Council Reform and Judicial Conduct and Disability Act of 1980);
ication (ABA) has completed its first comprehensive revision of the Code of Judicial Conduct,2 and a national commission has been established to investigate the discipline and removal of federal judges.3 In Pennsylvania, the Governor’s Commission on Judicial Reform, known as the Beck Commission for its chair, the Honorable Phyllis W. Beck of the Pennsylvania Superior Court, has inspired a constitutional amendment that will establish an entirely new system of judicial discipline in Pennsylvania if approved by statewide referendum.4


2. See Model Code of Judicial Conduct (ABA House of Delegates 1990) (hereinafter Model Code). The Model Code amends the previous Code of Judicial Conduct in several minor ways: (a) adding personal bias or prejudice against a party’s attorney as grounds for judicial disqualification, Model Code Canon 3E(1)(a); (b) including de minimis interest as an exception to the provisions requiring disqualification for interest, Model Code Canon 3E(1)(c); and (c) permitting the parties to remit or waive disqualification of the judges so long as the basis for disqualifying her is not personal bias or prejudice concerning a party, Model Code Canon 3F. The Model Code, with correlation tables to the 1972 Code of Judicial Conduct, is available from the ABA. For a discussion of the Code of Judicial Conduct as adopted in Pennsylvania, see infra notes 14-22 and accompanying text.


4. As required by the Pennsylvania Constitution in Article XI, both houses of the General Assembly approved the proposed amendment in identical form in two consecutive legislative sessions as a joint resolution. H.B. 1, P.N. 166, 1991 Pa. General Assembly Sess. (signed by Speaker Feb. 12, 1991); S.B. 1, P.N. 2414, 1990 Pa. General Assembly Sess. (reported from committee June 29, 1990). In addition to the reform of the judicial disciplinary system, the pro-

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Judicial removal is frequently in the news. In the last few years Congress has impeached three federal judges, and the criminal prosecution of some sixteen judges of the Pennsylvania Court of Common Pleas in the so-called Roofers’ scandal has brought unwanted notoriety to Philadelphia.

Public reaction nowadays seems to favor dismissal of any judge who accepts gifts from potential litigants. This article suggests that a less drastic sanction could be used, such as requiring the return of any money accepted, public censure and removal from any matter involving the giftgiver. For example, fifteen years ago, the Pennsylvania Supreme Court reprimanded a judge for taking the proceeds of a testimonial dinner and ordered him to return the money, notwithstanding the custom for judges to keep such proceeds.7 The judge, however, was not removed from office.

posed constitutional amendment mandated the same financial disclosure by state judges as is required of state legislators and made the budget for statewide courts and judicial agencies subject to approval and appropriation by the General Assembly.

The Commonwealth was enjoined by preliminary injunction on April 1, 1991 from placing the amendment on the ballot for the May 21, 1991 primary election. Kramer v. Lewis, No. 72, Misc. Dkt. 1991 (Pa. Commw. Ct. Apr. 1, 1991). President Judge David W. Craig held that the Commonwealth had not sought timely publication of the amendment in newspapers in each county as set forth in Article XI of the Pennsylvania Constitution. Id. slip op. at 22-27. The court also held that the amendment improperly delegated discretion to the Commonwealth’s Secretary of State to decide on which election to place the amendment before the voters. Id. slip op. at 17-21. By setting oral argument on the appeal for September 1, 1991, the Pennsylvania Supreme Court has made it unlikely that the amendment will be on the ballot in the November 1991 general election even if Judge Craig’s preliminary injunction is reversed or vacated.

Despite the clear legislative support behind the amendment, judicial opposition may make its future somewhat unpredictable. It is too soon to foretell whether, how and when the voters in Pennsylvania will be presented with a proposal to alter the judicial disciplinary system discussed in this article. For a discussion of the possible effect of this constitutional amendment on recusal decisions in Pennsylvania, see infra notes 179-80 and accompanying text.


This article does not address the effect of sanctions on judicial behavior, but does argue that at least some unacceptable judicial conduct in Pennsylvania is better prevented through a neutral application of the doctrine of judicial recusal than by the drastic wrench of removal from office. In reaching this conclusion, the procedures and standards for recusal of Pennsylvania judges are reviewed and compared with those in other state courts, the federal courts and with the laws in two foreign countries, Switzerland and Germany.

Before 1972, recusal rules in Pennsylvania and elsewhere were generally set by statute or general court rule. The introduction of a judicial conduct code shifted the legal analysis from applying general legal norms to judging moral behavior of judges. Conflicts of interest and discipline became the prevailing concerns rather than common sense and statutory interpretation.

Two changes in judicial recusal standards for Pennsylvania are suggested by a look at the laws of other jurisdictions: first, whenever feasible, a judge other than the one whose recusal is sought ought to decide a recusal petition; and second, the appropriate standard for recusal is the appearance of prejudice or impropriety, not whether the judge is actually biased or has abused his discretion in declining to recuse himself. Recusal should be required whenever a judge's impartiality might reasonably be questioned. In cases where the challenged judge is willing to grant the recusal motion, referral should not be necessary. Otherwise, the decisionmaker should not be the judge whose recusal is sought. Although the Code of Judicial Conduct does not suggest that the decision to recuse should be referred to another judge, doing so may help reinstil or maintain the confidence of litigants and the public's perception that state judges are impartial.

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8. For a discussion of the procedures and standards for judicial recusal in Pennsylvania, see infra notes 15-171 and accompanying text.
9. For a discussion of the procedures and standards for judicial disciplinary action in other states, see infra notes 272-99 and accompanying text.
10. For a discussion of federal procedures and standards for judicial discipline, see infra notes 186-271 and accompanying text.
11. For a discussion of the Swiss and German procedures and standards for judicial discipline, see infra notes 300-61 and accompanying text.
12. Professor Thode, the reporter for the Code, once suggested that if a judge is unwilling to disqualify himself, the motion should be decided by other members of the court. See Thode, supra note 1, at 410-11. The ABA's Standards Relating to Trial Courts partially shares this view, stating that "a judge against whom a motion to disqualify . . . is made may . . . determine whether it is legally sufficient on its face, but factual issues raised by the motion should be heard and resolved by another judge." Standards Relating to Trial Courts § 2.32(a)
This author suggests, therefore, that while referring recusal motions to "fellow judges" will offer its own opportunities for abuse, it will provide needed peer review and will reinforce judges' sense of institutional loyalty and commitment. Discipline should be reserved for cases of extreme misbehavior by judges, not for matters where the decision depends on the appearance of impropriety. If these practices are incorporated into Pennsylvania law, by statute or case law, the opportunity for Pennsylvania judges to act corruptly in deciding cases will be substantially reduced.

II. RECUSAL RULES IN PENNSYLVANIA

A. Overview

Unlike the federal Constitution, the Pennsylvania Constitution incorporates the Code of Judicial Conduct and thus mandates judicial impartiality. The Pennsylvania Supreme Court, however, has interpreted recusal issues much more restrictively than has the United States Supreme Court. Recusal standards for Pennsylvania judges are found in Canon 3C of the Code of Judicial Conduct. Canon 3C(1) states broadly: "A judge should..."
disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . . .”15 It then gives examples of disqualifying conduct, such as where the judge “has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.”16

(1924), reprinted in H. DRINKER, LEGAL ETHICS 328 (1953). Canon 5 provided that a judge should be “temperate, attentive, patient, impartial, . . . studious of the principles of the law and diligent in endeavoring to ascertain the facts.” Id. Canon 13 dealt with kinship and influence:

[A judge should] not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person.

Id. at 330. Canon 29 stated that a judge “should abstain from performing or taking part in any judicial act in which his personal interests are involved.” Id. at 334.

15. PA. CODE OF JUDICIAL CONDUCT Canon 3C(1), reported in 455 Pa. xxix, xxxv (1973). In contrast, the analogous section of the ABA Model Code uses the term “shall” instead of “should” as it does in many other sections throughout the Code. See MODEL CODE Canon 3E(1). Notwithstanding the strengthening of the language, the Preamble of the ABA Model Code cautions that it “is not intended . . . that every transgression [of the Code] will result in disciplinary action.” Id. at 4.

16. PA. CODE OF JUDICIAL CONDUCT Canon 3C(1)(a) (1974). While Canon 3C(1)(a) refers only to disqualification, the cases refer interchangeably to recusal or disqualification. See, e.g., Aetna Life Ins. Co. v. LaVoie, 475 U.S. 813, 821 (1986); Municipal Publications, Inc. v. Court of Common Pleas, 507 Pa. 194, 200-01, 489 A.2d 1286, 1289 (1985). For a discussion of Aetna, see infra notes 248-59 and accompanying text. For a discussion of Municipal Publications, see infra notes 29-45 and accompanying text. But cf. Kilgarlin & Bruch, supra note 1, at 601-02 (defining disqualification as statutory, mandatory grounds and recusal as discretionary decision on factors not set forth in rule or statute). For a discussion of the German law distinction between mandatory grounds for exclusion for interest (AUSSEHLSCHLOS) and discretionary rejection of a judge for bias (ABLEHNUNG), see infra notes 340-41 and accompanying text.

The Code suggests disqualification where the judge has a personal or financial interest. These interests include situations where the judge served as lawyer or material witness in the matter in controversy or where the judge knows that he, his “spouse or minor child residing in his household, has a substantial financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.” PA. CODE OF JUDICIAL CONDUCT 3C(1)(b), 3C(1)(c).

In addition, the Code provides for judicial disqualification in the following situations which involve some sort of personal relationship to the party or proceeding:

[Where the judge,] his spouse or a person within the third degree of relationship to either of them, or the spouse of such person

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

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

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

(iv) is to the judge’s knowledge likely to be a material witness in the proceeding.
Recusal Standards in Pennsylvania

Other canons not directly referring to recusal also provide a measure of what is expected from a judge. Canon 2 provides: "A judge should avoid impropriety and the appearance of impropriety in all of his activities."\(^{17}\) Canon 3 says: "A judge should perform the duties of his office impartially and diligently."\(^{18}\)

In addition to the incorporation of the Code of Judicial Conduct, the Commonwealth’s Constitution establishes a Judicial Inquiry and Review Board (JIRB) to investigate violations of the Code and to make recommendations to the state’s supreme court as to the discipline or removal of judges.\(^{19}\) The supreme court selects five members of the Board; the Governor selects the remaining four members.\(^{20}\) The Board has become a repository for complaints about a judge’s failure to recuse himself.

Neither the constitution nor the statutory law of the Commonwealth grant any board or court exclusive jurisdiction over recusal issues. The Code of Judicial Conduct replaced Pennsylvania recusal statutes, some over one hundred years old.\(^{21}\) The current applicable Pennsylvania statute simply repeats the constitutional obligations of state judges that "[j]udges . . . shall not . . . violate any canon of ethics prescribed by general rule."\(^{22}\)

The Pennsylvania Supreme Court’s decisions before 1985 followed the Code of Judicial Conduct by examining recusal determinations for the appearance of impropriety.\(^{23}\) Like the United States Supreme Court, the Commonwealth’s supreme court has also used due process to review recusal determinations, but when doing so made actual prejudice its guide as opposed to the appearance of partiality or bias.

\(^{17}\) PA. Code of Judicial Conduct Canon 3C(1)(d)(i)-(iv).
\(^{18}\) PA. Code of Judicial Conduct Canon 2.
\(^{19}\) PA. Code of Judicial Conduct Canon 3.
\(^{20}\) PA. Const. art V, §§ 18(a), (e), (g).
\(^{21}\) Id. § 18(a).
\(^{22}\) A law passed in 1816 instructed the president judge of any judicial district not to hear any case in which he had been counsel or had a personal interest, but to forward it to the president judge of the next nearest judicial district. 1816 Pa. Laws 347. Another law, passed in 1825, provided for a special court of common pleas to decide cases brought by or against a "near relative" of the president judge of any judicial district. 1825 Pa. Laws 218. For a discussion of statutes which enabled or required judges to certify cases to other judges, see infra note 66.

The "appearance of impropriety" is the standard used by most courts outside of the Commonwealth of Pennsylvania. See Kilgarlin & Bruch, supra note 1, at 642-48. For a discussion of the standards used outside Pennsylvania, see infra notes 182-299 and accompanying text.
Since 1985, the Pennsylvania Supreme Court has maintained that only the supreme court may review a judge's determination of a recusal request, and the court will take action only after the JIRB has issued a recommendation to remove the judge from office. At the same time, the court has nevertheless permitted review of the recusal determination in the case-in-chief where actual prejudice, a very difficult standard to satisfy, is shown to have altered the result at trial.

The Pennsylvania Superior Court, meanwhile, has continued steadfastly to review recusal determinations by trial judges; some panels requiring a showing of actual prejudice for reversal, others using the appearance of impropriety test in silent rejection of the supreme court's recent jurisprudence.

B. The Pennsylvania Supreme Court

The meaning of the Code of Judicial Conduct in Pennsylvania depends, of course, on its interpretation by the state's highest court, the Pennsylvania Supreme Court. The present recusal rules were developed in Municipal Publications, Inc. v. Court of Common Pleas and the companion case of Reilly v. Southeastern Pennsylvania Transportation Authority. These cases required actual bias to be shown in order to warrant recusal, a stricter standard than found in every other jurisdiction examined in this article. As a result of the Pennsylvania Supreme Court's interpretation of the Code of Judicial Conduct in these two cases, review of recusal determinations has been relegated primarily to the judicial disciplinary process.

1. Who Decides: The Municipal Publications Case

The Pennsylvania Supreme Court ruled in the Municipal Publications case that a recusal motion must be transferred to another

24. The Supreme Court, by thus increasing its control over judicial behavior, perhaps unwittingly contributed to the Beck Commission's proposals to change the judicial disciplinary system.

25. For a discussion of Pennsylvania cases dealing with allegedly outrageous conduct by a trial judge, see infra notes 79-100 and accompanying text.

26. For a discussion of recent Pennsylvania Supreme Court cases dealing with recusal standards, see infra notes 101-41 and accompanying text.

27. 507 Pa. 194, 489 A.2d 1286 (1985) (judge must disqualify himself from deciding recusal motion where he has personal knowledge of disputed facts and permits himself to be witness in recusal hearing).

28. 507 Pa. 204, 489 A.2d 1291 (1985) (superior court's reliance on Canon 3 to resolve recusal issue is improper because supreme court has exclusive right to supervise conduct of state judges).
judge only if the judge whose recusal is sought decides to testify on the matter. The superior court had issued a writ prohibiting the trial judge from deciding the motion to recuse. The judge was later removed from office in part for his behavior in the Municipal Publications case. In addition, a civil damages suit was filed against both the judge and plaintiff’s counsel for their alleged actions in that case.

Municipal Publications began as a libel suit against the publisher of Philadelphia Magazine. Trial was before Judge Bernard Snyder, sitting without a jury. After trial, but before the judge had rendered a decision, the defendants filed a motion seeking Judge Snyder’s recusal. An affidavit of Herbert Lipson, one of the defendants, was attached to the motion. Mr. Lipson, in his affidavit, stated that he had heard from a trial lawyer not involved in the case that plaintiff’s counsel “was going to get a hugh [sic] award” from the trial judge, that the case was “fixed,” that “plaintiff’s counsel had ‘told a number of attorneys that he was raising money for and supporting’ the trial judge’s campaign to be elected” to the state supreme court, and that the judge “had recently been a guest of plaintiff’s counsel on a chartered bus trip.”

Although Judge Snyder initially directed the recusal motion back to the motions court for reassignment, he later vacated that order after the president judge, the court administrator and the supreme court had each rejected the defendants’ requests to assign the motion to a judge from outside Philadelphia.

Judge Snyder rejected Municipal Publication’s offer to prove, by testimony of his former law clerk, that the judge had participated in ex parte communications with plaintiff’s counsel during

32. Lipson v. Snyder, 701 F. Supp. 541 (E.D. Pa. 1988) (court denied motion to dismiss made by one defendant, plaintiff’s counsel; proceedings against other defendant, judge, stayed due to his filing bankruptcy petition).
34. Id.
35. Id.
36. Id.
37. Id. at 481, 469 A.2d at 1093.
38. Id. at 478, 469 A.2d at 1091.
the trial.\textsuperscript{39} After hearing testimony on the motion to recuse, Judge Snyder awarded the plaintiff $7 million, $5 million of which were in punitive damages.\textsuperscript{40}

Judge Snyder's former law clerk was willing to testify to the following allegations: the judge and plaintiff's counsel often met in the judge's chambers and outer office during the trial with no one present to represent the defendants; the judge and plaintiff's counsel discussed evidentiary questions, trial tactics, and the character of witnesses; the judge discussed with plaintiff's counsel issues that the law clerk was researching; plaintiff's counsel had helped the judge write a speech for his candidacy to the supreme court; the judge commented that defendants' counsel "would not be able to get rid of the verdict;" the judge told the law clerk that the motion to recuse would cost defendants another $3 million in punitive damages; and plaintiff's counsel and the judge discussed the recusal motion after defendants' counsel had left the judge's chambers.\textsuperscript{41}

Before Judge Snyder ruled on the motion to recuse, the superior court granted a writ of prohibition, holding that the law clerk's allegations required another judge to resolve the motion.\textsuperscript{42} On appeal, the supreme court vacated the superior court's order for lack of jurisdiction, but agreed with the superior court's action, stating:

[W]here, as here, a judge concludes that the allegations justify an evidentiary hearing in which he will testify, it then becomes incumbent upon that judge to step aside for the appointment of another judge to hear and rule upon the issue of disqualification.\textsuperscript{43}

In an opinion authored by Chief Justice Nix and joined by all four of the other participating justices, the court remanded the recusal motion to another judge. This action, according to the court, was warranted by the "extraordinary circumstances" in which the judge had "permitted himself to be called as a witness," gave testimony concerning his own conduct, and put himself in a position to "rule on objections to his own testimony and to assess his own credibility in light of conflicting evidence."\textsuperscript{44} In reaching

\begin{itemize}
\item \textsuperscript{39} Id. at 479, 469 A.2d at 1091.
\item \textsuperscript{40} Id. at 478-79, 469 A.2d at 1091.
\item \textsuperscript{41} Id. at 481-82, 469 A.2d at 1093.
\item \textsuperscript{42} Id. at 494, 469 A.2d at 1099.
\item \textsuperscript{43} Municipal Publications, 507 Pa. 194, 202, 489 A.2d 1286, 1290 (1985).
\item \textsuperscript{44} Id. at 201, 489 A.2d at 1289.
\end{itemize}
this conclusion, the court did not need to delineate a recusal standard, but had only to rely on longstanding evidentiary rules to reach the same conclusion.\textsuperscript{45} By instead setting the referral threshold so high, the court ensured that the judges whose recusal is sought will decide most recusal motions.

2. \textit{The Standards of Review: The Reilly Case}

\textit{Reilly v. Southeastern Pennsylvania Transportation Authority}\textsuperscript{46} involved a personal injury claim against the regional mass transit agency. The recusal issues raised for the first time after trial concerned alleged relationships between Judge Kremer, the trial judge and the plaintiff’s trial attorney.\textsuperscript{47} Plaintiff’s counsel had once represented all of the Commonwealth’s justices and judges, including Judge Kremer, in a class action which sought increased compensation for the judiciary.\textsuperscript{48} In addition, Judge Kremer’s son-in-law and step-nephew were affiliated with the law firm of plaintiff’s counsel.\textsuperscript{49}

The superior court had remanded the recusal issues to a different judge, ordering him to decide the following: (1) whether Judge Kremer’s son-in-law had an interest that could be substantially affected by the outcome of the case; and (2) whether the judge’s relationship with a step-nephew who had appeared briefly in the case and was employed by plaintiff’s counsel warranted recusal.\textsuperscript{50} The superior court held that, while no one of these contacts required recusal, the hearing judge should inquire whether the relationship between Judge Kremer and his step-nephew was so intimate and of such duration and the step-nephew’s participation in the case so extensive that the judge’s

\textsuperscript{45} See \textit{Federal and Uniform Revised Rules of Evidence} 605 (1988) ("the judge presiding at the trial may not testify in that trial as a witness. No objection need be made to preserve the point."); \textit{McCormick on Evidence} § 68, at 164 (3d ed. 1984) ("When a judge is called as witness in a trial before him, his role as witness is manifestly inconsistent with his customary role of impartiality . . . ").

\textsuperscript{46} 507 Pa. 204, 489 A.2d 1291 (1985).

\textsuperscript{47} \textit{Id.} at 214, 489 A.2d at 1297. A motion to recuse the trial judge for alleged personal bias against trial counsel for South Eastern Pennsylvania Transportation Authority (SEPTA) was made orally at the pretrial conference and by written motion during jury selection. \textit{Id.} at 213-14, 489 A.2d at 1296-97. The trial judge denied this motion. \textit{Id.}

\textsuperscript{48} \textit{Id.} at 214, 489 A.2d at 1297.

\textsuperscript{49} \textit{Id.}

impartiality might reasonably be questioned.\textsuperscript{51} The supreme court, in an opinion authored by Justice Papadakos and joined by four justices, reversed an \textit{en banc} Superior Court on the recusal issue.\textsuperscript{52} The court held that the enforcement of the Code of Judicial Conduct is the exclusive province of the supreme court and that the superior court may neither interpret Canon 3C nor create standards for reviewing recusal decisions.\textsuperscript{53} Under the \textit{Reilly} standard, therefore, only the supreme court and the judge whose recusal is sought may apply the Code of Judicial Conduct to resolve a recusal motion.

Because the supreme court can review only a small number of cases, the \textit{Reilly} decision leaves the task of applying standards of conduct to the very individuals who are accused of violating those standards. The result is easy to predict: relatively few recusal motions are granted and attorneys avoid raising such motions in the first place, having no wish to antagonize the presiding judge and knowing that the recusal decision essentially rests with the judge alone.\textsuperscript{54}

Under \textit{Reilly}, if a judge errs in denying a recusal motion, that denial can be evaluated in a disciplinary proceeding. Only rarely, however, will that denial be considered on an appeal of the case. As Justice Papadakos wrote for the Court:

> Upon the [Judicial Inquiry and Review] Board's findings and determinations recommending disciplinary action for violations of the Code, the matter is referred to this body. We then review the record and may wholly accept or reject the recommendation as we find just and proper. . . . This procedure, except for impeachment proceedings, is the exclusive mode established for the discipline of our judges for violations of the Code and we have not abdicated or delegated any of our supervisory authority in enforcing these standards of conduct to Superior Court. To presume that the Code or its alleged violations can be reviewed by any tribunal other than

\textsuperscript{51} Id. at 444, 479 A.2d at 985 (citing Pa. Code of Judicial Conduct Canon 3C(1)).
\textsuperscript{52} Reilly v. SEPTA, 507 Pa. 204, 489 A.2d 1291 (1985).
\textsuperscript{53} Id. at 218-20, 489 A.2d at 1298-99.
\textsuperscript{54} At the 1990 Annual Bench-Bar Conference of the Philadelphia Bar Association, a "buffer committee" was created to informally approach judges about complaints from lawyers which would otherwise go unreported because of fear of recrimination. Legal Intelligencer, Sept. 20, 1990, at 1; see also Sarvey, \textit{On the Chopping Block: The Dilemma of Turning in a Judge}, PA. LAW. 13 (Nov. 1990).
those we authorize is a misapprehension of the purpose of the Code, and is seen as an impermissible meddling into the administrative and supervisory functions of this Court over the entire [state] judiciary.55

The *Reilly* court held that a trial judge's decision not to recuse herself is reviewable in the case-in-chief for abuse of discretion.56 Because the recusal motion in *Reilly* was made for the first time on appeal, the court applied standards used in the appeal of cases involving after-discovered evidence: that the evidence was not discoverable at trial by use of due diligence, and a "but for" test—the newly discovered evidence "would have compelled a different result" at trial.57 Since the complaining defendant, SEPTA, could not prove either of these additional factors, the court upheld the trial judge's refusal to recuse himself without defining abuse of discretion in the context of recusal decisions.58 *Reilly*, therefore, also provides that, however narrow the abuse of discretion standard might be, it does permit judicial review of a recusal decision in the case-in-chief. This review, however, can only occur after the conclusion of the trial proceedings.

3. *The Shaky Foundations of the Reilly Holding*

In emphasizing the disciplinary process in *Reilly*, the Pennsylvania Supreme Court relied extensively on *In re Crawford's Estate*,59 a case then almost fifty years old. The facts in *Crawford's Estate* were peculiarly unsuited to support a broad holding on recusal procedures.

The trial judge in *Crawford's Estate* had in fact referred the motion to recuse to a judge from another county.60 It was dictum, therefore, when the *Crawford's Estate* court said that a trial judge is ordinarily not required to refer a motion to recuse to another judge.61 The supreme court agreed that no direct evidence of prejudice was shown.62 The lawyer filing the recusal request had successfully defended a will against challenge and had filed a request for payment of fees.63 The lawyer alleged that the

55. *Reilly*, 507 Pa. at 220, 489 A.2d at 1299.
56. *Id.* at 224, 489 A.2d at 1301.
57. *Id.*
58. *Id.* at 225, 489 A.2d at 1302.
60. *Id.* at 105, 160 A. 586.
61. *Id.* at 108-09, 160 A. at 587.
62. *Id.* at 109-10, 160 A. at 587.
63. *Id.* at 110, 160 A. at 587-88.
trial judge was prejudiced against him personally. While the supreme court denied the recusal motion, it also reversed the trial judge on the merits and directed the trial court to award the full amount of fees sought by counsel. In result, the lawyer who sought recusal got what he wanted even though he lost the motion to recuse.

The relevance of Crawford's Estate as support for Reilly is further in doubt because, unlike Reilly, Crawford's Estate interpreted statutes since repealed which in specific circumstances permitted a judge to refer a recusal motion to another judge. Thus, the issue in Crawford's Estate was more one of statutory interpretation than of policy.

The Crawford's Estate court interpreted a statute from 1917 that permitted a judge of a court of common pleas, in a judicial district having no orphans' court, to call upon any judge to preside in a matter arising under the court's orphan court jurisdiction "by reason of sickness, absence, interest or other cause." The Reilly court used Crawford's Estate as precedent when neither the facts nor the laws then controlling were similar. Since 1974, the Code of Judicial Conduct had provided the sole non-case derived principles in Pennsylvania governing judicial recusal, yet the Reilly court ignored the Code's provisions that admonish judges to avoid the appearances of impropriety and to recuse themselves whenever their impartiality might reasonably be questioned.

64. Id. at 105, 160 A. at 586.
65. Id. at 111-13, 160 A. at 588-89.
66. No fewer than seven different statutes then enabled or required judges to certify cases to other judges. See 1834 PA. LAWS 531, 539 (repealed in 1978) (special courts to be formed where president judge of county court of common pleas: (1) was "personally interested in the event of any cause"; (2) owned claim under which parties sued; (3) had near relative who was party to case or interested in its outcome; or (4) was counsel for either of parties in same suit or in any related matter); 1840 PA. LAWS 153 (repealed in 1978) (special court must not itself be incompetent if same cause was before his own court); 1856 PA. LAWS 500 (repealed in 1978) (when president judge is party in action, action "shall be tried and heard before president judge residing nearest place of trial who shall be disinterested"); 1860 PA. LAWS 552 (repealed in 1978) (in case of sickness or inability of judge to hold regular court session, any other judge in Commonwealth may be called in); 1861 PA. LAWS 494 (supplemented 1860 PA. LAWS 552) (repealed in 1978) (in all cases in which judge is prohibited from trying, any other judge in Commonwealth may be called in); 1875 PA. LAWS 35 (repealed in 1978) (allowing party to file petition for change of venue where president judge has interest in outcome of case); 1917 PA. LAWS 363, 368 (repealed in 1977) (judge unable to sit in matter involving orphans' court jurisdiction by reason of sickness, absence, interest or other cause, may call upon any other judge to preside over case).
Moreover, Reilly ignored precedent of more recent vintage than Crawford's Estate.

In Commonwealth v. Darush, a 1983 case, the Pennsylvania Supreme Court had affirmed a jury verdict and the trial court’s denial of a motion for disqualification but nonetheless remanded the case for sentencing before another judge. A jury in Potter County had convicted William Darush of burglary, theft, receiving stolen property and conspiracy. Darush argued that Judge Fink, the trial judge, should recuse himself for four reasons: (1) Judge Fink was district attorney at the time Darush’s offenses were committed; (2) while he was district attorney, he took a statement from the Commonwealth’s primary witness in regard to an unrelated event; (3) while he was district attorney, he had prosecuted Darush on unrelated charges; and (4) he had made derogatory remarks about Darush and had overheard Darush make derogatory remarks about him during his election campaign.

The Darush court stated that a judge must recuse himself whenever “he believes his impartiality can be reasonably questioned,” yet the court looked to the record for an actual showing of the judge’s prejudgment or bias which affected the jury. Finding none, the court refused to order a new trial, but did vacate the defendant’s sentence and order resentencing before a different trial judge as “[t]he largely unfettered sentencing discretion afforded a judge is better exercised by one without hint of animosity toward appellant.”

In a 1982 case, the murder verdict against a former United Mineworkers Union president, Tony Boyle, for murdering his predecessor, was appealed. The Pennsylvania Supreme Court upheld the trial judge’s refusal to recuse himself from presiding over Boyle’s trial. The court, in an opinion by Justice Nix, examined the record with care for instances of the judicial bias alleged by Boyle. The fact that the presiding judge had participated in an earlier stage of the proceeding—the first trial—was not grounds for recusal. Nor was the fact that the presiding

69. Id. at 19, 459 A.2d at 729-30.
70. Id. at 20-21, 459 A.2d at 729-30.
71. Id. at 21, 459 A.2d at 731 (quoting Commonwealth v. Goodman, 454 Pa. 358, 361, 311 A.2d 652, 654 (1973) (emphasis in original)).
72. Id. at 24, 459 A.2d at 732.
74. Id. at 499, 447 A.2d at 257.
75. Id. at 490, 447 A.2d at 252.
judge's rulings in the former trial were similar to his rulings in the retrial sufficient grounds for recusal. In short, the Boyle court found no specific incident with which to question the trial judge's objectivity.  

In rejecting the request to reverse on the ground of judicial bias in Boyle, unlike the Reilly court, Justice Nix used no conclusory language regarding the proper standard of review of recusal requests. Rather, he affirmatively stated the general principle that "[r]ecusal is required whenever there is substantial doubt as to a jurist's ability to preside impartially." In dictum, Justice Nix pointed to circumstances that would have provided for recusal: (1) whenever a judge "has doubts as to his ability to preside objectively and fairly . . . or where . . . factors or circumstances [exist] that may reasonably question [his] impartiality"; (2) when there is "exposure of a judge in a pretrial proceeding to highly prejudicial and inflammatory evidence" that would not be admissible at the trial stage; or (3) when a judge receives "information from an extrajudicial source that may have inspired a prejudice" against the defendant.

4. Constitutional Law

As a result of its undue emphasis on the disciplinary process for handling recusal complaints, the Pennsylvania Supreme Court has come to rely on constitutional principles of due process of law, not the recusal standards in the Code of Judicial Conduct, when a trial judge's behavior is so outrageously biased as to require reversal of the judgment. Commonwealth v. Hammer, decided three months after Municipal Publications and Reilly, illustrates the court's use of a due process standard.

The defendant in Hammer was convicted of murder. On direct appeal, Hammer alleged that the trial judge's manner of examining the witnesses advocated a point of view favoring the prosecution and this undue participation by the judge adversely

76. Id.
78. 498 Pa., at 490-91 nn.4-6, 447 A.2d at 252 nn.4-6 (citations omitted).
80. Id. at 95, 494 A.2d at 1056. Hammer was sentenced to a term of imprisonment of seven and one-half years to fifteen years on March 9, 1980. Id. at 95, 494 A.2d at 1058. Notice of appeal was filed April 18, 1980. Id.
and prejudicially contributed to the verdict, amounting to a denial of due process.\(^{81}\)

Under the standard used by the court just three months before in Reilly,\(^{82}\) Hammer's appeal should have been dismissed because the reasons for a recusal motion were evident at trial.\(^{83}\)

In addition, the Pennsylvania Supreme Court, since Commonwealth v. Goodman,\(^{84}\) had applied a waiver doctrine in judicial recusal matters which precluded review of a disqualification motion where the grounds for the motion were raised for the first time on appeal. The Hammer court, however, suspended the waiver rule and reviewed the trial record more carefully than had been done in either Municipal Publications or Reilly.\(^{85}\) "Trial judge participation in the examination of the testifying defendant," wrote Justice Flaherty in a 5 to 2 decision, "is acutely objectionable where there is any suggestion that the judge has an opinion regarding the credibility of the defendant or the plausibility of the events related by the defendant."\(^{86}\) According to the court, the aggregate of improprieties by the judge compelled the conclusion that due process had been denied.\(^{87}\) Thus, the court, in effect, adopted an appearance of impropriety test under the guise of due process.

Yet, the Hammer court, in addressing allegations of judicial impropriety, made no reference to the Code of Judicial Conduct other than to excuse the failure of Hammer's counsel to object to the judge's questioning and to seek recusal at trial.\(^{88}\)

The due process standard used in Hammer by the Penn-

81. Id.
83. In Reilly, the court did not review allegations that relatives of the trial judge were employed by the law firm of plaintiff's counsel, not only because of the new interpretation of the Code of Judicial Conduct as applying only in disciplinary cases, but also because SEPTA did not make these allegations at trial. Id. at 221-22, 489 A.2d at 1300. SEPTA failed to show that the information on which the allegations were based was unavailable to it at trial in the exercise of due diligence, and that the allegations, if raised, would have compelled a different result. Id. at 224, 489 A.2d at 1301. For a discussion of the Reilly holding, see supra notes 52-58 and accompanying text.
84. 454 Pa. 358, 311 A.2d 652 (1973) (no review of disqualification motion after prosecution for marijuana possession where grounds for disqualification raised for first time on appeal).
85. Hammer, 508 Pa. at 99, 494 A.2d at 1060. The court stated: "We . . . question the continued validity of the waiver doctrine as applied to improprieties of the trial judge for when the position of power and authority enjoyed by the judge is considered, the strict enforcement of the waiver doctrine becomes inadvisable." Id. at 96-97, 494 A.2d at 1058.
86. Id. at 101, 494 A.2d at 1061.
87. Id. at 108, 494 A.2d at 1064.
88. Id. at 95, 494 A.2d at 1058.
sylvania Supreme Court requires actual judicial bias so strong that it is deemed to inordinately influence the outcome of the trial. 89 Few litigants have been able to pass this test and get a new trial. For example, in Commonwealth v. O’Shea, 90 the court declined to reverse the trial judge’s action on a recusal motion in a death penalty murder case. The case was directly appealable to the supreme court because the death penalty was imposed. 91 The O’Shea court held that the trial judge did not abuse his discretion when he stated gratuitously at O’Shea’s sentencing hearing that, although he was district attorney when O’Shea had been prosecuted for an unrelated robbery, he had not known of any deals or agreements made affecting O’Shea. 92

In Goodheart v. Casey, 93 however, the supreme court granted reargument because of a claim that two justices had improperly participated in deciding a matter by which they would have been personally affected. The case involved the construction of a state statute that eliminated certain options for judges’ retirement contributions and increased contribution rates for judges entering service after March 1, 1974. 94 This statute affected the retirement options of the two justices. 95

The Goodheart court attempted to distinguish Aetna Life Insurance Company v. Lavoie, 96 in which the United States Supreme Court, subsequent to Reilly and Municipal Publications, held improper an Alabama justice’s participation in an insurance tort case where the justice was involved in similar insurance litigation himself and the decision clearly benefited his own case. Chief Justice Nix wrote without dissent on the issue of recusal: Aetna required “an objective standard as to whether the ‘interest’ would lead the average judge . . . ‘not to hold the balance nice, clear and true.’ ” 97 Seizing dictum in Aetna that the interested justice there

89. Id. at 101, 494 A.2d at 1061 (“[W]here the judge oversteps the bounds of propriety in examining witnesses, by exhibiting opinion, bias or prejudice, the jury must be deemed to be inordinately impressed by this evidence of the judge’s opinion such that the defendant is deprived of a fair and impartial trial . . .”).
91. Id. at 389, 567 A.2d at 1025.
92. Id. at 406-09, 567 A.2d at 1034-35.
94. Id. at 190 n.1, 565 A.2d at 758 n.1.
95. Id. at 195-97, 565 A.2d at 760-61.
96. 475 U.S. 813 (1986).
had played a leading role in the 5-4 decision reached by the Alabama Supreme Court, Chief Justice Nix wrote that the participation of the two admittedly personally interested justices in this case was "mere surplusage" because the decision was 6-1.98

Disregarding the United States Supreme Court’s decision in *Aetna*, the Pennsylvania Supreme Court said that whether a justice has a personal bias or interest is an “unreviewable” decision, and that whether the justice’s participation would give the appearance of impropriety is a decision “of lesser importance because appearances are not justice.”99 According to the *Goodheart* court, if a judge violates the Code of Judicial Conduct, “that is a matter for this Court to address under [its disciplinary] powers.”100

C. The Pennsylvania Superior Court

Until *Municipal Publications* and *Reilly*, the Pennsylvania Superior Court had required referral of a recusal motion whenever the allegations provided a sufficient basis on which the trial judge’s impartiality might reasonably be questioned.101 The court also required judges to recuse themselves whenever the appearance of partiality existed, especially in the sentencing phase of criminal trials.102

For example, in *Commonwealth v. Bryant*,103 the superior court remanded proceedings for sentencing to a different judge where

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98. Id. at 197-98, 565 A.2d at 761-62.
99. Id. at 201-02, 565 A.2d at 764. The scope of this decision may be limited to recusal petitions involving supreme court justices. Viewed in this way, the “unreviewability” of the justice’s decision whether to recuse himself is no stricter than the United States Supreme Court’s practice. United States Supreme Court justices recuse themselves frequently without explanation. *Goodheart* went farther by obliging the other members on the court to request a justice not to participate in a case. Id. at 202, 565 A.2d at 764.
100. Id. at 198, 565 A.2d at 762.
101. See, e.g., *Commonwealth v. Harrison*, 228 Pa. Super. 412, 323 A.2d 72 (1972) (case remanded for new trial where judge, in colloquy with counsel, demanded apology from counsel for counsel’s questioning the veracity of witness who was police officer).
the trial judge was alleged to have said, in two other cases involving this defendant, that the defendant would get the maximum sentence. The trial judge had also allegedly changed the date for the sentencing hearing of the defendant in one of those earlier cases in order to generate pre-election publicity for himself.\textsuperscript{104} An en banc court which included the trial judge from the case had rejected the defendant's motion to recuse and the trial judge then sentenced the defendant.\textsuperscript{105} The superior court ruled that the trial judge should have recused himself from the post-verdict motions and sentencing because "[t]he precept governing judicial conduct is the avoidance of not only actual impropriety but also the appearance of impropriety."\textsuperscript{106}

In Commonwealth v. Schwartz,\textsuperscript{107} the superior court remanded another criminal case for resentencing where the trial judge was alleged to have said that he did not need a pre-sentence investigation because he had seen the defendant on television and would rely on that program in sentencing the defendant.\textsuperscript{108} The matter, however, was not automatically remanded to another judge. Rather, the superior court permitted the trial judge to decide whether or not to have another judge sentence the defendant.\textsuperscript{109} The court also directed the trial judge to "state on the record why his impartiality could not reasonably be called into question" if he had, in fact, seen a television program about the defendant.\textsuperscript{110}

Since the Reilly and Municipal Publications decisions, the Pennsylvania Superior Court has cautiously continued to review recusal decisions by trial judges for abuse of discretion.

In Commonwealth v. Lemanski,\textsuperscript{111} a case involving former Common Pleas Court Judge Fink, Superior Court President Judge Cirillo held that the trial judge had abused his discretion by not recusing himself from deciding a marijuana prosecution where the record established that the trial judge had a "predetermined policy with respect to sentencing drug offenders."\textsuperscript{112} While the Commonwealth conceded that the recusal motion should have

\textsuperscript{104} Id. at 5-6, 476 A.2d at 424.
\textsuperscript{105} Id. at 6, 476 A.2d at 424.
\textsuperscript{106} Id. at 10, 476 A.2d at 426 (citations omitted).
\textsuperscript{108} Id. at 172, 406 A.2d at 574.
\textsuperscript{109} Id. at 173, 406 A.2d at 574. The court cited Canon 3C(1)(a) of the Code of Judicial Conduct as the appropriate standard to be applied by the trial judge on remand. Id. at 172, 406 A.2d at 574.
\textsuperscript{110} Id.
\textsuperscript{112} Id. at 341, 529 A.2d at 1089.
been referred to another judge, President Judge Cirillo stretched Municipal Publications to apply not only to where a trial judge actually testifies but also to “where the judge brings his credibility into issue by having to admit or deny certain facts.”

The superior court’s decision in Lemanski was no doubt fortified by the fact that Lemanski’s counsel had already testified before the JIRB regarding two incidents related to the proceeding under appeal. Additionally, after argument was held, appellant informed the court by a post-submission memorandum that Judge Fink had been temporarily suspended from hearing cases and had subpoenaed the appellant, the appellant’s wife, and the prosecuting attorney to testify at the JIRB proceedings. These facts, ruled the superior court, warranted remanding the case to a different judge regardless of the outcome of the other issues in the appeal.

Another superior court panel, in Commonwealth v. Satzberg, stated that Municipal Publications required a trial judge to transfer a recusal motion “only when he has personal knowledge of the disputed facts and has decided to testify at the recusal hearing.” Because this judge did not testify, the superior court upheld his action. To reach this conclusion, the appellate court reviewed the record, but found nothing that “cast doubt on the trial judge’s impartiality or objectivity.” The court also noted that the jury verdict protected the integrity of the fact-finding process and that the defendant had made the recusal motion only after the jury verdict was rendered.

Superior court decisions in the past few years have tended to omit any reference to the Code of Judicial Conduct. Moreover, when the superior court uses abuse of discretion as a standard of

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113. Id. at 339 n.2, 529 A.2d at 1088 n.2 (citing Municipal Publications, Inc. v. Court of Common Pleas, 507 Pa. 194, 201-02, 489 A.2d 1286, 1289 (1985)).
114. Id. at 359, 529 A.2d at 1098.
115. Id.
116. Id. at 358-59, 529 A.2d at 1097-98.
118. Id. at 44, 516 A.2d at 760 (citations omitted). According to the defendant, the judge had spoken to him in a threatening manner during settlement negotiations of a civil case arising from the same facts. Id. The judge allegedly threatened the defendant in the civil case with seven years in prison if the defendant did not resolve a matter in which he had removed a corporation’s assets and appropriated its accounts. Id. at 44 n.1, 516 A.2d at 760 n.1.
119. Id. at 44-45, 516 A.2d at 760.
120. Id. at 45, 516 A.2d at 761.
121. Id. at 45, 516 A.2d at 760-61. The case was remanded for a new trial on other grounds. Id. at 45-47, 516 A.2d at 761-62.
review, it means actual partiality or impropriety. For example, in Commonwealth v. Patterson, a defendant in a murder case asserted that the trial judge should have recused himself because: (1) the judge had been a prosecuting attorney when the case was being investigated; (2) the prosecutor actively supported the judge in his election campaign and was socially acquainted with him; (3) the assistant prosecutor was a former law clerk of the trial judge; and (4) the assistant prosecutor’s mother was the judge’s bailiff. The court rejected these grounds, holding that there was no evidence of any actual impropriety. The judge had stated that, although the case stemmed from the time of his employment in the district attorney’s office, he lacked any knowledge of this case. Consequently, the superior court found no abuse of discretion after an “independent and thorough review of the record.”

In Commonwealth v. Hewett, the superior court also required the defendant to show that actual partiality affected the outcome of the trial in order to reverse a conviction for a judge’s refusal to recuse himself. That the trial judge was the subject of an unrelated disciplinary investigation did not itself warrant recusal.

In re McFall, an aberration in terms of superior court decisions on recusal issues, illustrates another resort to due process to resolve recusal issues that the Code of Judicial Conduct was meant to resolve. In McFall, the Defenders Association of Philadelphia filed motions on behalf of twenty-nine criminal defendants, seeking nullification of all judicial actions of Common Pleas Court Judge Cunningham during the period that she acted as an undercover agent for the Federal Bureau of Investigation in the Roofers investigation. Judge Cunningham’s actions were challenged as violative of the state constitution’s separation of power doctrine, the federal guarantee of due process, and Pennsylvania case law on recusal.

123. Id. at 353-54, 572 A.2d at 1270.
124. Id. at 354, 572 A.2d at 1270.
125. Id.
126. Id.
128. Id. at 340-44, 551 A.2d at 1083-85.
130. Id. at 360-61, 556 A.2d at 1372-73.
131. Id. at 361, 556 A.2d at 1373.
At the time the motions were filed, Judge Cunningham had been transferred to a different court division.\textsuperscript{132} The motions were consolidated and assigned to another judge who granted them.\textsuperscript{135} This judge ordered new proceedings for any defendant whose case had been handled by Judge Cunningham during the period she was a government informant; if the same result occurred as at the original hearing, the case would be returned to its current status.\textsuperscript{134}

Citing due process guarantees, its own precedents,\textsuperscript{135} pre-
\textit{Reilly} Pennsylvania Supreme Court cases,\textsuperscript{136} and federal decisions,\textsuperscript{137} the superior court, in \textit{McFall}, held that the "threat of bias and appearance of impropriety was significant enough" to warrant the relief entered by the trial judge to whom the recusal motions had been assigned.\textsuperscript{138} According to the \textit{McFall} court, the threat of bias and appearance of impropriety violated guarantees of due process and judicial decisions on recusal, and therefore warranted rehearings before another judge.\textsuperscript{139}

"The public confidence in the integrity of the criminal justice system," said the court, "will not be served by leaving unredressed the role of a judge in deciding key phases of criminal prosecution while also working for prosecution authorities during the same period of time."\textsuperscript{140} The \textit{McFall} court held that the threat of bias and appearance of impropriety, according to due

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} \textit{Id.} at 361-62, 556 A.2d at 1373.

\textsuperscript{134} \textit{Id.}


\textsuperscript{137} \textit{Id.} at 364-66, 556 A.2d at 1374-75 (citing Aetna Life Ins. Co. v. Lavioie, 475 U.S. 813 (1986); \textit{In re Murchison}, 349 U.S. 133 (1955)).

\textsuperscript{138} \textit{Id.} at 368, 556 A.2d at 1376. Judge Kelly dissented because the court's decision conflicted with \textit{Reilly}. \textit{Id.} at 369, 556 A.2d at 1376-77 (Kelly, J., dissenting).

\textsuperscript{139} \textit{Id.} at 368, 556 A.2d at 1376.

\textsuperscript{140} \textit{Id.} The court failed to note that the "prosecution authorities" were different: the cases before the judge were brought by the Commonwealth, but the judge was informing for federal authorities.
process guarantees and judicial decisions on recusal, warranted hearings of all of Judge Cunningham's judicial actions during the time she acted as an undercover agent for the government. But for the strained interpretation of the Code of Judicial Conduct in Municipal Publications and Reilly, it would not have been necessary for the McFall court to reach for a holding relying on constitutional guarantees of due process.

III. JUDICIAL DISCIPLINE AND RECUSAL IN PENNSYLVANIA

The state constitution gives the Pennsylvania Supreme Court general supervisory and administrative authority over all the courts. The constitution also establishes the Judicial Inquiry and Review Board as an institution to recommend suspension, removal from office or other discipline of a judge for violating any law or canon of legal or judicial ethics set by the supreme court. Nowhere, however, does the constitution confer exclusive power on the Board to redress violations of the Code of Judicial Conduct. One result of this constitutional split of power is that judicial interpretation of the Pennsylvania Code of Judicial Conduct occurs today almost exclusively in the Pennsylvania Supreme Court's decisions reviewing disciplinary recommendations of the Judicial Inquiry and Review Board. Moreover, the supreme court's decisions on recusal and disciplinary actions do not appear to be entirely consistent.

There is an implicit tension between most of the recent judicial disciplinary cases and the recusal standards established in Reilly. With the exception of two opinions written by Justice Juanita Stout, and a 3 to 2 split opinion authored by Justice

141. Id.
143. Id. §§ 18(d), (g).
144. See In re Sylvester, 521 Pa. 300, 555 A.2d 1202 (1989); In re Braig, 520 Pa. 409, 554 A.2d 493 (1989). The supreme court in these two cases rejected a recommendation from the JIRB that two of the so-called "Roofers' judges" had violated the Code of Judicial Conduct and should be removed from office. 521 Pa. at 313-14, 555 A.2d at 1208; 520 Pa. at 426, 554 A.2d at 502. Justice Juanita Kid Stout, writing for the court in both instances, stressed the JIRB's burden of proof by clear and convincing evidence. 521 Pa. at 304, 313, 555 A.2d at 1203, 1208; 520 Pa. at 413, 526, 554 A.2d at 495, 502. Neither case involved any allegations that the respondent judges should have recused themselves in any matter; the focus was on gifts they had accepted from Stephen Traitz, Jr., the business manager of Roofers' Union Local 30-30B. 521 Pa. at 302-04, 555 A.2d at 1203; 520 Pa. at 411-13, 554 A.2d at 494-95. The only reference to recusal was in Braig where court noted that Judge Braig had a policy of recusing himself from cases involving members of the roofers union since 1981 because of a longstanding family friendship with Traitz. 520 Pa. at 415, 554 A.2d at 496.
Papadakos, the judicial disciplinary standard is the *appearance* of impropriety. The rule set by *Reilly*, however, is that recusal decisions are directly reviewed only for *actual* impropriety that affected the outcome of the trial. Tension for the judges is created by these two standards because a recusal determination does not necessarily put the matter at rest. The same decisions reviewed on a recusal motion can return to haunt the judge later with vengeance in a disciplinary proceeding.

This result does not aid litigants in the main proceeding who are deprived of an impartial judge. In addition, it transfers undue powers over judges to a board whose members are political appointees and it overemphasizes the state supreme court as the disciplinarian of other judges. It is no wonder that lower court judges feel their independence increasingly threatened and that the press complains about inconsistent and partial administration of justice in the Commonwealth’s courts.

**A. Application of Current Standards By The Pennsylvania Supreme Court**

In *In re Glancey*, the Pennsylvania Supreme Court approved the JIRB’s recommendation to bar Judge Joseph Glancey from holding judicial office. The grounds for the decision were Judge Glancey’s acceptance of gifts from the Roofers’ Union and his later denial of having done so, in both official forms and interviews with law enforcement agents.

There were no allegations that Judge Glancey should have recused himself in any particular matter. The court, however, cited the commentary to Canon 2 of the Code of Judicial Conduct: “[A] judge must avoid all impropriety and appearance of impropriety.” The court barred Judge Glancey from future ju-


146. For a discussion of Reilly, see supra notes 46-58 and accompanying text.


148. *Id.* at 288, 542 A.2d at 1356. Judge Glancey resigned his position as Chief Judge of the Philadelphia Municipal Court while the disciplinary proceeding was on appeal in the supreme court, and he consented to the entry of an order declaring him ineligible for election to judicial office in the future. *Id.* at 282, 542 A.2d at 1353. Nevertheless, the supreme court found it necessary to explain by written opinion why Judge Glancey should be barred from judicial office. *Id.* at 282-84, 542 A.2d at 1353-54.

149. *Id.* at 284, 542 A.2d at 1354.

150. *Id.* at 287, 542 A.2d at 1356.
dicial office because he had refused to answer inquiries before the grand jury and had actively concealed information from federal authorities.  

Similarly, the Pennsylvania Supreme Court, in In re Cunning-

ham, upheld recommendations of the JIRB to remove or sus-
pend another eight judges for accepting cash gifts from the Roofers' Union. The opinion is ambiguous and at times contra-
dictory. First, it is not clear whether the court relied on the intent of the giver, the effect of the gift on the judge, or both in evalu-
ating the propriety of a judge's acceptance of a gift. Second, the
court ultimately adopted neither the intent of the donor nor the
effect on the donee as a standard in judging gifts. Rather, the
court focused on an objective test of how such a gift would appear
to the public. While cautioning against applying "an overly
crassful gloss" to the appearance of impropriety, the court
gave no indication how an improper appearance is to be
discerned.

151. Id. at 288, 542 A.2d at 1356.
153. Id. at 430, 538 A.2d at 479-80. The court states:
That the value of the "fee, emolument or prerequisite" may appear de
minimis is of no significance if it was given and received to influence the
judicial officer in the performance of his or her judicial responsibilities.
The clear purpose of this provision is to assure the objectivity of the
jurist. Whatever the value of the token, if it is given and received to
secure a favored position for the donor with the jurist in the perfor-
ance of his or her official responsibilities, the impartiality of the judg-
ment has been eroded and the integrity of the process destroyed
thereby. The question is not the intrinsic value of the thing offered but
rather its impact upon the actions of the jurist.

154. Id. This passage hints, at the beginning, that the giver's intent is the sole crite-
rion, but, by the end of the passage, the emphasis has shifted to the impact of
the gift upon the judge's actions.

155. Footnote, the court reversed a prior opinion which had held that a
judge's personal life is not subject to censure under the Code of Judicial Con-
duct. Id. at 430-31 n.12, 538 A.2d at 480 n.12. In so doing, the court rejected
the contrary "implication" in In re Delassandro, 483 Pa. 431, 397 A.2d 743
(1979) (judge's "open and notorious" meretricious relationship with a married
woman and his attempted appointment of her as chief cashier in court office, a
job for which she was qualified, held not to violate the Code of Judicial Con-
duct). The Delassandro court had drawn a distinction between private moral be-
iefs and notions of acceptable social conduct on the one hand, and judicial
How this "gloss" is applied has a significant impact on all state court judges in Pennsylvania. Judges are elected in Pennsylvania. The resulting need to obtain campaign contributions virtually assures that every Pennsylvania judge is now in danger of removal because of campaign contributions from potential litigants and counsel who appear in court.

The Pennsylvania Supreme Court again grappled with the significance of gifts to judges in In re Chiovero,\textsuperscript{156} another case stemming from the Roofers investigation. The supreme court implied that if Common Pleas Court Judge Chiovero did not know that he received a free new roof courtesy of the Roofers' Union, he would not be subject to removal.\textsuperscript{157} The court found the gloss of improper appearance to be softer than that in In Re Cunningham:

There is no evidence in the record before us to suggest that any of the players in this roofing skit would ever be litigants before [Judge Choviero] or that they were "potential litigants." We cannot believe that the [JIRB] views every human being on earth as a "potential litigant" and that judges henceforth cannot interact with any human beings.\textsuperscript{158}

The court ordered Judge Chiovero to respond to an interrogatory describing completely the facts surrounding the install-
tion of his roof.\textsuperscript{159} Nine months later, the supreme court reinstated Judge Chiovvero by a narrow 3 to 2 majority, crediting the judge's new testimony that his mother-in-law, since deceased, had paid $650 cash for the roof.\textsuperscript{160}

The supreme court's crowded docket guarantees that only the most notorious failures of trial judges to recuse themselves are checked through the disciplinary process. Usually there are other abuses that take precedence in the disciplinary process. In 1987, the supreme court did hear two recusal cases and, in both cases, approved recommendations of the JIRB to remove the judges from office.\textsuperscript{161} In each case, the acts by the removed judges went far beyond the appearance of impropriety.

In one case,\textsuperscript{162} the court discussed a judge's actions in eleven cases involving, \textit{inter alia}, improper communication with parties to pending litigation,\textsuperscript{163} abuse of criminal contempt powers,\textsuperscript{164} improper use of judicial office,\textsuperscript{165} failure to disqualify,\textsuperscript{166} criticism of

\begin{footnotesize}
\textsuperscript{159} Id. at 200, 570 A.2d at 66.
\textsuperscript{160} See \textit{The Never-ending Scandal}, Phila. Inquirer, Aug. 21, 1990, at A22, col. 1 (negative public reaction to case).
\textsuperscript{162} Fink, 516 Pa. 208, 532 A.2d 358.
\textsuperscript{163} Id. at 215-16, 532 A.2d at 361-62. The judge contacted a defendant directly, without notice to the plaintiff, and suggested a particular defense which had not been raised by the defendant. \textit{Id}. at 215, 532 A.2d at 361. The judge also met \textit{ex parte} with the defendant's lawyer and gave the same advice. \textit{Id}.
\textsuperscript{164} Id. at 215-23, 532 A.2d at 362-65. In a child custody case, the judge met \textit{ex parte} with the plaintiff's son, tried to get the plaintiff to drop his request for the return of his runaway daughter, and criticized the plaintiff's lawyer. \textit{Id}. at 216-17, 532 A.2d at 362. The lawyer for the plaintiff, when he learned of what the judge had said, moved for recusal. \textit{Id}. Four days later and without prior notice, the judge summoned the plaintiff's lawyer to chambers, summarily held him in contempt, and fined him $300. \textit{Id}. at 222, 532 A.2d at 365.
\textsuperscript{165} Id. at 223-25, 532 A.2d at 365-66. The judge attempted to persuade the district attorney, the state Attorney General, and a special prosecutor not to prosecute two of his friends for withholding evidence. \textit{Id}. at 223-24, 532 A.2d at 365.
\textsuperscript{166} Id. at 225-26, 532 A.2d at 366-67. The court held that the judge's refusal to recuse himself in three cases violated Canon 3C(1)(a) of the Code of Judicial Conduct. \textit{Id}. at 226, 532 A.2d at 366-67. In one case, the judge sentenced his former opponent's son to imprisonment on drug-related charges after an acrimonious campaign in which the judge had accused his opponent of being soft on crime. \textit{Id}. at 225, 532 A.2d at 366. The judgment of sentence was reversed by the superior court and the case was remanded for a new trial before another judge. \textit{Id}. In another case, the judge said he hated the defendant—the "damn gas company"—and, if he could find a way to rule against the gas company, he would do so. \textit{Id}. In another case involving the gas company, the judge threatened to hold counsel for the company in contempt if that attorney at-
\end{footnotesize}
the Pennsylvania Supreme Court, and interjection of religion and religious bias in judicial proceedings.

The second case barred Common Pleas Court Judge Snyder from holding judicial office based on his actions in the Municipal Publications trial. The court upheld the JIRB’s findings that Judge Snyder, inter alia, “presided at a hearing on a motion for his own recusal, acting simultaneously as judge and as witness.” Although Judge Snyder had lost his reelection bid since the Municipal Publications trial, the court nevertheless stated that it had a duty to give sanctions and therefore to bar him from holding any judicial office in the future.

The use of discipline to redress improperly decided recusal motions is simply wrong. It does nothing for the case-in-chief, which continues with the same judge. Moreover, the independence of the judiciary is threatened by disciplinary bodies which thereby acquire too much responsibility and power. Only

167. Id. at 226-28, 532 A.2d at 367-68. The judge called an opinion of the supreme court “monstrous,” “frivolous,” and a “travesty.” Id. at 227, 532 A.2d at 367. The court found this behavior to be a violation of Canon 3A(6) (abstaining from public comment on pending proceedings), but declined to find in these remarks any violation of Canon 2(a) (judges should respect and comply with law and conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary). Id. at 228, 532 A.2d at 367.

168. Id. at 228-31, 532 A.2d at 368-69. The judge frequently interjected his religious beliefs into proceedings. Id. For example, the judge suggested that a teenage boy before him in a delinquency hearing be examined by a local priest to determine whether an exorcism was required. Id. at 228, 532 A.2d at 368. Because of the judge’s known religious “bias,” parties who appeared before him frequently professed their religious practices. Id. at 230, 532 A.2d at 369.


170. Id. at 145, 523 A.2d at 295.

171. Id. at 152-53, 523 A.2d at 299.

172. The Massachusetts Supreme Court said of this danger:

We cannot... permit or encourage the use of the disciplinary power of this court as the initial remedy for alleged error in judgment or abuse of discretion by a judge. Attempts to correct judicial action in these areas must be left to established methods of appeal... To invoke the disciplinary power of this court against a judge as a substitute for appellate review would establish a practice dangerous to the public’s constitutional right to an independent judiciary. Moreover, permitting such a procedure could encourage individuals or groups of individuals to take action primarily for the purpose of intimidation.

In re Troy, 364 Mass. 15, 39-40, 300 N.E. 159, 173 (1973) (judge’s conduct in setting bail in 17 criminal cases criticized but not made basis for discipline; other behavior such as lying under oath, neglecting judicial duties, using court officer for personal work, and diverting charitable property to personal use warranted

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where the failure to recuse is flagrantly wrong and part of a pattern of other violations of the Code of Judicial Conduct should discipline be an appropriate initial response.

B. Impact of Proposed Judicial Disciplinary System on Pennsylvania Recusal Standards

The Beck Commission's report, published in January 1988, recommended a two-tiered judicial disciplinary system: The Board of Complaints Regarding Judicial Conduct to receive and investigate complaints against judges and The Court of the Judiciary to adjudicate those complaints. The Court of Judicial Discipline, as renamed by the General Assembly, is to hold hearings in public, in contrast to the Judicial Inquiry and Review Board which investigates and adjudicates complaints against judges without publicity.

While the proposed judicial disciplinary system differs from the operation of the JIRB, it does not alter the Pennsylvania Supreme Court's rules on recusal. The new system will, however, affect the influence of the supreme court on disciplinary matters. It is likely that the issue of judicial reform will be presented to the voters and approved by majority vote, and at that time, the Pennsylvania Supreme Court will lose influence in judicial disciplinary matters in two major ways.

First, the supreme court's power of appointment will be curtailed. There will be two bodies instead of a single board: a Judicial Conduct Board to investigate complaints, and a Court of Judicial Discipline to adjudicate complaints. Unlike the Judicial Inquiry and Review Board, of which the supreme court appoints 5 of 9 members, the Court of Judicial Discipline will not have any members appointed by the supreme court. The governor will appoint all seven judges of this new court, subject to the approval of a majority of the state senate. The Judicial

175. Id. at 4-10.
176. Id. at 8. For a discussion of the current constitutional provision, see supra notes 19-20 and accompanying text.
177. H.B. 1, P.N. 166, 1991 Pa. General Assembly Sess. 8. The seven members will be: "one active judge of the court of common pleas; one active judge
Conduct Board, the investigatory body, will hold eleven members, only three of whom are to be appointed by the supreme court. The governor will appoint the remaining eight members with the advice and consent of a majority of the state senate.

Second, the supreme court’s review of determinations of the new Court of Judicial Discipline will be limited to matters of law and not the independent, de novo review currently undertaken by the supreme court when examining the recommendations of the Judicial Inquiry and Review Board.

The effect of this reform will be to further politicize oversight of the judiciary. The appointment and consent powers bring the governor and state senate perilously close to control over judicial tenure. The new court will have to reach assiduously for ways to discipline judges to justify its existence.

The answer to the supreme court’s influence over judicial discipline in Pennsylvania, and particularly its shunting of recusal to the disciplinary arena, is not necessarily to transfer its powers to separate institutions. These separate institutions will be inherently driven to discipline judges since judicial discipline is their sole reason for existence. Nevertheless, the weight of the legal profession and the lack of meaningful opposition (who would oppose disciplining judges other than judges themselves?) make it likely that some sort of judicial disciplinary reform will emerge in Pennsylvania within the next few years, despite the efforts of the supreme court to retain exclusive disciplinary jurisdiction over the state judiciary. Perhaps then the supreme court will see reason to return to the pre-Reilly standard that permitted lower courts to rely on the Code of Judicial Conduct in reviewing recusal determinations.

of an appellate court; one active justice of the peace; one non-judge member of the bar of the Supreme Court; and three non-lawyer electors. Id.

178. Id. at 5. The supreme court will appoint one active judge of the court of common pleas, one active judge of an appellate court, and one active justice of the peace. Id.

179. Id. The governor will appoint three non-judge members of the supreme court bar and six non-lawyer electors. Id.

180. Id. at 12. The supreme court shall review the record “as it would review the record in a civil action in which the moving party in the lower court had the burden of proving its allegations by clear and convincing evidence.” Id. For a discussion of the supreme court’s standard of review for JIRB findings, see supra note 55 and accompanying text.
IV. Recusal Rules Elsewhere

A. Overview

The use of a standard of actual impropriety for recusal isolates Pennsylvania from the approach taken by many other jurisdictions in the United States. Federal courts, under statutory provisions and the due process clause, have unconditionally adopted an appearance of impropriety test for reviewing motions to recuse judges, and judicial discipline and recusal are not linked as they are in Pennsylvania.181 There is even a federal statutory procedure for a judge to refer recusal motions to another judge, although it is not often used.182 For the most part, the courts in other states also use an appearance of impropriety standard to review recusal decisions.183

Pennsylvania also differs in its approach to recusal from many foreign countries. Swiss and German laws, for example, contain detailed rules concerning recusal requests.184 In most cases, the judge whose recusal is sought does not participate in the decision on recusal, and the standard is again the appearance of impropriety, not actual bias.185

B. Federal Courts

Two separate strands of federal law exist with regard to judicial recusal: constitutional and statutory. The constitutional strand is based on due process, which is defined to include the right to an impartial judge. The statutory strand sets more specific standards. Decisions on recusal generally deal entirely with one body of law, ignoring the other. Courts more commonly rely on the statutory strand in discussing recusal of federal judges.

1. Statutory Recusal Standards

Statutory recusal standards for federal judges are modeled on Canon 3C of the Code of Judicial Conduct. The standards are

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181. For a discussion of the federal standards, see infra notes 186-259 and accompanying text.
182. For a discussion of this federal procedure, see infra notes 190-93 and accompanying text.
183. For a discussion of the recusal standards of other states, see infra notes 272-99 and accompanying text.
184. For a discussion of the recusal standards of Switzerland and Germany, see infra notes 300-61 and accompanying text.
185. For a discussion of the recusal procedures of Switzerland and Germany requiring the non-participation of the judge whose alleged bias is at issue, see infra notes 315-21, 391-33, 341, 351-54, & 359-61 and accompanying text.
contained in two places—sections 455 and 144 of title twenty-eight of the United States Code. Section 455 is more commonly invoked, probably because it has fewer procedural requirements.

Borrowing from Canon 3C(1), section 455(a) states: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."186 Four of the five other, more specific grounds for recusal in section 455(b) are also lifted directly from Canon 3C.187 In addition, like the model code and unlike the Pennsylvania code, section 455(e) permits a judge to waive recusal with the consent of the parties.188 The Pennsylvania Code


Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, 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.


The first federal recusal legislation, adopted in 1792, required disqualification of district judges where they were "concerned in interest" or had been of counsel in the case before them. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 279-79. See Lewis, supra note 1, at 387 n.52 (describes statutory evolution for federal judicial recusal legislation).

By 1911, the statute had taken the general form in which it was to remain until 1974 except that the grounds for disqualification on the basis of relation to counsel was omitted. Act of Mar. 3, 1911, ch. 231, § 21, 36 Stat. 1087, 1090 (codified as amended at 28 U.S.C. § 455 (1988)). The 1948 version simplified the 1911 language and omitted instructions as to how a judge's disqualification should be recorded and certified. Act of June 25, 1948, ch. 646, 62 Stat. 907, 908 (codified as amended at 28 U.S.C. § 455 (1988)).

187. 28 U.S.C. § 455(b)(1) comes from Canon 3C(1)(a) (personal bias or prejudice concerning a party or personal knowledge of disputed facts); (b)(2) comes from Canon 3C(1)(b) (served as counsel, or associate served as counsel, or was material witness); (b)(4) comes from Canon 3C(1)(c) (judge in individual capacity or as fiduciary, spouse or minor child residing in household has financial interest that could be substantially affected by outcome of proceeding; Pennsylvania's Code, 455 Pa. xxix, xxxv (1973), by comparison, requires "a substantial financial interest"); (b)(5) comes from Canon 3C(1)(d) (personal interest of judge, spouse or related person). Section 455 contains only one ground for recusal that is not in Canon 3C—service in governmental employment as counsel, adviser or material witness concerning the proceeding before the court, or expression of an opinion concerning the merits of the particular case in controversy while in governmental employment. 28 U.S.C, § 455(b)(3) (1988).

188. Section 455(e) allows a waiver of a ground for disqualification under subsection (a) so long as it is preceded by "full disclosure on the record of the basis for disqualification." 28 U.S.C. § 455(e) (1988). Section 455(f) states that a judge may divest any financial interest he or his spouse or minor child residing
lacks any provision for waiver of grounds for recusal.189

Section 144 gives litigants the possibility of getting a different judge to determine a recusal motion if the motion alleges that the assigned judge is personally biased or prejudiced either against a party or in favor of an adverse party.190 This section, which has no counterpart in the Code of Judicial Conduct, establishes circumstances which require referral of a recusal motion to another judge. The standard, unlike that set by Pennsylvania case law, is not a subjective and extraordinary standard under which referral is mandated only where the judge decides to testify on the recusal motion. Rather, the only requirement is a "timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party . . . ." The affidavit under section 144 must be filed not less than ten days before the "beginning of the term" at which the proceeding is to be heard unless good cause is shown. Only one such affidavit is permitted to be filed in any

with him has in a party or a matter before him where the conflict came to his attention after he has devoted substantial judicial time to the matter and the interest could not be substantially affected by the outcome of the matter. 28 U.S.C. § 455(f) (1988).

Judges may not turn their eyes away from knowledge of their financial interests, however, since § 455(c), like its counterparts in Canon 3C(1)(c) and Pennsylvania Code of Judicial Conduct Canon 3C(2), states that judges should inform themselves about their personal and fiduciary financial interests and make a reasonable effort to do so with regard to the financial interests of their spouse and minor child residing with them. 28 U.S.C. § 455(c) (1988).

The 1972 Model Code of Judicial Conduct is stricter in its provisions for waiving disqualification. Canon 3D authorizes "remittal" of disqualification only in cases involving financial interest of a judge, his spouse or minor child residing with him as well as where a relative of the judge is a party, lawyer, likely material witness, or holder of an interest that could be substantially affected by the outcome of the proceeding. In such cases, disclosure on the record of the basis of the disqualification is necessary as well as the written, filed consent of the parties and lawyers in the proceeding. 1972 ABA CODE OF JUDICIAL CONDUCT Canon 3D, in MODEL CODE OF JUDICIAL CONDUCT, App. C at 35 (1990). For a discussion of changes to the Model Code, see supra note 2.

189. Where the trial judge has as much discretion as he does under Pennsylvania law, however, the existence of a waiver provision with consent of the parties is unlikely to have much significance.

190. Section 144 states in part:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.


191. Id.

192. Id.
case.\textsuperscript{193} The United States Supreme Court construed section 455 in \textit{Liljeberg v. Health Services Acquisition Corp.}\textsuperscript{194} Addressing issues that the Pennsylvania Supreme Court has consigned to the disciplinary process, Justice Stevens, writing for the Court in a 5 to 4 decision, held that "[s]cience\textsubscript{r} is not an element of a violation of section 455(a)."	extsuperscript{195} Thus, according to the Court, a federal judge need not be aware of the disqualifying circumstance to violate the federal recusal standards.

While acknowledging that there could be a violation of section 455 that would be harmless error,\textsuperscript{196} the Court suggested the following criteria for determining whether a judgment should be vacated for a violation of section 455: "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases and the risk of undermining the public's confidence in the judicial process."\textsuperscript{197}

In \textit{Liljeberg}, the Supreme Court held that the judge, a trustee of a university which stood to benefit if Liljeberg prevailed, should have recused himself from a declaratory action to determine the ownership of a corporation.\textsuperscript{198} Liljeberg was negotiating with the university to buy land on which to build a hospital.\textsuperscript{199} The negotiations hinged, according to the Court, on Liljeberg prevailing in the declaratory action.\textsuperscript{200} The Court emphasized that the judge had received letters from the university about the negotiations, some of which mentioned the case pending before him.\textsuperscript{201}

However remote the judge's own financial interest was in the outcome of the action and the university's negotiations, the Court

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\item[193.] Id. Section 144 additionally requires a certificate of counsel stating that the affidavit is made in good faith. \textit{Id.}
\item[194.] 486 U.S. 847 (1988) (judge disqualified under 28 U.S.C. § 455(a) because of his membership on board of university which was in negotiation with party involved in case before him).
\item[195.] Id. at 859. The violation discussed in \textit{Liljeberg} was whether the judge's "impartiality might reasonably be questioned" by other parties. \textit{Id.} According to the Court, the judge's knowledge of the board's involvement with a party was not required. \textit{Id.} The judge's involvement in the proceeding constituted a violation of § 455(a) regardless of his knowledge. \textit{Id.}
\item[196.] Id. at 862. The Court gave large, multidistrict class actions as an example of where harmless error could occur. \textit{Id.} at 862 n.9.
\item[197.] Id. at 864.
\item[198.] Id. at 850.
\item[199.] Id.
\item[200.] Id.
\item[201.] Id. at 858.
\end{enumerate}
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still found that the judge’s failure to recuse himself violated section 455(a), 455(b)(4) and perhaps 455(c).\textsuperscript{202}

The Supreme Court, in affirming the court of appeals decision, applauded the court of appeals’ “willingness to enforce section 455” and encouraged “a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered.”\textsuperscript{203} The Supreme Court agreed with the court of appeals that the trial judge should have granted the motion to vacate the judgment, which was filed under Federal Rule of Civil Procedure 60(b)(6)\textsuperscript{204} some ten months after the court of appeals had affirmed the judgment.\textsuperscript{205}

\textit{Liljeberg}, through a motion to vacate the judgment, redressed a violation of federal recusal standards in a civil case after the appeal period had run. The standard of review by the court of appeals as well as the Supreme Court was a \textit{de novo} examination of whether there was an appearance of impropriety.\textsuperscript{206}

Two cases decided after \textit{Liljeberg} in the Second and Third Circuit Courts of Appeal reflect the close scrutiny mandated by \textit{Liljeberg} for reviewing recusal motions in the federal courts. Both

\textsuperscript{202} Id. at 867-68. The judge’s position as university trustee, according to the Supreme Court, gave an appearance of partiality in violation of § 455(a); it also constituted a financial interest in the proceeding because of the judge’s fiduciary duties as trustee, a violation of § 455(b)(4); and the judge’s failure to stay informed of his fiduciary interest “may well” have been a separate violation of § 455(c). Id.

\textsuperscript{203} Id. at 868.

\textsuperscript{204} Rule 60(b)(6) permits a judge, upon motion and such terms as are just, to relieve a party or a party’s legal representative from a final judgment, order, or proceeding “for . . . any . . . reason justifying relief from the operation of the judgment.” \textit{Fed. R. Civ. P. 60(b)(6)}.

\textsuperscript{205} 486 U.S. at 850. The Supreme Court attributed the ten month delay to the judge for his failure to recuse himself or disclose the conflict upon gaining knowledge of it. Id. at 869.

The case came to the Supreme Court after the court of appeals had heard the issue for the second time. Id. at 851. In its first review, the court of appeals determined that factual findings were required to determine the extent and timing of the trial judge’s knowledge of the university’s interest in the litigation. Id. The appellate court remanded the matter to a different district judge for such findings. Id.

The judge to whom the matter was remanded found that the trial judge had known of the university’s interest in the subject matter of the case before it went to trial, but had forgotten about this interest prior to the commencement of the proceedings and the filing of his opinion. Id. The judge hearing the remand concluded that “the evidence nevertheless gave rise to an appearance of impropriety.” Id. He, however, denied the Rule 60(b)(6) motion. Id. The court of appeals reversed, holding that the appearance of impropriety was sufficient to disqualify the trial judge under section 455(a). Health Services Acquisition Corp. v. Liljeberg, 796 F.2d 796, 802-03 (5th Cir. 1986).

\textsuperscript{206} 796 F.2d at 800-02; 486 U.S. at 684.
cases were based on interlocutory mandamus petitions and were not ordinary appeals after final judgment.

In *Moody v. Simmons*, the Third Circuit case, a bankruptcy judge repeatedly told the parties that he would recuse himself, but declined to do so until he had granted a petition to convert the bankruptcy petition from chapter 7 to chapter 11. The judge’s daughter worked for the second largest unsecured creditor of the bankrupt company, and her employer would benefit from the conversion. The Third Circuit granted a writ of mandamus and vacated the judge’s orders, relying on the district judge’s announced intentions during hearings that he would recuse himself from the case.

The Second Circuit case, *Securities and Exchange Commission v. Drexel Burnham Lambert Inc.*, involved civil fraud actions brought by the Securities and Exchange Commission (SEC) and individual plaintiffs against an underwriting firm in the aftermath of the Ivan Boesky insider trading prosecution. Judge Milton Pollack, who heard the Boesky matter, received the individual plaintiff cases in August 1987 and presided over a year of “substantial” pretrial activity—issuing three published opinions, thirty-six management orders, and resolving a host of procedural and discovery matters.

In September 1988, the SEC filed a civil enforcement action against Drexel Burnham Lambert and others which was assigned to Judge Pollack. Drexel’s lawyers then moved to recuse Judge

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207. 858 F.2d 137 (3d Cir. 1988).
208. Id. at 139-40.
209. Id. at 139. The judge’s relationships with two attorneys were also brought to the judge’s attention as further grounds for his recusal. First, two defendants in the bankruptcy cases were represented by the same law firm that was representing a defendant in a personal injury action that the judge and his wife had recently filed in state court. Id. Second, the wife of an attorney for the trustee of the bankrupt company was employed in a law firm which also represented another defendant in the judge’s personal injury suit. Id. The appellate court, however, gave no indication that these relationships alone would suffice to require recusal. Id. at 142-43.
210. Id. at 142-44. The case was remanded for assignment to another judge. Id. at 144. The Third Circuit panel also took the unusual step of suggesting that “in light of the animosity that appears to have arisen between the district judge and the two petitioning law firms, the district judge may wish to consider not sitting on cases involving these firms in the future.” Id. at 144 n.11.
211. 861 F.2d 1307 (2d Cir. 1988).
212. Drexel Burnham Lambert (Drexel) was charged, with others, with acting in concert with Ivan Boesky to violate securities and anti-racketeering laws. Id. at 1310.
213. Id. at 1309-10.
214. Id. at 1311. The complaint alleged that Drexel and others had com-
Pollack from the Drexel litigation and the Boesky litigation on the grounds that the judge's wife was a controlling stockholder in a company for whom Drexel was to act as an underwriter in the sale of its business, and that Drexel had the option to buy fifteen percent of the new company to be formed as a result of the transaction.\footnote{215} Although the sale agreement occurred in June 1988, Drexel's lawyers claimed they first became aware of the financial interest of Judge Pollack's wife in September 1988—after the SEC had filed the complaint.\footnote{216} Drexel's counsel also alleged a second ground for recusal: personal attacks by the judge on the integrity of Drexel's counsel.\footnote{217}

The Second Circuit declined to issue the writ, upholding Judge Pollack's refusal to recuse himself. First, the court found that the financial interests of Judge Pollack's wife lacked any nexus with the suits pending before the judge and did not involve any business dealings with Drexel.\footnote{218} Second, according to the court, the challenged remarks made by the judge were directed to the professional conduct of the attorneys, did not extend to extra-judicial matters, and did not reflect prejudice or lack of impartiality regarding the parties to the action.\footnote{219} The court stated: "[B]ias against a lawyer . . . without more is not bias against his client."\footnote{220} If, after trial, bias was found to have "permeated" the case, that situation could be corrected on direct appeal.\footnote{221}

Both of these cases, although differing in result, applied an appearance of impropriety standard.\footnote{222} In addition, these cases

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  \item \footnote{215} Id. at 1310-11.
  \item \footnote{216} Id. at 1511. Judge Pollack's wife had a $30 interest in the sale. \textit{Id.}
  \item \footnote{217} \textit{Id.}
  \item \footnote{218} Id. at 1314. The court held that, because Drexel had no direct or indirect obligation to Mrs. Pollack, Judge Pollack's connection was too remote to require recusal. \textit{Id.} at 1515. Holding otherwise would mean that "the price of avoiding any hint of impropriety, no matter how evanescent, would grant litigants the power to veto the assignment of judges." \textit{Id.}
  \item \footnote{219} \textit{Id.} at 1316.
  \item \footnote{220} \textit{Id.} at 1314 (citations omitted). According to the court, "[d]ecisions or rulings must be adverse to a party and legal disagreements with counsel are not sufficient for judicial disqualification . . . ." \textit{Id.}
  \item \footnote{221} \textit{Id.} at 1516.
  \item \footnote{222} Federal cases before \textit{Liljeberg} also applied this standard. \textit{See}, e.g., \textit{In re Beard}, 811 F.2d 818 (4th Cir. 1987) (writ of mandamus to disqualify district judge rejected after detailed review of allegations); Hall v. Small Business Admin., 695 F.2d 175 (5th Cir. 1983) (law clerk's prior employment in Small Business Administration and acceptance of job from plaintiff's counsel while working on employment discrimination case required magistrate to recuse himself from case; case remanded for new trial before judge or another magistrate);}

https://digitalcommons.law.villanova.edu/vlr/vol36/iss3/1
show a willingness to examine recusal issues in interlocutory appeals, and neither case even begins to hint that recusal issues should be left to the judicial disciplinary process.

2. Due Process

Early common law recognized direct pecuniary interest as the sole basis for judicial disqualification. In 1813, Justice Livingston and Chief Justice Marshall reportedly disqualified themselves, each in a different case, because they had direct pecuniary interests in matters before the court. In addition, federal trial judges were disqualified by statute from hearing cases in which they had a financial interest as early as 1792. Neither common law nor statutory law, however, made bias or prejudice grounds for judicial disqualification.

Not until the twentieth century did the principle evolve that parties have a constitutional right to an impartial judge. Even today, the Constitution is still less commonly relied on than are United States v. Ritter, 540 F.2d 459 (10th Cir.), cert. denied, 429 U.S. 951 (1976) (in response to mandamus petition which sought to disqualify district judge in antitrust action, court held total facts required case to be tried by judge from outside district).

223. See Tumey v. Ohio, 237 U.S. 510, 528-31 (1917) (general rule is that officers acting in judicial capacity are disqualified by their financial interest in controversy).

224. See Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813) (Chief Justice Marshall did not participate); Livingston & Gilchrist v. Maryland Ins. Co., 11 U.S. (7 Cranch) 506 (1815) (Justice Livingston did not participate). The case reports do not reflect the reasons for their nonparticipation, setting a standard followed to this day by Supreme Court justices. Commentators, however, assure us of the justices' financial interest in these cases. See White, The Working Life of the Marshall Court, 1815-1835, 70 VA. L. REV. 1, 13 n.52 (1984) (because Marshall was member of syndicate who brought original action to quiet title, he had strong interest in outcome of case and felt he could not openly participate); Frank, supra note 1, at 609 (practice of Supreme Court justices disqualifying themselves in cases in which they had direct pecuniary interest originated by Justice Livingston and immediately followed by Chief Justice Marshall).

225. For a discussion of the federal recusal statutes, see supra note 186-93 and accompanying text.

226. See Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 820 (1986) ("traditional common law rule was that disqualification for bias or prejudice was not permitted"; more recent trend is towards adoption of statutes to permit disqualification on these grounds).

227. For a discussion of constitutional grounds for judicial recusal, see infra notes 228-59 and accompanying text. Justice Frankfurter eloquently expressed the need for judicial impartiality to be guaranteed by the Constitution in his dissent in Sacher v. United States:

Bitter experience has sharpened our realization that a major test of true democracy is the fair administration of justice. If the conditions for a society of free men formulated in our Bill of Rights are not to be
statutory grounds for recusal. While the federal Constitution is replete with checks and balances intended to prevent abuses of political power, it is silent regarding the obligation of judicial impartiality. The Constitution also lacks sanctions against federally appointed civil officers, including judges, other than their impeachment from office.228

The framers may have considered an impartial judge to be an inherent element of natural law that needed no restatement. It was part of their implicit faith that individuals appointed or elected to public office would seek to carry out their duties honestly and fairly. James Madison wrote in the Federalist Papers: “No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and not improbably, corrupt his integrity.”229 Another possibility is that the framers considered judicial impartiality to be outside the scope of the Constitution and adequately covered by common law or statute.

The Constitution nevertheless shows that judicial impartiality was of concern to the citizenry. The Bill of Rights guarantees an accused in a criminal case, and both parties in a common law civil case, the right to trial by jury rather than by a judge.230 The Constitution itself provides for trial by jury for all crimes prosecuted in federal court except impeachment.231 The jury was the colonial citizen’s constitutional remedy to avoid the biased or interested judge.

In the twentieth century the U.S. Supreme Court began to apply the Constitution to prohibit federal judges from deciding cases in which they had a personal stake, usually a financial interest. Most of these cases involved criminal prosecutions.

turned into mere rhetoric, independent and impartial courts must be available for their enforcement.

349 U.S. 1, 23 (1952) (Frankfurter, J., dissenting) (dissenting to affirman of summary contempt convictions for 11 defendants, all of whom were leading members of the United States Communist Party).

228. The only constitutional sanction against federal officers provides: “The President, Vice President and all civil officers of the United States shall be removed from office on Impeachment for, and Commission of, Treason, Bribery, or other high Crimes and Misdemeanors.” U.S. CONST. art. II, § 4.


230. “In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury . . . .” U.S. CONST. amend. V. “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States than according to the rules of the common law . . . .” U.S. CONST. amend. VII.

231. “The Trial of all Crimes, except in Cases of Impeachment, shall be by jury . . . .” U.S. CONST. art. III, § 1, cl. 3.
Prohibition statutes engendered *Tumey v. Ohio*, 232 the first major case from the Supreme Court linking due process and judicial impartiality. An Ohio statute provided that fines from persons convicted of possessing intoxicating liquor could be used to finance the enforcement of prohibition laws. 233 The Village of North College Hill provided by ordinance that the mayor, who decided prohibition cases, would receive a part of the fine collected as compensation for hearing such cases in addition to his regular salary. 234 The mayor received such money only if the defendant was convicted. 235 In addition, the only provision for funding the marshalls, inspectors and detectives who enforced the prohibition law was the fines collected from convicted defendants. 236

Chief Justice Taft held that the Ohio statute and the village ordinance violated the fourteenth amendment's guarantee of due process of law:

All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion. But it certainly violates the Fourteenth Amendment, and . . . due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case. 237

At the time *Tumey* was decided, there were many statutes giving public officials and public coffers a financial interest in the criminal conviction of the defendant. 238 The *Tumey* Court, however, concluded "that a system by which an inferior judge is paid for his service only where he convicts the defendant has not been so embedded . . . that it can be regarded as due process of law

233. Id. at 517.
234. Id. at 519.
235. Id. at 520. The mayor would receive the amount of his costs from hearing the case if the defendant was convicted. *Id.* "There is, therefore, no way by which the mayor would be paid for his service as judge if he does not convict those who are brought before him . . . ." *Id.*
236. Id. at 520.
237. Id. at 523 (citation omitted).
238. See id. at 527-32 (Court gave examples of cases which involved common practice of allowing judges no compensation apart from fees collected on conviction).
Tumey was thus the first case to apply the due process clause to the recusal of judges.\textsuperscript{239}

For a long time the Supreme Court confined the application of due process in recusal matters to judges with a personal financial interest in the proceeding. However, in 1955, the Supreme Court held that due process was violated when a state judge decided criminal contempt charges related to testimony he had heard while acting as a one-man grand jury pursuant to state law.\textsuperscript{241} Applying the principle that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome," the Supreme Court overturned the criminal contempt conviction of two individuals for their responses in a grand jury hearing about suspected gambling and bribery of policemen.\textsuperscript{242}

Thus, a judge's previous involvement in a criminal prosecution as "a part of the accusatory process" was added to financial interest as grounds for the reversal of convictions in order to assure due process of law.\textsuperscript{243} "[O]ur system of law," Justice Black wrote in a 6 to 3 opinion, "has always endeavored to prevent even the probability of unfairness" and not simply "an absence of actual bias in the trial of cases."\textsuperscript{244} For the first time, the Supreme Court endorsed "the appearance of justice" as the appropriate standard for recusal.\textsuperscript{245}

Another Ohio statute, which authorized mayors to sit as judges in cases of ordinance violations and certain traffic offenses, provided the Supreme Court with a further occasion to link due process to the principle of judicial impartiality.\textsuperscript{246} Even though the fines went to the village treasury and not to the mayor personally, the Supreme Court found a lack of due process of law because of the possible temptation for the mayor, sitting as traffic

\textsuperscript{239}Id. at 531.

\textsuperscript{240}The Court held that any procedure which offers temptation to a judge and which therefore might affect his impartiality denies due process of law. \textit{Id.} at 532.

\textsuperscript{241} \textit{In re Murchison}, 349 U.S. 133, 139 (1955).

\textsuperscript{242} \textit{Id.} at 134, 136, 139. Michigan, situs of the inquiry, then authorized a judge to act as a so-called "one-man grand jury." \textit{Id.} at 133. Acting as such, a judge could compel witnesses to testify in secret about suspected crimes. \textit{Id.}

\textsuperscript{243} \textit{Id.} at 137.

\textsuperscript{244} \textit{Id.} at 136. The Court stated that an "interest in the outcome" could not be defined with precision; circumstances and relationships have to be considered. \textit{Id.}

\textsuperscript{245} \textit{Id.} The Court noted that this standard could sometimes bar judges who had no actual bias from trying cases. \textit{Id.}

court judge, to convict the defendant in order to maintain the traffic court’s high level of contributions to the village treasury. 247

The most recent Supreme Court decision applying the due process clause to judicial recusal where a judge has a financial interest in the outcome of a case is Aetna Life Insurance Co. v. Lav- oie. 248 In Aetna, a justice of the Alabama Supreme Court participated in reviewing a $3.5 million verdict against an insurer for its bad faith refusal to pay a medical insurance claim, despite the pendency in state court of two actions filed on the judge’s behalf. 249 One suit was against a different insurance company alleging bad faith failure to pay the judge’s own insurance claims; the other suit was a class action on behalf of all Alabama state employees insured under Blue Cross-Blue Shield of Alabama. 250 Aetna’s counsel challenged the justice’s participation after learning of these pending suits. 251 The Alabama Supreme Court had denied the recusal motion. 252

As to the insurer’s allegations that the justice was biased and prejudiced, the United States Supreme Court held that the justice’s “general frustration with insurance companies” was insufficient to establish any constitutional violation. 253 However, by affirming the jury’s verdict of punitive damages in the amount of $3.5 million, the largest punitive damages award ever in Alabama, Chief Justice Burger stated that the Alabama Supreme Court “un- doubtedly raised the stakes” for the insurer in the justice’s own suit. 254 This interest made the Alabama justice “a judge in his own case” when he participated in the decision, regardless of whether in fact he was influenced “not to hold the balance nice, clear and true.” 255

247. Id. at 60. According to the Court, “the test is whether the mayor’s situation is one ‘which would offer a possible temptation to the average man . . . which would lead him not to hold the balance nice, clear and true between the State and the accused . . . . ’” Id. (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)).
249. Id. at 816-17.
250. Id.
251. Id.
252. Id. at 819 (discussing Alabama Supreme Court’s unreported order of March 8, 1985).
253. Id. at 821.
254. Id. at 824.
255. Id. at 824, 825 (quoting Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972)). The Alabama justice was the determining vote in affirming the award of punitive damages, a fact highlighted by Chief Justice Burger, id. at 828, but downplayed by a concurring opinion of Justice Blackmun. Id. at 831-33 (Blackmun, J., concurring).
Therefore, under *Aetna*, the due process clause of the federal constitution is violated where a judge acts as a judge in his own case or where he reaps a tangible financial benefit by deciding the case in a certain way. In these situations, actual bias need not be shown to vacate a judgment in which the judge participated.256

The United States Supreme Court, in *Aetna*, declined to address the issue of a due process violation because of alleged judicial bias or prejudice where the judge is not financially interested in the outcome of the case.257 The Court noted the recent trend to adopt statutes that permit disqualification for bias or prejudice, and in this connection, cited the Code of Judicial Conduct.258 Only "in the most extreme of cases," however, "would disqualification on this basis be constitutionally required . . . ."259

3. Discipline and Recusal

Federal judges hold office for life "during good behavior."260 They may be removed from office only on a majority vote to impeach by the House of Representatives and after trial by the Senate.261 Recusal complaints, however, have not figured prominently in recent judicial impeachments.

The federal Constitution grants no powers to the United

256. Chief Justice Burger wrote in *Aetna*:
We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." The Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice."

Id. at 825 (quoting Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972), *In re Marchison*, 949 U.S. 133, 136 (1955)). *See also* Gomez v. United States, 490 U.S. 858, 876 (1989) ("Among those basic fair trial rights that can never be treated as harmless is a defendant's right to an impartial adjudicator, be it judge or jury.").

257. *Id.* at 821.

258. *Id.* at 820. Under the Code, a judge should disqualify himself where he has a personal bias or prejudice concerning a party. *Id.* (citing ABA CODE OF JUDICIAL CONDUCT Canon 3C(1)(a) (1980)).

259. *Id.* at 821 (emphasis added).


The last three impeachment trials of federal judges were conducted by a committee of 12 Senators. *See* Stewart, *Impeachment by Ignorance*, 76 A.B.A. J. 52 (June 1990). The committee needed a quorum of just seven to hear testimony. *Id.* The full Senate then voted on the basis of a written record after hearing closing arguments. *Id.*
States Supreme Court to discipline federal judges of lower courts. Administratively though, the federal court system has exercised informal oversight over judges. In 1969, Chief Justice Warren created an Interim Advisory Committee on Judicial Activities which was composed of federal judges.262 The committee's task was to give informal, nonbinding opinions on matters of judicial conduct to the circuit judicial councils, the informal body that includes all federal judges within each federal judicial circuit.263 The advisory committee still publishes opinions or refers to its previous opinions on judicial conduct upon written request from federal judges.264 The committee, however, has no authority to impose sanctions.265

In 1980, Congress authorized each federal circuit to resolve complaints of judicial misconduct.266 Even before then, however, as one federal circuit judge has pointed out, the Administrative Office Act of 1939 had empowered the judicial councils to take action as necessary to ensure "that the work of the district courts shall be effectively and expeditiously transacted."267

The 1980s witnessed some 1,650 complaints against federal judges, but only four public reprimands or censures. One circuit executive has claimed, however, that at least nine federal judges or magistrates retired after a complaint was filed against them or when one was imminent.268 Some commentators dislike the confidential nature of the responses of the judicial circuit committees to complaints of misconduct.269 Others (mostly judges) believe

263. Id.
264. Id. at 254-55, 258-59.
265. Id. at 255-56.
267. Edwards, supra note 1 at 792 (quoting the Administrative Office Act of 1939, the author notes that legislation, as well as judicial practice before 1980, authorized federal courts to take informal disciplinary measures against federal judges).
269. See, e.g., Margolick, A Glimpse at the Secrets of Penalizing Judges, N.Y. Times, July 14, 1989, at A1, col. 1 ("[T]he mechanism Congress devised nearly 10 years ago to punish judges for improprieties that do not merit impeachment remains little known, little used and of limited capacity to educate and police the Federal judiciary.").
that the formality brought by the 1980 Act has increased the number of frivolous complaints without contributing much else.\textsuperscript{270} Even so, the circuit committees in federal courts probably do not receive as many complaints about recusal as does the disciplinary body for Pennsylvania judges, the Judicial Inquiry and Review Board.\textsuperscript{271}

C. \textit{Other State Courts}

No uniform procedures for judicial recusal exist for state courts, but most states have adopted the Code of Judicial Conduct with little or no modification.\textsuperscript{272} The following cases from

\textsuperscript{270} Edwards, \textit{supra} note 1, at 789. Chief Justice Wald of the Court of Appeals for the District of Columbia Circuit observed that the Act "has not proven its worth as a vehicle for unearthing real judicial misconduct." \textit{Id.}

\textsuperscript{271} Ten complaints were filed about federal judges with the Third Circuit Court of Appeals in 1988. See Brennan, \textit{Federal Judicial Discipline Questioned}, Legal Intelligencer, Aug. 11, 1989, at 1, col. 2. Seven of them were dismissed by Chief Justice Gibbons as having come from litigants dissatisfied with a particular decision. \textit{See id.} Statistics identifying the nature of complaints about judges filed with the JIRB are not publicly available. The JIRB initiated 325 inquiries during 1990; another 175 matters were pending. The JIRB dismissed 39 matters following formal investigation and rejected another 289 matters as frivolous. Four matters were referred to the Pennsylvania Supreme Court with recommendations for formal discipline. \textit{See Letter of Feb. 13, 1991 from JIRB to Administrative Office of Pennsylvania Courts} (copy on file with author).

\textsuperscript{272} Only Montana, Rhode Island and Wisconsin have not enacted the Code of Judicial Conduct.

Montana has a statute on judicial disqualification of trial judges for personal bias or prejudice. MONT. CODE ANN. § 3-1-805 (1989). As does 28 U.S.C. § 144 (1988), the Montana statute provides that on the filing of a timely affidavit alleging facts showing bias or prejudice, another judge must be assigned to determine the recusal motion. MONT. CODE ANN. § 3-1-805(1). In the case of district judges, the chief justice of the state supreme court assigns a district judge to hear the matter. \textit{Id.} For judges of municipal courts, small claims courts and justice of the peace courts, any district judge may appoint another judge or justice of the peace to hear the matter. \textit{Id.} The affidavit must be filed more than 30 days before hearing or trial, and attorneys' fees, costs and damages may be assessed by the judge presiding at the disqualification proceeding "against any party or his attorney who files such disqualification without reasonable cause and thereby hinders, delays or takes unconscionable advantage of any other party, or the court." \textit{Id.} § 3-1-805(a), (d). Montana also requires judicial disqualification in all of its state courts in cases where the judge is a party, interested, related to either party within the fourth degree by marriage or blood, counsel or sat in a lower court on the matter appealed. \textit{Id.} § 3-1-803.

Rhode Island is the only state which retained the 1924 canons of judicial ethics. Canon 4, relating to recusal, states: "A judge's official conduct should be free from impropriety and the appearance of impropriety. A judge should avoid infractions of law. A judge's personal behavior, not only upon the bench and in the performance of his judicial duties, but also in his everyday life, should be beyond reproach." R.I. Sup. Cr. R. 48 (Michie 1991).

Wisconsin's statute for disqualification of judges follows the Model Code of Judicial Conduct Canon 3C(1)(b), (d) and (f). \textit{See Wis. Stat. Ann.} § 757.19
Alabama, Florida and the District of Columbia reflect the use of the appearance of impropriety test for recusal and do not rely on the disciplinary process for review of recusal determinations.

In *Ex parte Rollins (Grace v. Reed)*,273 the Alabama Supreme Court granted a mandamus petition to require a trial judge to recuse himself from a civil action because of a personal conflict between the judge and the petitioner’s counsel.274 Some twenty months before the filing of the recusal motion, the judge had filed a complaint against petitioner’s counsel with the state bar association alleging that the lawyer was unfit to practice law.275 The complaint was dismissed four months after it was lodged.276 Reviewing the papers filed by the judge, the Supreme Court concluded that the judge still harbored “some negative feelings toward” petitioner’s counsel.277 The court, also pointing to two recent matters involving the judge and counsel in which the judge had recused himself, held that the evidence showed the judge was biased against counsel and required his recusal.278

The Court of Civil Appeals of Alabama decided another recusal case involving relationships between parties and judge in *Ex parte Sanders (Sanders v. Head)*.279 The writ of mandamus to reassign a case involving modification of a child custody decree was denied by the court where the grounds for recusal were that the assigning judge had taken a vacation in Reno, Nevada with the husband and children involved in the case.280 Since nothing had been alleged to challenge the judge to whom the case had been assigned, the court declined to issue a writ for assignment to an-

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(2)(a)-(d) & (f) (West 1981 & Supp. 1988) (judge disqualified if he or she is relative of party or counsel, is party or material witness in proceeding, is former counsel in same proceeding or prepared legal paper whose validity is at issue, or has significant financial or personal interest in outcome). Wisconsin also requires recusal when “a judge determines that . . . he or she cannot, or it appears he or she cannot, act in an impartial manner.” *Id.* § 757.19(2)(g). The statute establishes a nonexclusive link with the judicial disciplinary process in stating that, “[i]n addition to other remedies, an alleged violation under this section or abuse of the disqualification procedure shall be referred to the judicial commis-

273. 495 So. 2d 636 (Ala. 1986).
274. *Id.* at 637.
275. *Id.*
276. *Id.*
277. *Id.* According to the court, the answer filed by the judge attempted to prove that his accusations against petitioner’s counsel were justified. *Id.*
278. *Id.* at 638.
280. *Id.* at 56.
other judge.\textsuperscript{281} Had, however, the assigning judge known of the child custody proceeding and nevertheless gone on the trip with the husband, "the impartiality of the entire legal process—in view of the totality of these circumstances—might well have been seriously compromised in the eyes of the public . . ." so that mandamus might have been the appropriate remedy.\textsuperscript{282}

At first glance, this requirement of actual partiality seems contrary to Liljeberg's standard for the federal courts. However, the judge involved in Sanders was not the trial judge but the assigning judge. Therefore, the court relied primarily on Canon 2 of the Alabama Canons of Judicial Ethics which dealt with the general conduct of judges, rather than on the recusal standards of Canon 3.\textsuperscript{283}

A Florida appellate court issued a writ of prohibition directing a trial judge to recuse himself from a medical malpractice case where the judge had expressed sympathy with the plaintiff, a child suffering from cerebral palsy.\textsuperscript{284} Also, the plaintiff's counsel was a longtime friend of the judge and the two had engaged in ex parte communications in two previous trials of the same case where almost all rulings favored plaintiff.\textsuperscript{285} The trial judge had denied the motion to recuse solely for the reason that it was untimely.\textsuperscript{286} The appellate court disregarded this reason, noting that the trial was scheduled at a later date so that the motion would not interfere with the orderly progress of the case.\textsuperscript{287} The appellate court stated that the test was "how [ ] the litigant reasonably view[s] the remarks or conduct of the judge."\textsuperscript{288} By this standard, the court found that recusal was required.

The District of Columbia Court of Appeals wrestled with the

\textsuperscript{281} Id. at 58. In denying the writ, the court stated: "[W]e are unable to conclude that [the assigning judge's] continuing presence in this case in any way compromises the judicial process in the case or creates the appearance of impropriety such that his recusal is mandated." Id.

\textsuperscript{282} Id.

\textsuperscript{283} Id. at 57-58.

\textsuperscript{284} Deren v. Williams, 521 So. 2d 150 (Fla. Dist. Ct. App. 1988).

\textsuperscript{285} Id. at 151.

\textsuperscript{286} Id. at 151-52.

\textsuperscript{287} Id. at 152.

\textsuperscript{288} Id. Applying this test, the court concluded:

While few persons would not be sympathetic to the plight of a child afflicted with cerebral palsy, . . . the continued expression of that sympathy and the manifestation of a close friendship with opposing counsel, coupled with ex parte communications during trial, would reasonably cause a litigant to be apprehensive of the fairness of the trial judge.

Id.
issue of recusal where a defendant contended that the court should set aside his conviction of assault with intent to kill as well as his sentence because, unknown to the defendant, the judge had interviewed for a job with the prosecutor's employer during the trial and sentencing.\textsuperscript{289}

The court assumed that the judge had violated Canon 3C(1) of the Code of Judicial Conduct.\textsuperscript{290} The court, however, said it would grant a remedy only if due process was denied.\textsuperscript{291} Relying on criminal law cases, the court found that the violation was harmless error and had not affected the defendant's substantial rights.\textsuperscript{292} According to the court, the appearance of partiality was not enough to violate due process; the defendant must show actual prejudice such as adverse rulings on crucial issues.\textsuperscript{293}

Finding no prejudice during the trial, the court panel declined to order a new trial.\textsuperscript{294} The court did, however, remand for resentencing.\textsuperscript{295} Since the trial judge had already left the bench for employment with the Department of Justice, the resentencing was to be conducted by another judge.

The District of Columbia Court of Appeals reheard this case \textit{en banc}.\textsuperscript{296} The entire court agreed with the panel's decision that the trial judge had violated Canon 3C(1) of the Code of Judicial Conduct by applying for employment with the prosecutor's em-

\begin{itemize}
\item \textsuperscript{289} Scott v. United States, 536 A.2d 1040, 1042 (D.C. 1987), \textit{vacated}, 543 A.2d 546 (D.C. 1988), \textit{rev'd on reh'g}, 559 A.2d 745 (D.C. 1989) (\textit{en banc}). The judge had applied for employment as a managerial attorney with the Executive Office for United States Attorneys. 559 A.2d at 747. While this office is responsible for providing policy and oversight guidance to all federal prosecutors, the division to which the judge had applied was not concerned with criminal litigation. \textit{Id.}
\item \textsuperscript{290} 536 A.2d at 1045.
\item \textsuperscript{291} \textit{Id.}
\item \textsuperscript{292} \textit{Id.} at 1046-48.
\item \textsuperscript{293} \textit{Id.} at 1047-48. The court gave the following as examples of situations which would be due process violations: where the judge denies a motion to suppress or other motion on which the conviction stands on the basis of credibility findings adverse to the defendant; where the judge as factfinder makes critical rulings adverse to the defendant during trial; or where the judge otherwise conducts the trial in a manner which might be perceived as motivated by actual bias. \textit{Id.} In dictum, the court stated that prejudice could be shown merely by establishing that the case was tried by a judge rather than jury. \textit{Id.} at 1048.
\item \textsuperscript{294} \textit{Id.} at 1049. The defendant had admitted that the judge was not actually biased against him. \textit{Id.} at 1046.
\item \textsuperscript{295} \textit{Id.} at 1049.
\item \textsuperscript{296} Scott v. United States, 559 A.2d 745 (D.C. 1989). The judge who had authored the panel's decision was a retired judge who did not participate in the rehearing. \textit{Id.} at 746. The other two judges from the panel joined the rest of the Court of Appeals in a decision ordering a new trial for the defendant. \textit{Id.} at 746-47.
\end{itemize}
ployer during the trial and sentencing. However, it rejected the panel’s use of due process and actual prejudice as standards for granting a new trial for violation of Canon 3C(1) of the Code. Instead, the court en banc held that an “objective” standard of impartiality must control the remedy as well as the finding of a violation of Canon 3C(1). Even though the trial judge did not sit as trier of fact in the criminal case, a new trial was necessary “to assure the continued public confidence in the integrity of the judiciary.”

D. Two Foreign Jurisdictions

The recusal laws of foreign jurisdictions reflect rules that are similar to federal and sister states’ laws in that a neutral judge decides most recusal motions under a standard of appearance of impropriety, not actual bias. The methodology of comparative law used here is functionalist. Two continental law systems—Switzerland and the Federal Republic of Germany—share a common goal with the American legal system: the need to protect and guarantee judicial impartiality. As does the Code of Judicial Conduct, Switzerland and Germany both distinguish between interest and bias. In Switzerland, a constitutional provision is used to evolve rules similar to the interpretation of the due process clause in the United States. Germany, despite having a constitutional provision nearly identical to Switzerland’s, relies more on detailed procedural rules set forth in statutes for deciding recusal requests. Neither country uses discipline as a way to control recusal determinations.

1. Switzerland

Swiss recusal law is cantonal, with federal law intervening only on matters of constitutional dimension.

Article 58 of the federal constitution of Switzerland states in relevant part: “No one may be deprived of his lawful judge.”

297. Id. at 756.
298. Id. at 748-49.
299. Id. at 755-56.
300. See K. Zweigert & H. Koetz, Einführung in die Rechtsvergleichung auf dem Gebiet des Privatrechts 34 (1984) (authors of this respected treatise on comparison of law in field of private law suggest that introductory question for every inquiry into comparative law be put functionally in order to formulate the problem free of systemic concept of one’s own legal order).
Originally intended to prevent cantons from establishing special courts in which to try political opponents, the Swiss federal supreme court, the Tribunal fédéral, has relied on this provision often in reviewing recusal decisions.  

In its decision of November 17, 1987, Firm A v. Firm B and Appeals Court of the Canton of Zurich, the civil division of the Tribunal fédéral explained Article 58: “According to the more recent decisions of the Tribunal fédéral, the individual has the right from Article 58 of the Constitution to demand the judgment of his dispute by an impartial and independent court.” The standard for Article 58, said the court, “is not that the judge [whose recusal is sought] must actually be partial; it is enough that circumstances exist which could raise in a party the impression of partiality.” The court held that a remand of the case to the same arbitrator who initially arbitrated the matter did not itself create such circumstances, so it rejected the appeal of Firm A.

In a decision of July 15, 1988, Y v. Spouse X, the President of the Regional Court Z, and the Appeals Court of the Canton of Thurgau, the public law division of the Tribunal fédéral applied Article 58 to require a judge’s recusal. The trial judge had obtained personal knowledge concerning a case pending before him while he was on a drill as a volunteer fireman. Mrs. X had filed a judicial complaint against her spouse Y to deny him a building permit on the grounds that Y’s “hobby repair shop” created an impermissible burden for pedestrians and vehicular traffic and an impermissible noise level for her adjoining property. The president of the Regional Court, while on a volunteer fireman’s exercise, observed that the repair shop of Y was still in use after 8 p.m. The judge walked around the shop, talked briefly with Y’s son and sent each party a copy of his notes for the case file. Y then petitioned to the Tribunal fédéral for a hearing on that basis.

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302. For examples of this reliance, see infra notes 303-33 and accompanying text.

303. 113 Entscheidungen des Schweizerischen Bundesgerichts (BGE I) 407 (translations by the author).

304. 113 BGE I 407, 408 (citation omitted).

305. Id. at 409.

306. Id. at 410. The Tribunal fédéral used the same standard for arbitrators as for judges because of the requirement of equal treatment for disputants. Id.

307. 114 BGE I 153.

308. Id. at 154.

309. Id.

310. Id. at 154, 159-60.

311. Id. at 154.
remove the notes from the file and to recuse the judge.\textsuperscript{312}

The trial court at the Regional Court (\textit{Bezirksgericht}) is ordinarily composed of a panel of judges and in this case the president judge participated in the decision to reject the recusal petition.\textsuperscript{313} The first issue was whether the president judge’s participation itself required reversal of the Regional Court’s decision.\textsuperscript{314}

The intermediate court of the Canton of Thurgau held that this procedure was improper and the Tribunal fédéral agreed.\textsuperscript{315} “No one can be an impartial judge when his own case stands to be decided,” stated the Tribunal fédéral, “[a]nd this incapacity applies also for the case of a recusal petition.”\textsuperscript{316} The Tribunal fédéral held, however, that the error was cured by the independent decision of the appellate court so long as no cantonal law expressly prohibited such participation.\textsuperscript{317} The Tribunal fédéral distinguished this result from a previous criminal case in which the Tribunal fédéral had vacated the judgment. In the previous case, the cantonal procedural law had prohibited participation of the judge whose recusal was sought, and the reversal was thus based on cantonal law, not federal constitutional law.\textsuperscript{318}

Examining the recusal petition on the merits, the Tribunal fédéral held that recusal was required.\textsuperscript{319} Although the president judge’s personal knowledge of the case from his observation and conversation with Y’s son did not show partiality (especially since the judge had made a file notation of the event and sent it to both parties), the evaluations of the case reflected in the president judge’s notes could create the impression that the outcome of the case was no longer open.\textsuperscript{320} The Tribunal fédéral held that Article 58 compelled the judge’s recusal from the case.\textsuperscript{321}

\textsuperscript{312} \textit{Id.} at 154-55, 159 (petition sought recusal on grounds that judge’s behavior while visiting Y’s property and content of his notes reflected bias against Y).

\textsuperscript{313} \textit{Id.} at 155.

\textsuperscript{314} \textit{Id.} at 156.

\textsuperscript{315} \textit{Id.}

\textsuperscript{316} \textit{Id.} (citations omitted).

\textsuperscript{317} \textit{Id.} at 157.

\textsuperscript{318} \textit{Id.} at 156-57 (discussing decision of April 2, 1987, H v. Canton of Schaffhausen; court gave no further citation).

\textsuperscript{319} \textit{Id.} at 163.

\textsuperscript{320} \textit{Id.} at 161. The president judge wrote that the noise was “aggravating, in spite of the distance,” and that the constant flashes of soldering were “very clearly annoying.” \textit{Id.}

\textsuperscript{321} \textit{Id.} at 163. The complainant also relied on Article 6 of the European Human Rights Convention, guaranteeing a lawfully constituted court. \textit{Id.} at 155. The court, however, did not address the applicability of the Convention.
Other decisions of the Tribunal fédéral on recusal refer to Article 58 and to statutory rules governing recusal.322 The statutory rules are not federal law but are established in the court organization statutes of each canton with the exception of the Tribunal fédéral, the sole federal court in Switzerland.

Zurich's Law on Court Organization323 contains provisions similar to Canon 3C of the Code of Judicial Conduct, but it also provides court procedures for recusal requests.324 It prohibits taking gifts from a party or in connection with a pending case.

322. See, e.g., M v. X and Z, decision of September 6, 1988 of the criminal division of the Tribunal fédéral, 114 BGE I 348 (where filing of motion to recuse judge was delayed until trial, even though grounds were previously known, timing of motion violates good faith and criminal code as well as Article 58); X v. City of Zurich, Governing Council of the Canton of Zurich and Administrative Court of the Canton of Zurich, decision of September 7, 1988 of the public law division of the Tribunal fédéral, 114 BGE I 278 (Article 58 and Article 4 of federal constitution give party right to know which judges participated in deciding recusal petition; party violates good faith by delaying recusal petition until appeal where grounds for knowledge existed earlier); H v. P.W.S.A., Appellate Judge M, Appellate Judge G, General Prosecutor and Appellate Court of the Canton of Bern, decision of March 29, 1989 of the public law division of the Tribunal fédéral, 115 BGE I 34 (judge who ruled in related criminal case not required to recuse himself under Article 58 of federal constitution or Article 6 of European Human Rights Convention although if it had been criminal case, judge who approved charges and/or supervised discovery would not be allowed to decide case).

323. GERICHTSVERFASSUNGSGESETZ (GVG) (Staatskanzlei Zurich 1979).

324. The essential terms in Sections 95 and 96 of the Law on Court Organization provide:

95. A judge, jury member, prosecutor, official or justice of the peace is excluded from carrying out his duties—
1. in cases involving himself, matters of his spouse or fiancée, his natural or adopted or marital relatives in direct relationship and through to the fourth degree of relationship; also when either he or these persons can expect an indemnification or contribution suit;
2. in matters of his ward or his foster child;
3. when he participated in a decision on the matter below as well as when he acted as agent or ordered judicial acts on the matter;
4. when he accepted a gift or allowed a promise to be made by a party or a third person in connection with the matter.

96. Also each [such] judicial official [referred to] in section 95 can be rejected or can demand his own exclusion—
1. in matters of an entity in which he is a member other than belonging to the state or community;
2. when he gave or will give advice as an intermediary, expert or witness;
3. when between him and a party there exists friendship, enmity or an obligational or dependent relationship;
4. when other circumstances exist that make it appear he is partial.

GVG at 20-21 (Staatskanzlei Zurich 1979).
The Zurich law assigns disputed recusal petitions to the supervisory authorities of the court— in the case of most trial courts, this means the appellate courts. Appellate courts decide the recusal petition themselves but without participation of the judge against whom recusal is sought. If no quorum is obtainable, the Cantonal Council (an executive body) decides the petition. Under Zurich’s law, supervisory authorities can take disciplinary measures and may direct the matter to another judge or court division if a judge has refused to apply law or has delayed the decision in a case. There is no specific provision that subjects Zurich’s judges to the threat of discipline for wrongly deciding a recusal petition.

A federal statute, the Court Organizational Law, establishes the rules for seeking recusal of judges of the Tribunal fédéral and other federal officials including prosecutors, court reporters, investigating judges and jury members. This law has provisions similar to Zurich’s law on recusal except that it omits any prohibition of gifts and extends the bar on hearing relatives’ cases only to the second degree rather than the fourth degree of kinship.

Disputed requests for the recusal of judges on the Tribunal fédéral are decided by the president judge or, if the basis for exclusion is disputed, by the entire court panel without the participation of the judge whose recusal is sought. If there is no quorum to decide the recusal petition, the president judge appoints the required number of substitute judges from the president judges of cantonal appellate courts which are not involved in the matter. This body decides the recusal request and, if necessary, the underlying case.

2. Germany

German procedural law follows the system of specialized

325. Id. § 95(4).
326. Id. § 101.
327. Id.
328. Id. § 108.
329. Organisationsgesetz.
331. Id. art. 24, 26.
332. See W. Habscheid, supra note 330, at 110.
333. See id.
courts prevalent in Germany. Each specialized court is a unified system governed by federal law for each type of court: civil, criminal, labor, administrative, social welfare, patent, tax and constitutional. The Code of Civil Procedure and the Code of Criminal Procedure contain rules on recusal for litigation in the ordinary courts for civil and criminal matters. In contrast with Switzerland, there are no state laws on judicial recusal.

The German Constitution (Grundgesetz) proclaims in language similar to its Swiss counterpart that “[n]o one can be deprived of his lawful judge.” The Federal Constitutional Court, the Bundesverfassungsgericht, has stated that arbitrary action on a request to recuse a judge can violate this constitutional provision. The constitutional law on recusal, however, is relatively sparse. Most cases on recusal are decided on the basis of the statutory rules.

The Civil Procedure Law, like the Zurich cantonal law, separates recusal into cases where it is mandatory (exclusion or Ausschluss) and instances in which the exercise of discretion is required (rejection or Ablehnung). There are six mandatory recusal grounds: (1) the judge is a party or shares “a duty, right or bears liability” with a party; (2) the matter concerns the judge’s spouse, even if the marriage no longer exists; (3) the matter concerns a person with whom the judge is directly related or is related by blood to the third degree of kinship or in the case of relation by marriage to the second degree regardless of whether still so related; (4) the judge is or was a legal advisor or litigator for a party; (5) the judge was heard as a witness or an expert in the matter; or (6) he participated as a judge or arbitrator in an earlier decision in

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334. The Unification Treaty of August 31, 1990 (Einigungsvertrag) between West and East Germany, BGBI.II at 889 (dated Aug. 31, 1990), stipulated in Article 8 that the federal law of the Federal Republic of Germany would take effect on October 3, 1990 in the territory of the five new states comprising the territory of the former German Democratic Republic unless otherwise provided in the Unification Treaty. German procedural law is federal and it became effective in the five new states on October 3, 1990 without changes regarding the treatment of recusal decisions.

335. Zivilprozessordnung (ZPO).
336. Strafprozessordnung (StPO).
337. Grundgesetz (GG) art. 101.
338. See B. Schmidt-Bleibtreu & F. Klein, Kommentar zum Grundgesetz fuer die Bundesrepublik Deutschland 1048 (6th ed. 1985) (citing cases and commentary in support of Federal Constitutional Court’s decisions).
the case unless by appointment to take discovery.340

Recusal on grounds of partiality is discretionary and is based on whether there is a reasonable appearance of partiality, not proof of actual bias. The Civil Procedure Law states that rejection is justified when "a reason exists which is sufficient to justify mistrust of the impartiality of a judge."341

The court decides the recusal request without participation by the affected judge.342 As in Switzerland, most German trials are conducted by panels of judges. If the court lacks a quorum to decide the recusal request, the next higher court determines whether recusal is justified.343 The judge whose recusal is sought must provide a formal response.344

A denial of a request to recuse in a civil case can be appealed by an immediate interlocutory complaint (Beschwerde), filed within two weeks of service of the order.345 The appeal is decided by the next highest court and there is no further appeal.346

Recusal in criminal cases is governed by the Code of Criminal Procedure. Although the standards are the same as those for civil cases, there are some additional restrictions on the use of requests to recuse judges.347

First, unless the circumstances at the time are reasonably unknown and the request to recuse is made as soon as the facts become known, no request based on alleged partiality can be made after the defendant starts to testify at trial.348 If the recusal concerns an appellate judge, it must be made before the speech of the reporting judge begins.349 No request to recuse a trial judge is permitted once the defendant has finished testifying.350

Second, the judge whose recusal is sought participates in the

340. ZPO § 41(1)-(6).
341. Id. § 42(2).
342. Id. § 45.
343. Id. § 45(2). The exception is the municipal court (Amtsgericht), where a single judge is the rule. The ZPO provides that the next higher court, the Landgericht, will decide requests to recuse municipal judges unless the municipal judge grants the request. Id.
344. Id. § 45(3).
345. Id. §§ 46(2), 77(2).
346. Id. § 568.
347. StPO §§ 22, 24.
348. Id. § 25.
349. Id. The head of the panel appoints one judge as reporting judge to present the court's summary of the case at appellate argument. T. KLEINKNECHT & K. MEYER, STRAPROZESSORDNUNG 918, 975 (36th ed. 1983); R. ZOELLER, ZIVILPROZESSORDNUNG 2173-74 (13th ed. 1981).
350. StPO § 25.
decision on whether the request should be rejected on procedural grounds.\textsuperscript{351} In cases where normally only one judge sits, that judge alone decides whether such procedural grounds for rejection of the request exist.\textsuperscript{352} The procedural grounds for rejection are: (1) untimely filing; (2) no reason given for recusal or no prima facie evidence presented; or (3) the only apparent purpose is delay or the pursuit of non-trial purposes.\textsuperscript{353} Decisions on the third ground must be unanimous and reasons must be given.\textsuperscript{354}

If the request to recuse a judge in a criminal matter is not denied as impermissible on one of the three procedural grounds listed above, the court decides the recusal request without the participation of the judge whose recusal is sought.\textsuperscript{355}

Appeals of a refusal to grant recusal in criminal cases may be made by way of complaint (Beschwerde), filed with the appellate court within one week after the denial of the recusal request.\textsuperscript{356} As for judges who are sitting only for the purpose of taking testimony, an appeal against their failure to recuse themselves is permissible only with the appeal against the judgment.\textsuperscript{357}

Most reported decisions on recusal are decisions on complaints. These decisions are from the courts of appeals, not the highest courts. Recusal issues also appear on occasion in decisions of the highest nonconstitutional courts but only rarely in the Federal Constitutional Court.\textsuperscript{358} This court, the interpreter of

\textsuperscript{351} Id. § 26a.
\textsuperscript{352} Id. Examples of when one judge might sit include cases where a single judge is requested to take discovery in another jurisdiction (ersuchter Richter) or is asked by the presiding judge to hear testimony alone (beauftragter Richter). In Germany, as in other civil law countries, there is no pretrial discovery by the parties. For this general observation in the American literature, see Langbein, \textit{The German Advantage in Civil Procedure}, 52 U. Chi. L. Rev. 823, 826 (1985). Rather, evidence is taken over a series of hearings. \textit{Id.} When oral testimony is taken, the judge asks most of the questions. \textit{Id.} at 828-29. \textit{See also} Kaplan, von Mehren & Schaefer, \textit{Phases of German Civil Procedure II}, 71 Harv. L. Rev. 1443, 1471 (1958).
\textsuperscript{353} StPO § 26a(1).
\textsuperscript{354} Id. § 26a(2).
\textsuperscript{355} Id. § 27(1). In the case of a municipal court judge (Amtsrichter), another municipal judge decides the request rather than as in civil cases, sending it to the next higher court, the Landgericht. \textit{Id.} § 27(3).
\textsuperscript{356} Id. § 28(2). If the judge has failed to recuse herself, in violation of a mandatory ground for recusal (exclusion or Ausschluss), an appeal on this issue may be a part of an appeal against the judgment. \textit{Id.} § 338(2). No appeal is permitted where a request to recuse is granted. \textit{Id.} § 28(1).
\textsuperscript{357} Id. § 28(2).
\textsuperscript{358} The \textit{Bundesverfassungsgericht} has decided recusal requests directed towards its own justices according to rules established in the Law for the Federal Constitutional Court. \textit{Gesetz ueber das Bundesverfassungsgericht} §§ 18-19.
the Basic Law, has not taken a major role in the jurisprudence on judicial recusal.

Nevertheless, in addressing whether one of its members should be disqualified from hearing an asylum case, the Constitutional Court stated that its court rules, in order to justify recusal, do not require "that the judge be actually one-sided or partial or whether he thinks he's partial." Rather, what is decisive is whether a party, reasonably evaluating all the circumstances, has reason to doubt the impartiality of the judge." That the justice had spoken out publicly for restricting the constitutional right to asylum did not show partiality; there must be statements suggesting law reform relating concretely to a pending proceeding before there will be doubt as to the justice's impartiality.

German jurisprudence does not link judicial discipline with judicial recusal. Such a link is unlikely where the procedural rules require judges in most instances to defer the recusal issue to their colleagues on the same court or the next higher court. Where an interlocutory appeal is permitted, the time limits are extremely short and no further appeal is permitted, so the issue is resolved promptly.

Despite the different rationales for judicial recusal in Switzerland and Germany, their procedures and standards resemble each other and American practice outside of Pennsylvania. The Pennsylvania Supreme Court's rules on recusal stick out as aberrations.

V. Evaluation

A. Who Decides?

Recusal rules are intended to ensure that the presiding court

Its provisions are similar to those in the civil and criminal procedure codes; the result, however, is different. If a justice is disqualified by his colleagues, a replacement justice from the other panel of the court is chosen by lottery. Id. § 19(4). The Bundesverfassungsgericht is composed of 16 justices divided evenly into two panels. Id. § 2.


360. Id.

361. Id. In one respect the Constitutional Court is more secretive than its American and Swiss counterparts. No one knows the names of the justices on the panel of three who decide which of the 3,000 constitutional complaints filed each year will be accepted. See Ein Schichtes Ende, Frankfurter Allgemeine Zeitung, May 5, 1988, at 16. Only two percent of these complaints are accepted. Id. Therefore, what is in most cases the initial resort to the Constitutional Court takes place without the opportunity to seek recusal because the names of the justices on the review panel are not made public. Id.
is impartial and disinterested in the case at hand. This protects individual litigants and promotes public confidence in the judiciary. Effective redress for litigants is best achieved by having another judge decide the motion in cases where bias is alleged, and by allowing review of the recusal determination either on an interlocutory basis or with review of the final judgment.

Where only public confidence is sought, and not impartiality in particular cases, judicial discipline alone becomes a logical course of action; so long as biased or interested judges are eventually removed from the bench, the public will arguably be satisfied with the integrity of the judiciary. Discipline becomes less relevant once neutral judges decide the recusal request.

The Code of Judicial Conduct makes recusal mandatory when the judge has a designated type of interest in the case and discretionary in cases where a party claims that the judge is unduly prejudiced or biased. Recusal rules in Switzerland and Germany do the same. The Pennsylvania Supreme Court, in contrast to the courts of other jurisdictions examined in this article, gives the power to decide the issue of recusal to the very judge against whom the claim is brought. To do otherwise, the argument runs, would result in a flood of recusal motions under which the wheels of justice would spin out of control. Moreover, according to the argument, judges are persons of integrity who can be counted on to recognize if they had better step aside.

Some may argue that the administrative costs of referring recusal motions to neutral judges would be too high. This argument is not compelling. Controls on timing and frequency of recusal motions can reduce the cost. Moreover, delayed justice is better than taking the risk of a partial decisionmaker. Most litigants will undoubtedly prefer an impartial judge in their own case to a disciplinary complaint against the judge later.

B. Appellate Review

It would be congruent with the goals of ensuring public confidence in courts and guaranteeing impartiality of judges to use the "appearance of impartiality" standard in reviewing recusal requests. The standard promoted in Pennsylvania by the supreme court, however, is actual prejudice or bias.

The timing of the recusal motion is important for the availability of appellate review. The later the motion occurs in the case, the less cause exists to permit direct review. The concern, however, should be with ensuring that litigants promptly raise
grounds for recusal when they become aware of them. For example, the United States Supreme Court in *Liljeberg* gave no significance to the fact that the motion was first raised ten months after entry of judgment. To avoid case delays, interlocutory review should be available under strict time limits.

C. False Assumptions

The Pennsylvania Supreme Court’s rules imply that a judge recusing herself means that she has acted immorally. Public decisionmakers are no longer judged on utilitarian, pragmatic grounds, but by moral codes and public cries for discipline and punishment of errant public servants.

The perception of unfair judicial criticism can also lead to restrictions on the freedom of the press. In December 1990, a Philadelphia jury awarded a supreme court justice six million dollars, finding that the *Philadelphia Inquirer* libeled the judge when a reporter wrote that the justice should have recused himself from a case where his impartiality was questioned. The justice’s lawyer argued that accusing the justice “of being partial, that’s accusing him of a crime.” This moralistic perception has come to dominate the public outlook on elected and appointed officials. In the context of recusal requests at least, this view is questionable. That a judge is related to a litigant, holds stock in a corporation that files suit, or even intensely dislikes a particular litigant is not a basis for moral condemnation or discipline. Every person is passionately interested in one matter or another, and in such circumstances, recusal is no cause for disgrace.

Headless of human nature in other respects, the state supreme court puts too much faith in judges. The Supreme Court of Pennsylvania reveals a childlike trust that a judge will do no wrong. Why not put into place basic self-controls to avoid abuse of judicial power rather than tempt judges by giving them the power to decide if they are biased or interested themselves?

There are other possible explanations, less flattering to the courts, for the supreme court’s unique approach to recusal matters. By giving trial judges nearly *carte blanche* power to decide recusal motions while leaving disciplinary reins free, the justices increase their power over the judicial system. To have other

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363. *Id.*
judges review recusal motions might tempt the lower court judges to use it as a way to exercise power for themselves or to cast ill-will on a fellow judge. Judicial discipline and removal, however, can prematurely end a judge’s term. From this perspective, the proposed new judicial disciplinary system is designed to dilute the supreme court’s disciplinary powers over state judges.

The lack of attention given to Pennsylvania's backward recusal rules can be explained, but not justified, by the values now in vogue in public life. We have become moralists in our expectations of public servants by putting too much faith in the integrity of individual judges and too little faith in the integrity of the judicial system and the courts as a whole.

A challenge facing Pennsylvania's judicial system is to return to recusal standards based on ordinary judicial processes and to turn away from the sensationalist resort to judicial discipline. To accomplish this the public must change its demands on judges from the divine to the human scale. At the same time the legislature—if the courts themselves are unwilling—must curtail the excessive powers lodged with individual judges and the supreme court by specifying fair procedures for the determination and review of recusal requests outside of the disciplinary process.