RECUSAL

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I. Introduction. Disqualification and recusal of a judge is governed by Canon 3 of the Code of Judicial Conduct and, in criminal cases, by North Carolina General Statutes (hereinafter G.S.) § 15A-1223. In some exceptional circumstances the due process clause of the federal and state constitutions may be implicated as well.

II. Code of Judicial Conduct. Section C of Canon 3 of the North Carolina Code of Judicial Conduct states that a judge should recuse upon motion of a party, or on the judge's own initiative, whenever the judge's "impartiality may reasonably be questioned." The canon then lists specific instances when recusal is appropriate, including:

- The judge has a personal bias or prejudice concerning a party.
- The judge has personal knowledge of disputed evidentiary facts.
- While in law practice, the judge, or someone with whom the judge practiced, served as a lawyer in the matter in controversy or is a material witness about it.
- The judge or judge's spouse or minor child has a financial interest in the matter or another interest that could be substantially affected.
- The judge or judge's spouse, or someone within the third degree of relationship to either of them, or the spouse of such a person, is (a) a party or officer, etc., of a party, (b) a lawyer in the case, (c) known by the judge to have an interest that could be substantially affected, or (d) known by the judge to likely be a material witness.

The canon states that a judge should be informed about the judge's own financial interests and should make a reasonable effort to be informed about financial interests of the judge's spouse and minor children.

III. Recusal in Criminal Cases. G.S. 15A-1223, applicable to all criminal proceedings, allows a judge to recuse on the judge's own motion, requires a judge to be disqualified if the judge is a witness in the case, and requires disqualification upon the motion of the state or of a defendant when a judge is:

- Prejudiced against the moving party or in favor of the other side.
- Closely related to the defendant.
- Otherwise unable to perform the duties of a judge in an impartial manner.

There is no comparable statute for civil cases (see the discussion below on the procedure for raising disqualification issues).

IV. When Due Process Requires Recusal. In limited circumstances the constitutional right to due process may require a judge to recuse. "It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876 (2009) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)). It is an unusual case, however, when due process is implicated, and "only in the most extreme of cases would disqualification on this basis be constitutionally required." Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821 (1986).

The circumstances in which the due process clause has been applied to require disqualification are:

- Cases in which the judge has a direct, personal, substantial pecuniary interest in the outcome, such as in Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986), where a state supreme court justice had a pending lawsuit which turned on the same legal issue as the case before him on appeal.
- Cases before a court which is structured so that the judge will be tempted to impose a fine because the judge or the judge's governmental entity benefits financially from the revenue. Tumey v. Ohio, 273 U.S. 510, 532 (1927) (mayor also served as judge, received salary supplement from fines imposed in liquor cases); Ward v. Monroeville, 409 U.S. 57, 60 (1972) (fines assessed by mayor-judge went into town budget).
- Cases in which the judge who is trying a criminal case is responsible for bringing the charges in the first place or, when contempt is involved, otherwise has a strong personal interest in the outcome. In re Murchison, 349 U.S. 133, 137-38 (1955) (judge should not have presided at trial for perjury and contempt when charges were initiated by the judge in a previous proceeding); Mayberry v. Pennsylvania, 400 U.S. 455, 465-66 (1971) (judge should have recused self on contempt charges based on defendant's repeated curses and insults toward judge during a three-week trial; judge's personal feelings demonstrated by severity of 11- to 22-year sentence for contempt).
- Cases in which one party has made a financial expenditure to the judge's election campaign large enough to have likely affected the outcome of the election, knowing that the party's case would be coming before that judge. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 884 (2009).

V. Procedure for Raising Disqualification. For criminal cases, G.S. 15A-1223 provides that a party's motion to disqualify a judge must be submitted in writing, must have supporting affidavits, and must be filed at least five days before the trial unless there is good cause for delay. The failure to follow those rules can be the basis for denying the motion. State v. Poole, 305 N.C. 308, 321 (1982). When the basis for disqualification is not known until after the statutory deadline for filing the motion it should be filed as soon as reasonably possible.

For civil cases, neither Canon 3C nor any statute specifies when or how a party's motion to disqualify a judge should be made. Although there is no statutory deadline for a recusal motion in a civil case, a party may waive any right to object by waiting too long. In re Pedestrian Walkway Failure, 173 N.C. App. 237, 252 (2005) (motion for the judge's disqualification was not filed until months after the judge's disclosure of his daughter's summer employment with the opposing law firm); State v. Pakulski, 106 N.C. App. 444, 450 (1992) (recusal issue based on the judge's alleged prejudicial statement — "Why don't you just plead the slimy sons-of-bitches guilty?" — was raised only after the case was appealed and remanded).

"A defendant cannot choose to wait and seek a trial judge's recusal until after the trial judge rules unfavorably to the defendant on some other grounds." *Pakulski,* 106 N.C. App. at 450.

An unfounded motion to recuse is subject to Rule 11 sanctions just as any other motion, and there is no higher standard of proof for a Rule 11 violation in recusal cases than in other circumstances. O'Neal v. O'Neal, __ N.C. App. __, 739 S.E.2d 190, 192-93 (2013).

VI. Disclosure and Waiver of Disqualification. Canon 3D allows a judge to disclose a potential reason for disqualification and then continue to hear the matter if the parties and lawyers all agree in writing that the potential reason for disqualification is immaterial or insubstantial. The judge's disclosure and the parties' agreement must be placed in the record.

VII. When Recusal Should Be Decided by Another Judge. If the allegations made about the judge's bias or other potential disqualification are made with sufficient support to require findings of fact, the motion to recuse should be referred to another judge. Ponder v. Davis, 233 N.C. 699, 704 (1951) (an election dispute in which the judge whose recusal was sought had campaigned for one of the candidates); Topp v. Big Rock Foundation, Inc., 221 N.C. App. 64, 74-75 (2012) (Hunter, Robert C., dissenting), *rev'd and dissent adopted*, 366 N.C. 369 (2013) (per curiam) (factual findings related to judge's vacationing with party's lawyer). The judge whose impartiality is being questioned then may respond by affidavit or testimony to rebut the allegations.

If a party's motion to recuse is not supported by sufficient evidence to require findings of fact, or if the allegations would not require recusal even if true, a judge need not refer the recusal motion to another judge. State v. Scott, 343 N.C. 313, 323-26 (1996); State v. Poole, 305 N.C. 308, 320-21 (1982).

VIII. Actual Versus Perceived Partiality. Canon 3C states that a judge should recuse when the judge's "impartiality may reasonably be questioned." Similarly, 20th century case law states that a judge should be disqualified when "a reasonable man knowing all the circumstances would have doubts about the judge's ability to rule . . . in an impartial

manner." McClendon v. Clinard, 38 N.C. App. 353, 356 (1978). The supreme court has said that a judge should recuse in a criminal case not only when the disqualifications in G.S. 15A-1223 exist but whenever the judge's "objectivity may reasonably be questioned." State v. Fie, 320 N.C. 626, 628 (1987).

A 2003 revision to the Code of Judicial Conduct, though, eliminated the phrase "appearance of impropriety" from the canons. As rewritten, Canon 2 no longer says explicitly that a judge should avoid the appearance of impropriety; instead it says only, "A judge should avoid impropriety in all his activities." Canon 3C still states that a judge should disqualify in any proceeding "in which the judge's impartiality may reasonably be questioned."

In *Lange v. Lange*, 357 N.C. 645, 647 (2003), a trial judge found that another judge should disqualify, even though there was no violation of the Code of Judicial Conduct, because the relationship at issue "would cause a reasonable person to question whether [the judge] could rule impartially." The supreme court said that conclusion was wrong. Emphasizing that "the burden is upon the party moving for disqualification to demonstrate objectively that grounds for disqualification actually exist," and that such showing "must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially," the court said that the judge should not be disqualified unless there is an actual violation of the Code of Judicial Conduct. *Id*. at 649 (quoting *Scott*, 343 N.C. at 325). "Thus, the standard is whether 'grounds for disqualification actually exist.'" *Id*.

Based on the revision of Canon 2 and the *Lange* decision, it appears that a judge would not be expected to recuse if there is an appearance of partiality but no evidence of an actual personal bias, prejudice, or interest.

As discussed above, however, when a claim is made that constitutional due process requires a judge to step down from a case, the test is not whether actual bias exists, it is whether the circumstances are such that, given normal human tendencies and weaknesses, the average judge would be tempted to favor one side or the other. "Due process '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.'" Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 886(2009) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

IX. Meaning of Bias or Prejudice. Disqualification of a judge requires a showing of personal bias or prejudice against or in favor of one side. Dunn v. Canoy, 180 N.C. App. 30, 38 (2006); State v. Vega, 40 N.C. App. 326, 331 (1979); Love v. Pressley, 34 N.C. App. 503, 506 (1977); *In re* Paul, 28 N.C. App. 610, 618 (1976). Generalized allegations forecasting a likely prejudice based on the history of the case, a judge's prior involvement with the parties, a judge's general view of the law, or similar considerations are not sufficient to necessitate recusal. "The bias, prejudice or interest which requires a trial judge to be recused from a trial has reference to the *personal disposition or mental attitude of the trial judge*, either favorable or unfavorable, toward a party to the action before him." *Scott*, 343 N.C. at 325 (emphasis added).

X. Disqualification Based on Separate Case Against Judge. A judge is disqualified from hearing a case when one of the parties has a pending lawsuit against the judge. *In re* Braswell, 358 N.C. 721, 724 (2004). Likewise, a judge may not preside at a session of

court in which a traffic charge against the judge is on the docket. *In re* Martin, 302 N.C. 299, 310-11 (1981).

XI. No Disqualification for Prior Involvement with Case. A judge is not disqualified from hearing a case just because the judge is aware of evidentiary facts from a previous involvement with the case or because the judge ruled against one of the parties in an earlier phase of the case. Examples include:

- Love v. Pressley, 34 N.C. App. 503, 506 (1977). The judge was not disqualified from hearing a landlord–tenant dispute when the judge had ruled against the defendant in an earlier case involving similar allegations.
- *In re* Faircloth, 153 N.C. App. 565, 570 (2002). The judge was not disqualified from hearing an action for termination of parental rights against the defendant although the judge presided at an earlier trial in which the defendant was found guilty of abuse and neglect.
- State v. Vega, 40 N.C. App. 326, 331 (1979). The judge was not disqualified on the ground that he presided at an earlier murder trial for the defendant at which the judge had to declare a mistrial when the victim's mother made an emotional outburst.
- Savani v. Savani, 102 N.C. App. 496, 500 (1991). The judge was not disqualified from hearing a child support case against the defendant even though the judge had earlier ordered transfer of child custody from the defendant to the plaintiff.
- State v. McRae, 163 N.C. App. 359, 364-65 (2004). The judge was not disqualified from presiding over a competency hearing for a defendant in a murder case even though the judge had presided at a previous trial at which the defendant was convicted.
- State v. Moffitt, 185 N.C. App. 308, 311-12 (2007). The judge was not disqualified to preside over the resentencing of the defendant after appeal even though the judge was aware of the plea bargain the defendant had rejected at the original trial.
- State v. Monserrate, 125 N.C. App. 22, 32-33 (1997). The judge who issued a search warrant was not disqualified to hear a motion to suppress the evidence, but the better practice is for another judge to hear the suppression motion.
- *In re* LaRue, 113 N.C. App. 807, 809-10 (1994). The judge was not disqualified from hearing an action for termination of parental rights based on the parents' mental disability, even though the judge had presided over an earlier custody proceeding, had decided that the department of social services should retain custody of the child, and had recommended that social services proceed to termination.
- Sapp v. Yadkin County, 209 N.C. App. 430, 435-36 (2011). The superior court judge was not disqualified from hearing a dispute about the rezoning of land for a new county jail even though the judge previously had issued show cause orders to the county commissioners admonishing them to meet their obligation to provide adequate jail facilities and to construct a new jail with all deliberate speed.

XII. Contempt Cases. Cases of direct criminal contempt—willful behavior occurring in the court's presence that interrupts the proceedings or impairs the respect due to the court—can present situations in which it is difficult for a judge to remain impartial. If the contempt arises from personal insults spoken to the judge, perhaps containing foul language, it will be a challenge for the judge to not feel a personal repulsion.

Accordingly, G.S. 5A-15(a), the statute on plenary proceedings for criminal contempt (i.e., when the contempt is not dealt with summarily by the judge but is the subject of a separate hearing following issuance of a show cause order) states, "[i]f the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge." Although the statute does not cover summary proceedings for direct criminal contempt, the same principles apply. When the events leading up to the summary proceeding show an ongoing conflict between a judge and a defendant that would make it difficult for the judge to put personal feelings aside, the judge should consider recusal.

> Due process standards require that where the trial judge is so embroiled in a controversy with the defendant that there is a likelihood of bias or an appearance of bias, the judge may be "unable to hold the balance between vindicating the interests of the court and the interests of the accused," and should recuse himself from the proceeding.

In re Nakell, 104 N.C. App. 638, 647 (1991) (quoting *In re* Paul, 28 N.C. App. at 618).

XIII. No Disqualification for Efforts to Settle Case. A judge's efforts to get the parties to settle a case, even if accompanied by some expression of dissatisfaction at the parties, does not establish a disqualification by itself. Dunn v. Canoy, 180 N.C. App. 30, 38-39 (2006); *In re* Pedestrian Walkway Failure, 173 N.C. App. 237, 253 (2005); State v. Kamtsiklis, 94 N.C. App. 250, 258-59 (1989).

XIV. No Disqualification for Views on Law. The fact that a judge may view one kind of crime as more serious than another is not a basis for disqualification. State v. Kennedy, 110 N.C. App. 302, 305-06 (1993) (judge was not disqualified from hearing a drunk driving case because the judge's wife had been injured in an accident caused by a drunk driver; no evidence was presented of a personal bias toward the defendant).

XV. Resident Judge Not Disqualified from Case in Which County Is a Party. A resident superior court judge is not disqualified from hearing a condemnation case just because the judge's home county is the defendant. County of Johnston v. City of Wilson, 136 N.C. App. 775, 778 (2000).

XVI. Disqualification Based on Complaint Against Judge. Judicial Standards Commission Formal Advisory Opinion 2014-02 says that a judge is not necessarily required to recuse from a case just because a party in the case files a complaint against the judge. Automatic disqualification in that circumstance opens the door to judge shopping through motions to disqualify. If, though, the complaint leads to initiation of a formal investigation or the issuance of a private letter of caution to the judge or service of a statement of charges, the judge should disqualify from all matters involving the complainant.

The judge should disqualify from hearing a case if one of the parties has a separate, preexisting lawsuit pending against the judge. *In re* Braswell, 358 N.C. 721, 724 (2004).

XVII. Senior Resident Not Disqualified to Hear Magistrate Removal. The senior resident superior court judge is not disqualified to hear a removal proceeding for a magistrate even though the judge appointed the magistrate. *In re* Ezzell, 113 N.C. App. 388, 393-94 (1994).

XVIII. Disqualification based on Relationship with Lawyers. Canon 3C has clear rules on a judge's recusal because of a family relationship with a lawyer in the case or previous ties to one of the lawyers while in practice. The case law, therefore, tends to deal with more remote relationships. Examples include:

- Lange v. Lange, 357 N.C. 645, 646-49 (2003) (judge's joint ownership of mountain vacation property with several others, one of whom was one of the parties' lawyer, was not sufficient basis for disqualification in the absence of any other evidence of bias or prejudice).
- *In re* Pedestrian Walkway Failure, 173 N.C. App. 237, 252-53 (2005) (judge was not disqualified by the fact that his daughter, a law student, had a summer clerkship with one of the firms in the case; she was working in a separate part of a large firm, had no involvement in the case, and when the judge had informed the lawyers in the case about the summer job offer, none had objected).
- Savani v. Savani, 102 N.C. App. 496, 501 (1991) (judge was not disqualified from hearing a child support case because of an office-sharing arrangement with one of the parties' lawyers when the judge was in private practice; the lawyer in question did not enter the case until after the earlier custody hearing in which the judge had transferred custody of the child and found the child in need of support).

XIX. Judge May Not Bar Lawyer Rather Than Recusing. A judge cannot avoid a disqualification by barring a lawyer from cases heard by the judge. *In re* Bissell, 333 N.C. 766, 773 (1993). It was improper for a judge to bar a lawyer from sessions of court in which she was presiding because the lawyer had initiated an ethics investigation of her. The judge should have recused herself, not put the burden on the lawyer to avoid her.

XX. Disqualification for Expressing Opinion about Case. A judge should recuse when the judge previously has expressed, directly or indirectly, an opinion as to the merits of the case, casting doubt on the ability to be impartial. To disqualify a judge the expression must have been such as to indicate that the judge already had formed a firm opinion about the outcome. Examples include:

- State v. Hill, 45 N.C. App. 136, 141 (1980) (judge should have disqualified himself from criminal fraud trial when he had heard the defendant testify in an earlier trial of another defendant; had stated after the testimony that the defendant had implicated himself; and had, on his own motion, raised the defendant's bond).
- *In re* Dale, 37 N.C. App. 680, 684-85 (1978) (judge should have disqualified himself from hearing a disciplinary matter against a lawyer when the judge sent a notice of hearing stating in conclusory language that "you have negligently failed to . . . .").
- State v. Fie, 320 N.C. 626, 626-28 (1987) (judge should have disqualified himself from defendants' breaking-and-entering trial where he had written to the district attorney to request that the grand jury consider charges against them based on testimony he had heard in another trial).
- McClendon v. Clinard, 38 N.C. App. 353, 356-57 (1978) (judge should have disqualified himself because he had reported the plaintiff's lawyer to the local bar for contact with a member of the jury venire and then had notified a newspaper reporter of the incident and given an interview about it).
- Sapp v. Yadkin County, 209 N.C. App. 430, 435-36 (2011) (judge was not disqualified from hearing a challenge to the rezoning of property for a new county

jail, even though the judge previously had issued show cause orders to the county commissioners to meet their obligation to provide adequate jail facilities and to construct a new jail with all deliberate speed).

XXI. Recusal Related to Election. A March 24, 2014, memorandum of the Judicial Standards Commission states that a judge should recuse from hearing any matter involving the judge's campaign opponent, the opponent's or judge's campaign manager or treasurer, or anyone else who plays a significant role in the opponent's campaign or in the judge's campaign. The memorandum says the judge should disqualify regardless of whether a motion is made. An alternative is to follow the procedure of Canon 3D of the Code of Judicial Conduct for disclosure and written waiver of a disqualification. The commission memorandum says that a judge need not recuse when another member of the opponent's law firm appears in a matter, unless the judge is actually biased. Even if not actually biased, the judge may choose to disqualify.

In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), discussed above, the court said that the factors which should be taken into account in deciding whether campaign financial support requires a judge to disqualify are "the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." 556 U.S. at 884. "The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical." *Id.* at 886. If the expenditures for or against a judge are out of balance with other contributions; it is known or seems likely at the time of the campaign that the case will come before the judge; and the expenditures are large enough to have made a difference in the outcome; the judge should recuse. The test in this situation is not whether the expenditures create actual bias in the judge but whether, given that level of political support and normal human tendencies and weaknesses, the average judge would be tempted to tip the scales of justice toward one side.