COMMENT

Recusal and Recompense: Amending New York Recusal Law in Light of the Judicial Pay Raise Controversy

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INTRODUCTION

> The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions . . . . But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment.[1]

A fundamental principle of the American legal system is that judicial proceedings ought to be decided on the merits by an impartial and unbiased judge.[2] In order to protect both the fairness and dignity of the system, and to ensure

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1. Pub. Util. Comm'n v. Pollak, 343 U.S. 451, 466-67 (1952) (Frankfurter, J., recusing himself).

2. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 33 (2d ed. 2007).

the right to a fair trial, a judge will recuse[3] herself when she believes that it is not possible for her to be disinterested in the matter before her.[4] Unfortunately, however, this is not always the case. In the first decade of the twenty-first century much controversy has resulted from the failure of judges to recuse themselves in cases in which their impartiality appears to be in question.[5] Consequently, recusal has become a hot topic of discussion in legal circles and has received a heightened level of scrutiny by not only legal experts but also the American press and public.

In New York State—the subject of this Comment—recusal has received notoriety as a result of the judicial pay raise controversy. On April 10, 2008, New York Court of Appeals Chief Judge Judith Kaye sued leaders of the New York State Assembly and Senate, as well as Governor David Paterson, demanding a pay raise on behalf of all state judges.[6] Two other lawsuits demanding a pay raise have

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3. The term "recuse" refers to a judge removing herself from a case. *See* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 231 n.4 (3d ed. 2004). It is often used interchangeably with the term "disqualify," which is broader in meaning and generally refers to a judge being removed from a case by another party. *See id.*; *see also* William Safire, *On Language: Recuse, J'accuse!*, N.Y. TIMES, Mar. 12, 1989, (Magazine), at 22, 22-24.

4. *See Pollak*, 343 U.S. at 466-67.

5. *See* Cheney v. U.S. Dist. Ct., 541 U.S. 913, 922-24 (2004) (Scalia, J., mem.) (noting the heated debate in national newspapers over Justice Scalia's relationship with Vice President Richard Cheney). In *Cheney*, Scalia refused to recuse himself from a case where Vice President Dick Cheney was a named party, despite the fact that he shared a plane with the Vice President and participated in a duck hunt with him less than two years before the Court heard the case. *Id.* at 914-15. As a result of a slew of newspaper editorials lambasting the Justice for not recusing himself from the case, Scalia took the unusual step of issuing a separate memorandum opinion addressing the editorials and explaining why he would not end his participation in the matter. *Id.* at 915-16. *Cheney* was likely the most famous and divisive recusal case of the decade until the Supreme Court's 2009 decision in *Caperton v. A.T. Massey Coal Co.*, which will be discussed later. Recusal has garnered attention not only in the United States but also in international law. *See* Mats Lewan, *Pirate Bay Judge Accused of Conflict of Interest*, CNET NEWS, Apr. 23, 2009, http://news.cnet.com/8301-1023_3-10226167-93.html (noting an alleged conflict of interest in a high profile Swedish copyright case).

6. Bruce Golding, *Justice of the Cease*, N.Y. POST, Apr. 27, 2008, at 4. Kaye stepped down as chief judge at the end of 2008 after turning seventy years old—the mandatory retirement age for New York judges. *See* James Barron, *State's Top Judge, Now 70, Gives Her Farewell Speech*, N.Y. TIMES, Nov. 13, 2008, at

also been filed by state court judges.[7] As a result of these pay raise lawsuits, several New York judges recused themselves from cases argued by the law firms of state legislators.[8] Although the judges claimed that their recusal was a result of the inability to preside impartially, commentators have suggested that the judges were attempting to put pressure on the legislature to enact the desired pay raise.[9] Despite Kaye's recent retirement, the judicial pay raise controversy remains a contentious issue and is headed for a final showdown in the Court of Appeals,[10] with new Chief Judge Jonathan Lippman having already stated that he will recuse himself from that case.[11]

The relationship between judicial recusal and the judicial pay raise controversy has created the perfect opportunity to reevaluate and fix New York's recusal law, which is both "replete with inconsistencies" and without "a sound theoretical base."[12] While federal recusal law has been revised and updated over the last half-century,[13] New York continues to rely on an outdated subjective model that makes a judge the "sole arbiter" of recusal in non-mandatory areas.[14]

This Comment will argue that New York's system of judicial recusal undermines confidence in the right to a fair and impartial trial by allowing judges to sit in cases in which the judge's impartiality could reasonably be questioned. It then sets forth a new system of recusal with

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A31. Kaye has since been replaced as chief judge by Jonathan Lippman. John Eligon, *Paterson Pick Nominee for Top Judge and Objects That His Choices Included No Women*, N.Y. TIMES, Jan. 14, 2009, at A28.

7. *See* Larabee v. Governor, 880 N.Y.S.2d 256 (App. Div. 2009); Maron v. Silver, 871 N.Y.S.2d 404 (App. Div. 2008); *see also* Joel Stashenko, *Chief Judge Steps up Lobbying to Obtain Pay Raises for Judges*, N.Y. L.J., Aug. 3, 2009, at 1.

8. Golding, *supra* note 6.

9. *See id.*

10. The Court of Appeals is the highest court in the state of New York. N.Y. CONST. art. VI, § 3.

11. Stashenko, *supra* note 7.

12. *See* FLAMM, *supra* note 2, at 13. While Flamm's comments pertain to recusal law throughout the country, his words no doubt include New York.

13. *See* Liteky v. United States, 510 U.S. 540, 543-48 (1994) (giving history of federal recusal laws).

14. People v. Moreno, 516 N.E.2d 200, 202 (N.Y. 1987).

two salient features: the adoption of an objective recusal statute and the creation of an independent tribunal to review recusal petitions. Although this Comment primarily focuses on explaining and improving recusal law in New York, the problems identified and subsequent solutions are applicable to other states as well.[15]

This Comment is broken into three parts. Part I will provide a brief history of recusal law and its development in the United States. Part I is primarily concerned with explaining the objective recusal standard first introduced by the American Bar Association and later incorporated into federal law.

Part II examines the state of recusal law in New York and how it has failed to keep up with the reforms seen in federal law. Section A gives the procedure of how a judge recuses herself in New York by discussing the shortcomings of New York's recusal statute and how the Court of Appeals struck a blow for a strict, objective recusal standard in the landmark case *People v. Moreno*.[16] Showing the significance of *Moreno*, Section B analyzes New York recusal cases that likely would have been decided differently if the federal objective standard was used. Section C then looks at New York advisory opinions concerning recusal and how they also conflict with the federal standard.

Part III offers steps New York can take to overhaul its recusal law and set up a system which is fair to litigants and restores public confidence in the judicial system. Section A sets forth a new recusal statute which replaces New York's subjective standard with an objective one similar to federal law, while Section B proposes the creation of a special tribunal which will hear and decide recusal motions. Section C gives a more thorough discussion of the state's current judicial pay raise controversy and how the proposed system of recusal would have put an end to the controversy before it began to fester. The Comment then

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15. By no means is New York the only state affected by uncertainty over its recusal law. The Michigan Supreme Court, for example, recently held a meeting to consider whether the state should change its rules regarding disqualification. Editorial, *Michigan Parties Weigh in on* Caperton v. Massey, DETROIT FREE PRESS, Feb. 22, 2009, at C1. Michigan's current recusal law is similar to New York's in that it is "essentially up to the judge" in deciding whether to sit or recuse. *Id.*

16. 516 N.E.2d 200.

concludes with a brief discussion as to why it is in New York's best interest to quickly modernize its recusal law.

Finally, it needs to be noted that the scope of this Comment is limited to recusal based on a judge's "extrajudicial" knowledge in both criminal and civil cases. Extrajudicial refers to knowledge or biases a judge acquires outside of the case before her.[17] It includes, but is not limited to, relationships with the attorneys appearing in front of her as well as hostility towards one of the parties in the proceeding.[18] It does not include knowledge or biases a judge acquires as a result of information disclosed or learned during trial.[19] It is this author's belief that prejudice stemming from an extrajudicial source poses the biggest threat to the right to a fair and impartial trial.

In addition to being limited to extrajudicial knowledge, this Comment is also primarily about recusal at the trial court level. It is at the trial court level that recusal often has its biggest impact, due in part to the difficulty of obtaining appellate reversal of a judge's decision not to recuse herself. It is also at the trial court level that cases are heard by a single judge who has the ability to exercise vast influence over the parties and the case itself. Despite targeting recusal at the trial court level, some of the suggested reforms can also be applied to appellate judges.

While this Comment does not necessarily suggest that New York judges have acted improperly due to bias or interest, it is the *appearance* of impropriety that needs to be avoided at all costs in order to ensure public confidence in the legal system. It is because of this belief that this Comment sets forth new recusal standards to be adopted by New York that will restore confidence in the judicial system and ensure that all cases are decided on the merits.

I. A BRIEF HISTORY OF RECUSAL

The debate over recusal can be traced back centuries before the founding of the United States. As early as 530 A.D., a judge was encouraged to recuse herself from any case in which she was interested in order to quell suspicion

17. *See Liteky*, 510 U.S. at 550-51.

18. *Id.*

19. *See id.*

as to the fairness of the proceeding.[20] During the Middle Ages there continued to be a "strong . . . abhorrence of adjudication by a partial judge,"[21] but judges were not actually required to recuse themselves from cases in which they were interested.[22] The lack of a strict prohibition against a judge sitting in a case in which she might be interested was largely due to a dearth of judges and the belief that it was better to have an interested judge preside rather than no judge at all—a doctrine referred to as the rule of necessity.[23] As the number of judges increased after the American Revolution, the rule of necessity diminished in importance, resulting in the codification of stricter recusal standards.

Recusal was first codified into federal law in 1792 and required district court judges to recuse themselves in cases in which they had an interest as well as in cases where they were previously counsel to a party now appearing in front of them.[24] In 1821, recusal was broadened to include "all judicial relationship or connection with a party that would in the judge's opinion make it improper to sit."[25]

It was not until 1911, however, that federal law was modernized to require district court judges to recuse themselves for *bias*.[26] Section 144 of the United States Code, which is still in effect today, allows a party to file an affidavit petitioning a district court judge to recuse herself for "personal bias or prejudice either against him [the moving party] or in favor of an adverse party."[27]

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20. Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 537 n.20 (2005); *see also* Harrington Putnam, *Recusation*, 9 CORNELL L. REV. 1, 1 (1923).

21. Joseph M. Godman, *Disqualification for Bias of Judicial and Administrative Officers*, 23 N.Y.U. L. Q. REV. 109, 110 (1948).

22. *See* Kendra Huard Fershee, *Recent Development: Discretionary Recusal and the Appearance of Partiality Through the Eyes of the Fifth Circuit in* Republic of Panama v. American Tobacco Co., 77 TUL. L. REV. 517, 518 (2002).

23. Godman, *supra* note 21, at 117; Thomas McKevitt, Note, *The Rule of Necessity: Is Judicial Non-Disqualification Really Necessary?*, 24 HOFSTRA L. REV. 817, 818-19 (1996) (providing a history of the rule of necessity).

24. *See Liteky*, 510 U.S. at 544.

25. *Id.*

26. *Id.*

27. 28 U.S.C. § 144 (2006).

In 1948 Congress improved upon § 144 by passing 28 U.S.C. § 455, which is not only broader than § 144, but also pertains to *all* federal judges.[28] Section 455 provided:

> 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.[29]

Section 455 marked an important step in recusal law in that while a party could still file an affidavit requesting recusal, a judge was now expected to recuse herself sua sponte[30] when she believed her interest could affect the trial.

Although §§ 144 and 455 are credited with modernizing American recusal law, both statutes were criticized for allowing a judge to be her own arbiter as to whether her interest was "substantial" enough to warrant recusal.[31] A standard that allows a judge to use her discretion and look to her own conscience to determine whether she is biased is known as a *subjective* recusal standard.[32] It was because of this subjective standard and the possibility that judges would not recuse themselves that § 455 was amended in 1974.[33]

Leading up to the 1974 amendments, the subjective standard of § 455 was criticized by both the Supreme Court and the American Bar Association. First, in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, the Supreme Court warned that a judge should be careful to "avoid such action as may *reasonably tend* to awaken the suspicion that his social or business relations or friendships . . . constitute

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28. 28 U.S.C. § 455 (1970).

29. *Id.*

30. The phrase "sua sponte" refers to the court recusing on its own initiative.

31. *See* Shawn P. Flaherty, Note, Liteky v. United States: *The Entrenchment of an Extrajudicial Source Factor in the Recusal of Federal Judges Under 28 U.S.C. § 455(a)*, 15 N. ILL. U. L. REV. 411, 415 (1995) ("[I]n response to increased criticism of § 455 and the realized and potential abuses that accompany a subjective judicial disqualification statute, Congress amended § 455 in 1974.").

32. *Id.*

33. *Id.*

an element in influencing his judicial conduct," and that judges "not only must be unbiased but also must *avoid even the appearance of bias*."[34]

In a second case, *Laird v. Tatum*,[35] Justice William Rehnquist refused to recuse himself from a civil liberties action brought against the United States Army for unlawful surveillance despite testifying about the alleged activity as Assistant Attorney General while the appeal was pending.[36] Rehnquist's failure to recuse himself in *Laird* and the fact that he cast the deciding vote in that controversial case helped persuade Congress to broaden § 455 and codify parts of the ABA *Code of Judicial Conduct*.[37]

Canon 3(C)(1) of the 1972 ABA *Code of Judicial Conduct* ushered in an entirely new standard for deciding when a judge should recuse herself.[38] Instead of allowing a judge to use her own discretion in determining whether she could be impartial in deciding a case, the Code provided that "a judge should disqualify himself in a proceeding in which his impartiality *might reasonably be questioned*."[39] This language required a judge to view the situation from the perspective of a disinterested party and determine whether it appeared her impartiality might be in doubt. If

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34. 393 U.S. 145, 150 (1968) (emphasis added).

35. 408 U.S. 1 (1972).

36. FREEDMAN & SMITH, *supra* note 3, at 232.

37. *See id.* at 236 n.32.

38. CODE OF JUDICIAL CONDUCT Canon 3(C)(1) (1972). The original *Code of Judicial Conduct* has evolved throughout the years. In 1990 the ABA adopted the *Model Code of Judicial Conduct*. Am. Bar Ass'n, Center for Professional Responsibility, http://www.abanet.org/cpr/mcjc/home.html (last visited Sept. 3, 2009). In the 1990 Model Code, the applicable disqualification section was moved to 3(E)(1). MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (1990). The ABA also adopted a revised *Model Code of Judicial Conduct* in 2007. James Sample, David Pozen & Michael Young, *Fair Courts: Setting Recusal Standards*, BRENNAN CENTER FOR JUSTICE (N.Y.U. Sch. L.), 1998, at 17. As a result, the disqualification rule is now known as Rule 2.11(A). MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007). Since the disqualification language has essentially remained the same in each version of the ABA code, this Comment will simply refer to the ABA provisions as "the Code."

39. CODE OF JUDICIAL CONDUCT Canon 3(C)(1) (1972) (emphasis added); *see also* LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT (2d ed. 1992) (explaining the scope of the disqualification canon).

the judge determined that a reasonable person would not believe she could be impartial, the judge had to recuse herself. A standard that requires a judge to determine whether a reasonable person would question the judge's impartiality is known as an *objective* recusal standard.[40]

After the ABA adopted the *Code of Judicial Conduct*, Congress completely overhauled § 455 by creating two distinct recusal provisions.[41] Section 455(b) of the refurbished statute contains the traditional areas of mandatory recusal, which requires recusal in certain situations no matter how disinterested the judge may be.[42]

In § 455(a), however, Congress adopted the language from the Code and created a new and remarkably broad category of recusal. Section 455(a) provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality *might reasonably be questioned*."[43] Not only did § 455(a) constitute a "major improvement for protection of

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40. Flaherty, *supra* note 31, at 416.

41. 28 U.S.C. § 455(a)-(b) (2006).

42. *Id.* § 455(b). Recusal is mandatory:

> (1) Where he [the judge] has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it; (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy; (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a 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; (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a 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; (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

Id.

43. *Id.* § 455(a) (emphasis added).

public confidence"[44] in the judiciary, it also created a standard much different than that in § 144 and old § 455: instead of a subjective standard, federal law now required a judge to use an objective standard in determining whether to recuse herself.

In addition to creating an objective standard, another salient feature of § 455(a) is the replacement of a "bias-in-fact" standard with an "appearance-of-bias" standard.[45] An appearance of bias standard requires a judge to recuse herself merely if it *appears* she might be bias; it is not relevant whether the judge was unaware of the alleged bias or if the bias was not factually correct. An appearance of bias standard also creates an infinite amount of reasons as to why a judge may have to recuse herself, saving a party requesting recusal from having to cite to a statutorily prohibited activity found under the mandatory part of the recusal statute.

The Supreme Court's subsequent interpretation of § 455(a) in *Liljeberg v. Health Services Acquisition Corp.* confirmed that the section created an objective recusal standard.[46] In *Liljeberg*, the Court held that a federal district court judge's failure to recuse himself was a violation of § 455(a) since an "objective observer would have questioned" the judge's impartiality.[47] The Court also noted that a violation of § 455(a) "does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might

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44. R. Matthew Pearson, Note, *Duck, Duck, Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE. L. REV. 1799, 1809 (2005). Section 455(a) resembles the old § 455 in that a judge can either voluntarily recuse herself or can wait until a party brings a motion requesting recusal and then determine whether to recuse. *Compare* Kahvedzic v. Republic of Croatia, 537 U.S. 966 (2003) (denying cert.) (noting that Scalia took no part in consideration of certiorari petition), *with* Cheney v. U.S. Dist. Ct., 541 U.S. 913, 923-24 (2004) (Scalia, J., mem.) (noting that Scalia refused to voluntarily recuse himself and subsequently decided not to recuse after a motion requesting recusal was brought).

45. Flaherty, *supra* note 31, at 417.

46. 486 U.S. 847 (1988)

47. *Id.* at 861.

reasonably believe that he or she knew."[48] Finally, the Court held:

> If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible.[49]

By adopting a reasonable person standard, the Court attempted to take the judge's own beliefs and emotions out of the process and put a judge in the shoes of an objective observer. It was the Court's stated belief that a reasonable person standard would "promote public confidence in the integrity of the judicial process."[50] By focusing on public confidence, both the drafters of § 455(a) and the Supreme Court were aware that the judicial system was dependent in part on how outsiders perceived it, thus proving that the integrity of the judicial system and its perception are just as important as actual fairness and impartiality inside the courtroom. It is this principal that guides the objective standard of recusal.

Besides § 455, federal recusal law is also guided by the Due Process Clause of the Fifth and Fourteenth Amendments.[51] The Supreme Court's recent decision in *Caperton* provides that while most disqualification issues do not implicate due process, there are certain situations where the "probability of bias" is high enough to mandate recusal under the Clause.[52]

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48. *Id.* at 860. *Liljeberg* centered around a dispute concerning the awarding of a certificate from the state of Louisiana for a new hospital. *See id.* at 852. Ten months after the trial was decided it came to the attention of the losing party that the trial court judge was on the board of trustees of Loyola University, who although was not a named party, still had a substantial financial interest in the case. *See id.* at 850. Although the Supreme Court confirmed that the judge had truly forgotten about Loyola having an interest in the case, it did not matter since a reasonable person could have doubts about the judge's impartiality. *Id.* at 860, 864. As we will see, New York cases that are factually analogous to *Liljeberg* do not require recusal. *See infra* pp. 1616-17.

49. *Liljeberg*, 486 U.S. at 860.

50. *Id.*

51. U.S. CONST. amends. V; XIV, § 1.

52. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263 (2009).

In *Caperton*, West Virginia Supreme Court judge Brent Benjamin refused to recuse himself from a case where one of the parties donated almost $2.5 million to the judge's campaign fund while the party's appeal was pending before the state supreme court.[53] In his majority opinion, Justice Kennedy noted that the Due Process Clause had previously been used to mandate recusal in two situations: where a judge was found to have a financial interest in the case, and where a judge had participated in an earlier proceeding and was subsequently asked to determine the propriety of her actions in a later proceeding.[54] Kennedy held that this case created a third situation where due process required recusal.[55]

Like § 455, the Court noted that due process did not require a consideration as to whether Benjamin was actually biased.[56] Instead, "[d]ue process requires an *objective inquiry* into whether the contributor's influence on the election under all the circumstances 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance, nice, clear and true.'"[57]

Although it is not immediately clear what impact *Caperton* will have on recusal, it appears that the case is relatively narrow. For example, the Court warned that *Caperton* was an "extreme" case that addressed an "extraordinary situation."[58] It is also unclear whether *Caperton* will be extended beyond judicial election cases. Thus, *Caperton* and its interpretation of the Due Process

53. *Id.* at 2256-57. Interestingly, John Grisham's 2008 novel *The Appeal* is based on the facts of *Caperton*. Joan Biskupic, *At the Supreme Court, a Case with the Feel of a Best Seller*, USA TODAY, Feb. 17, 2009, at 1A. *The Appeal* tells the story of a state court judge who does not recuse himself from a case involving a chemical corporation despite being recruited and backed by the corporation during the previous judicial election. JOHN GRISHAM, THE APPEAL (2008).

54. *Caperton*, 129 S. Ct. at 2260-62.

55. *Id.* at 2263-64.

56. *Id.* at 2263.

57. *Id.* at 2264 (emphasis added) (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)).

58. *Id.* at 2265. Justice Roberts believed otherwise, stating in his dissent that courts will be "forced to deal with a wide variety of *Caperton* motions, each claiming the title of 'most extreme' or 'most disproportionate.'" *Id.* at 2273 (Roberts, C.J., dissenting).

Clause will likely not supersede § 455, but may allow the objective language from that statute to be applied to state courts in certain situations. In any event, states are still allowed to adopt recusal standards that are stricter than both § 455 and the Due Process Clause.[59] Indeed, this Comment urges New York to do just that.

In concluding this section, it should be noted that despite its objective recusal standard, federal recusal law has one major flaw: allowing a judge whose recusal is sought to be the arbiter of whether to recuse herself.[60] This issue presented itself in *Microsoft Corp. v. United States* when Justice Rehnquist applied § 455(a) to himself and determined that a reasonable person would not think he was partial towards Microsoft, a company his son worked for.[61] Therefore, although § 455(a) tries to remove a judge's conscious and subconscious feelings from the recusal process, it is still largely dependent on whether a judge believes recusal is proper.[62] This has the effect of endangering the objective language of § 455(a) and shows that the best recusal statute not only contains objective language but also ensures that it is applied properly by taking the judge whose recusal is sought out of the decision making process. The new system of recusal set forth in Part III of this Comment does just that.

In spite of the danger of allowing a challenged judge to decide a motion requesting her own recusal, § 455(a) helps ensure a fair trial by not only providing a method for litigants to seek a judge's recusal, but also a uniform standard that takes a common sense approach as to whether a judge is fit to preside over a matter. The popularity of the objective language used in § 455(a) is reflected in the fact that as of 2008 forty-seven states have adopted it into their judicial conduct codes.[63] New York is

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59. *See generally* Republican Party v. White, 536 U.S. 765 (2002).

60. *See* Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 559 (1994) ("[T]he challenged judge is perhaps the last person who should rule on the [recusal] motion.").

61. 530 U.S. 1301 (2000) (Rehnquist, C.J., mem.).

62. See Abramson, *supra* note 60, for a discussion on deciding recusal motions, including an alternate system where a challenged judge transfers the recusal motion to a different judge.

63. Sample et al., *supra* note 38, at 17 (noting Michigan, Montana, and Texas as the exceptions). Montana recently adopted the ABA standard into its 2008

included as one of the above forty-seven states.[64] Unfortunately, however, the state has chosen not to make the language binding on its judges.[65] Instead, New York judges use their discretion in determining whether to recuse themselves.[66] The combination of a subjective recusal standard and the ability of a judge to decide her own recusal motion has resulted in cases tainted with the appearance of impropriety and a potential loss of confidence in the right to a fair trial.

II. RECUSAL IN NEW YORK

A. *New York's Subjective Standard*

Judiciary Law section 14 is New York's statutory recusal provision.[67] Although the statute dates back to the nineteenth century, it was amended and codified at section 14 in 1945.[68] Unlike § 455, section 14 is organized as one section and provides for mandatory recusal in only four instances: (1) when the judge is a party in the matter before her; (2) when she has been attorney or counsel in the matter; (3) when she is "interested"; or (4) if she is related by consanguinity or affinity within the sixth degree to a party before her.[69] Section 14 also provides that a judge need not disqualify herself simply because she is a policy

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Code of Judicial Conduct, to be effective starting in 2009, and Texas follows the ABA standard by rule. Thus, Michigan remains the lone hold out. *See* Brief of the Conference of Chief Justices as Amicus Curiae in Support of Neither Party at 17 n.40, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009) (No. 08-22), 2009 WL 45973. However, it should be noted that this does not mean that all the states that have adopted the language of § 455(a) into their judicial codes have made the language binding.

64. N.Y. COMP. CODES R. & REGS. tit. 22, § 100.3(E) (2006).

65. *See* People v. Moreno, 516 N.E.2d 200, 201 (N.Y. 1987) (holding that recusal is a "discretionary decision . . . within the personal conscience of the court"); *In re* Murphy, 626 N.E.2d 48, 50 (N.Y. 1993) ("The Code of Judicial Conduct requires a Judge's recusal when his or her 'impartiality might be questioned.' Absent a legal disqualification, however[,] a Judge is generally the sole arbiter of recusal . . . .").

66. *See Moreno*, 516 N.E.2d at 201.

67. N.Y. JUD. LAW § 14 (McKinney 2005).

68. *Id.*

69. *Id.*

holder of an insurance company that appears before her or if she owns stock or securities of a corporate litigant.[70]

The lack of a "catch all" provision makes section 14 an inadequate recusal statute. Unlike the federal statute, section 14 does not contain a section providing for a judge's recusal when her impartiality might be in question. Although the requirement that a judge recuse herself when she is "interested" may have been intended by the drafters of section 14 as a catch all,[71] its scope has since been limited, and it is now acknowledged that the type of interest required for a judge's recusal is "an interest as a party or in a pecuniary or property right from which he might profit or lose."[72] Because of the narrow scope of section 14, many types of interests that would result in recusal under § 455(a) are not grounds for recusal in New York.

To possibly make up for the inadequacies of section 14, New York adopted the ABA model language found in § 455(a) into its Rules of Judicial Conduct.[73] Section 100.3(E) of the Rules is nearly identical to § 455, containing a section on mandatory recusal as well as a section requiring recusal when "the judge's impartiality might reasonably be questioned."[74] However, in the 1987 "landmark"[75] case of *People v. Moreno*, the Court of Appeals held section 14 is the rule of law in New York, thus

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70. *Id.*

71. Godman, *supra* note 21, at 114.

72. *In re* Estate of Sherburne, 476 N.Y.S.2d 419, 421 (Sur. Ct. 1984).

73. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 100.3(E) (2006). The Rules of Judicial Conduct are also sometimes referred to as "The Code of Judicial Conduct," *e.g.*, Connor v. N.Y. State Comm'n on Judicial Conduct, 260 F. Supp. 2d 517, 519 (N.D.N.Y. 2003), or the rules "Governing Judicial Conduct," *see In re* Tyler, 553 N.E.2d 1316, 1317 (N.Y. 1990). However, the Code of Judicial Conduct is usually understood to be the ABA rules. *See, e.g.*, Pearson, *supra* note 44; *see also* People v. Garson, 848 N.E.2d 1264, 1281 (N.Y. 2006) (distinguishing between the Rules of Judicial Conduct and the Code of Judicial Conduct). Thus, when referring to title 22, this Comment will use either the Rules of Judicial Conduct or the Rules Governing Judicial Conduct.

74. § 100.3(E).

75. Jason Bogg, *Backdoor Pay Push*, JUDICIAL REPORTS, Apr. 12, 2007, http://judicialreports.com/archives/2007/04/backdoor_pay_push.php.

eliminating any chance section 100.3(E) could be treated as binding law.[76]

Two distinct holdings from *Moreno* and one indirect effect of that case shape present day recusal law in New York. First, the Court of Appeals held that a judge is the sole arbiter of recusal so long as one of the four mandatory areas of recusal is not present.[77] Being the "sole arbiter" of recusal allows a judge to use her discretion and listen to her "personal conscience" in determining whether to recuse herself.[78]

The second holding of *Moreno* sets forth an "abuse of discretion" standard for appellate review of recusal.[79] Under the abuse of discretion standard of review, "[a] reviewing court will accord a lower court's disqualification decision great weight and substantial deference."[80] The use of this standard of review has resulted in a judge's decision not to recuse herself "seldom be[ing] disturbed on appeal."[81] Additionally, *Moreno* requires a party appealing a judge's decision not to recuse herself to present not only evidence of the judge's bias, but also evidence that the bias *affected the result of the trial*.[82] This requirement has resulted in the strange situation of an appellate court agreeing that the trial court judge was indeed biased, but that the appellants did not prove that the bias affected the outcome of the trial.[83]

Finally, an indirect effect of *Moreno* is that it discourages a party from seeking a judge's recusal due to fear of inciting the judge. As some commentators have noted: "[r]ecusal motions are not like other procedural

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76. 516 N.E.2d 200 (N.Y. 1987).

77. *Id.* at 201.

78. *Id.*

79. *Id.* at 203.

80. FLAMM, *supra* note 2, at 984.

81. *Id.* at 991.

82. *Moreno*, 516 N.E.2d at 203.

83. *See, e.g.*, Schrager v. N.Y. Univ., 642 N.Y.S.2d 243, 244 (App. Div. 1996); *see also* Schwartzberg v. Kingsbridge Heights Care Ctr., Inc. 813 N.Y.S.2d 191, 193 (App. Div. 2006) ("Although the ethical standards of judicial conduct require the avoidance of the appearance of impropriety, an ethical violation does not necessarily warrant reversal and a new trial.").

motions. They challenge the fundamental legitimacy of the adjudication. They also challenge the judge in a very personal manner: they speculate on her interests and biases; they may imply unattractive things about her."[84] Thus, rather than submitting a recusal motion that has little chance for success, a party may decide to take its chances in front of a possibly biased judge.

Although *Moreno* grants them broad discretion in determining whether to recuse, New York judges can request an advisory opinion from the New York State Advisory Committee on Judicial Ethics (ACJE) on whether they should recuse themselves.[85] The ACJE was created in 1987 (the same year *Moreno* was decided) to "help New York State's judges and justices adhere to the high standards set forth in the Rules Governing Judicial Conduct."[86] The creation of the ACJE is now codified in the New York Judiciary Law.[87] Each year the ACJE issues "approximately 140 to 220 opinions annually in response to questions from judges, justices, and quasi-judicial officers" regarding their own conduct.[88]

Unlike case law applying the *Moreno* standard, advisory opinions issued by the ACJE often propose recusal when it appears a reasonable person may suspect the judge's impartiality might be in question.[89] Although advisory opinions are nonbinding,[90] "[a]ctions of any judge or justice . . . taken in accordance with findings or recommendations contained in an advisory opinion issued by the panel shall be presumed proper for the purposes of any subsequent investigation by the state commission on judicial conduct."[91] Therefore, although a judge is under no obligation to seek

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84. Sample et al., *supra* note 38, at 31.

85. Advisory Comm. on Judicial Ethics, About the ACJE: Organization and Purpose, http://www.courts.state.ny.us/ip/acje/whatis.shtml (last visited Sept. 3, 2009).

86. *Id.*

87. *Id.*; *see also* N.Y. JUD. LAW § 212(2)(*l*) (McKinney 2005).

88. Advisory Comm. on Judicial Ethics, *supra* note 85.

89. *See infra* Part II.C.

90. Derosa v. Chase Manhattan Mortgage Corp., 782 N.Y.S.2d 5, 8 (App. Div. 2004).

91. § 212(2)(*l*)(iv).

an advisory opinion, and can still rely upon *Moreno* in determining whether to recuse herself, she can protect herself from subsequent punishment by seeking an opinion from the ACJE and following its recommendations.

In spite of the objective standard provided for in the New York Rules of Judicial Conduct and the creation of the ACJE, *Moreno* remains the rule of law in New York. As a result, recusal motions that would likely succeed in federal court fail in New York state courts, thus creating what a reasonable person would consider "the appearance of impropriety."

B. *Post*-Moreno *Case Law*

In the twenty plus years since *Moreno*, New York case law has reinforced the position of the Court of Appeals that a judge should use her discretion in determining whether to recuse herself. Very few of these decisions hold that a judge should have recused herself in the underlying case. More importantly, some of the appellate decisions affirming a judge's decision not to recuse would have came out differently if an objective standard was used. As a result, New York judges sometimes preside in cases in which they likely could not in federal court.

This section looks at cases in which a judge would likely have been forced to recuse herself if an objective standard was used and how a reasonable person might view the judge's refusal to recuse herself as creating the appearance of impropriety. All of the cases come from one of New York's four appellate divisions, which are the state's intermediate appeals courts.[92] The appellate division reviews decisions of state supreme courts and county courts, both of which are courts of original instance in criminal and civil matters.[93]

The following cases can be organized into three different categories: prejudice against a party, prejudice against an attorney, and having an interest in the matter. It should be noted that this is not a complete list of cases that conflict with the federal standard, but instead highlights common

92. *See* N.Y. State Unified Court Sys., Appellate Divisions, http://www.courts.state.ny.us/courts/appellatedivisions.shtml (last visited Sept. 3, 2009).

93. *Id.*

situations in which a New York judge is not required to recuse herself.[94]

1. *Prejudice Against a Party.* It would be nearly impossible for a judge to recuse herself simply because she recognizes a party. For example, many counties in New York are primarily rural and have small populations,[95] making it all but certain there are times when a trial court judge is familiar with the party appearing before her. In some instances, however, a judge's relationship or feelings towards a party may go beyond what is acceptable.

First, in *People v. A.S. Goldmen, Inc.*, the defendants' codefendant "was charged with hiring someone to murder the court."[96] The threat likely resulted from the trial court case in which several defendants were convicted for corruption and other business related crimes.[97] Because of the threat, the codefendant's trial was severed and tried separately from the remaining defendants' case, leading the remaining defendants to seek the judge's recusal.[98] In denying the defendants' appeal challenging the trial court's failure to recuse, the appellate court cited to *Moreno* and held that "there was no indication that the court could not remain fair and impartial to the remaining defendants."[99] Although, the defendants in *A.S. Goldmen* were not accused in any way of being connected to the murder plot,[100] the nature of the threat and the court's failure to recuse raises the issue of whether the judge could remain neutral towards the remaining defendants.

In a second case, *People v. Wallis*, the trial court judge presided over an earlier, unrelated family court case

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94. It should also be noted that recusal case law is inherently incomplete because of the widely held belief that a judge need not disclose the reason for her recusal. FLAMM, *supra* note 2, at 12.

95. For example, Washington County, New York, is "largely agricultural in nature and has no cities within its borders." Washington County N.Y., About Washington County New York, http://www.co.washington.ny.us/about.htm (last visited Sept. 3, 2009).

96. 779 N.Y.S.2d 489, 491 (App. Div. 2004).

97. *Id.* at 490.

98. *Id.* at 491.

99. *Id.*

100. *Id.*

involving the defendant in which the judge had referred to the defendant as being "scum" and a "predator."[101] In reviewing the case, the appellate court ruled that the judge properly refused to recuse since "the judge had no recollection [of calling the defendant names] until being shown the transcript."[102]

Unlike *A.S. Goldmen*, the judge in *Wallis* was clearly prejudiced towards the party in front him. Although the bias occurred in an earlier case, the judge was reminded of it after being shown the transcript from the family court case. The judge's comments and history with the defendant thus raised the possibility that he was not capable of being impartial in the case at hand.

Although it can be argued that a reasonable person would not question the judge's impartiality in *A.S. Goldmen,* the judge in *Wallis* would have had to recuse himself under the federal objective standard because of the case's similarity to *Liljeberg*. In *Liljeberg*, the federal district court judge presided in a case in which an organization the judge once worked for was an interested third party.[103] Although the Supreme Court confirmed that the district court judge had truly forgotten about the organization having an interest in the case, the Court held that it did not make a difference since the inquiry is not whether the judge is impartial, but whether a reasonable person might question the judge's impartiality.[104] Just like *Liljeberg*, the judge in *Wallis* was presumably unaware of his relationship with the party appearing in front of him.[105] But, because of the judge's harsh comments towards the defendant, a reasonable person might very well question whether the judge was capable of being impartial.

In a third case, *People ex rel. Spitzer v. Grasso*, the trial court judge also likely would have had to recuse himself if an objective recusal standard was used. In *Grasso*, the state Attorney General brought an action against the former CEO of the New York Stock Exchange (NYSE) challenging

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101. 806 N.Y.S.2d 760, 762 (App. Div. 2005).

102. *Id.*

103. Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 850 (1988).

104. *Id.* at 860-61.

105. *Compare id.*, *with Wallis*, 806 N.Y.S.2d 760.

compensation and benefits awarded to the CEO.[106] The trial court judge refused to recuse himself even though he had at one time been under consideration for a position on the NYSE's Board of Directors.[107] In requesting recusal, the defendant argued that the judge may have harbored bias toward him since the NYSE did not offer the judge a position on its Board of Directors.[108] The appellate court affirmed the judge's decision not to recuse himself, reasoning that the NYSE's failure to offer the judge a position on the Board did not "predispose[ ] the Judge to reach any particular conclusion in [the] litigation."[109]

A reasonable person might question whether the judge was affected in some way by the NYSE's failure to offer him a position. Again, although the judge in *Grasso* was likely not influenced by his involvement with the NYSE and the defendant, there was still an appearance of impropriety. Because of the sensitive nature of seeking employment with a prestigious institution such as the NYSE, it is not unreasonable to think that the judge was incapable of being impartial.

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106. 853 N.Y.S.2d 64, 65-66 (App. Div. 2008).

107. *Id.* at 66.

108. *Id.* at 68.

109. *Id.* In addition to using a subjective standard to hold that the judge was not biased, the appellate court in *Grasso* also based its decision on the fact that both parties agreed at the beginning of the litigation that the judge's involvement with the New York Stock Exchange was not a basis for recusal. *Id.* Seeking the consent of the parties to preside even though there appears to be a conflict of interest is a doctrine known as "remittal." *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.11(C) (2007); *see also* N.Y. COMP. CODES R. & REGS. tit. 22 § 100.3(F) (2006). While remittal is specifically allowed in the Rules of Judicial Conduct, New York case law provides that "a judge disqualified under a statute cannot act even with the consent of the parties interested, because the law was not designed merely for the protection of the parties to the suit, but for the general interests of justice." *In re* City of Rochester, 101 N.E. 875, 876 (N.Y. 1913); *see also* Beer Garden, Inc. v. N.Y. State Liquor Auth., 590 N.E.2d 1193, 1198 (N.Y. 1992). Therefore, since a judge cannot preside in a case prohibited by section 14, one would think that the consent of the parties should not be a factor in considering whether there should be recusal. Thus, there appears to be a conflict between the rule of remittal and the New York Rules of Judicial Conduct. *See* Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned*," 14 GEO. J. LEGAL ETHICS 55, 62-64 (2000) (discussing remittal in the 1972 *Code of Judicial Conduct* and the 1990 *Model Code of Judicial Conduct*).

The purpose of an objective standard is to not only ensure that trials are decided on the merits, but to also promote confidence in the judicial system. The failure to scrutinize the judges' relationships in *Grasso*, *A.S. Goldmen*, and *Wallis* not only allows a judge to sit in a case in which she might be biased, but also ignores the importance of the public's perception of the judicial system.

2. *Prejudice Against an Attorney.* A judge can be familiar with a party appearing before her, but it is more common for a judge to be familiar with an attorney.[110] Although a per se rule against a judge hearing a case in which she is familiar with an attorney would be virtually impossible, there are certainly instances in which a judge should recuse herself because of the relationship. The following cases are examples of when a judge's bias against an attorney creates an appearance of impropriety.

In *Berman v. Herbert Color Lithographers Corp.*, the plaintiff argued that the trial judge should have recused because of "past friction" with one of the attorneys who represented the plaintiff.[111] Because of the adversarial nature of any trial, it is not uncommon for judges and attorneys to develop animosity towards each other. Although it is debatable whether "past friction" is enough to warrant recusal under the objective standard, it would be a better practice for the judge to at least consider how a reasonable person would view the relationship.

A second case, *People v. Daly*,[112] is an example of a relationship between a judge and attorney that goes beyond mere "friction." In *Daly*, the defendant argued that the trial court judge should have recused because of the judge's "hatred" of defense counsel.[113] On appeal, the appellate court refused to reverse the trial court judge's decision, reasoning that since recusal was not required by section 14, the decision to recuse was left to the "conscience and discretion of the judge."[114]

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110. *See* Jeremy M. Miller, *Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)*, 33 PEPP. L. REV. 575, 612-14 (2006) (giving examples of how a judge and attorney may develop a friendship).

111. 636 N.Y.S.2d 98, 99 (App. Div. 1995).

112. 799 N.Y.S.2d 537 (App. Div. 2005).

113. *Id.* at 539.

114. *Id.*

Hatred of an attorney would surely require recusal under the federal standard since a reasonable person would be suspicious of a judge's motives if she hated an attorney who was arguing before her. Although bias stemming from hatred may not be enough to change the outcome of the case, it could be enough to result in unfavorable rulings or hurt an attorney's confidence in presenting a case. Because of these potential affects, recusal would be the appropriate move in this situation.

While *Berman* and *Daly* concern a judge being prejudiced against an attorney, just the opposite may be true: a judge may favor an attorney. An accepted feature of our legal system is that judges often get to the bench because of who they know.[115] This also applies in New York, where many judges were once practicing attorneys.[116] In the words of Justice Scalia, it would be "utterly disabling"[117] to require a judge to recuse herself simply because she has a relationship—good or bad—with an attorney. However, as the above two cases illustrate, that relationship may sometimes be stretched too far and take on the appearance of impropriety. Adopting the federal standard would allow a judge (or an independent body)[118] to objectively determine whether the judge's impartiality might reasonably be questioned. Although a judge is likely being honest when reasoning that she can be impartial when hearing a case where a friend is an attorney, this should not be the inquiry. Instead, it should be whether a reasonable person might believe the judge is not impartial—a standard with which *Berman* and *Daly* conflict.

3. *Having an Interest in the Matter*. A third set of cases consists of those where the judge can be considered to have

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115. *See* Cheney v. U.S. Dist. Ct., 541 U.S. 913, 916 (2004) (Scalia, J., mem.) (noting that many Supreme Court justices made the Court because they were friends with the President); *see also* Matt Chandler, *Nominating Commission Outlines Possible Changes*, BUFFALO L.J., July 23, 2009, at 4. (discussing how a lack of political ties hurts the chances of well qualified lawyers to obtain judgeships).

116. Reflecting this fact, New York recusal case law is in agreement that a judge who, as a district attorney, prosecuted a defendant now appearing before her does not need to recuse herself. *See, e.g.*, People v. Call, 731 N.Y.S.2d 557, 559 (App. Div. 2001); People v. Rosato, 599 N.Y.S.2d 195, 196 (App. Div. 1993).

117. *Cheney*, 541 U.S. at 916.

118. *See infra* Part III.A.2.

some sort of interest in the case before her. Having an interest in a case is different than favoring or hating a party or attorney in that it is the actual *subject matter* of the litigation that the judge may have an interest in.

One type of interest a judge may have in the matter is when she is familiar with the victim of a crime that is now being prosecuted. In *People v. Griffiths*, the trial court judge was presiding over an arson case in which the victim of the arson was a blood relative of the judge.[119] In reviewing the judge's decision not to recuse, the court held section 14's prohibition against a judge sitting in a case in which she is related to the party did not apply since a victim is not a party to a crime.[120] Then, applying the *Moreno* standard, the court subsequently held that the judge did not abuse his discretion in declining to recuse himself.[121] Although the trial court judge in *Griffiths* denied the recusal motion in part because he claimed not to have had contact with the victim in ten years,[122] the mere fact that the judge was deciding a case involving a family member makes the judge's impartiality questionable.

In a second case, *People v. Duffy*, the judge declined to recuse himself in a vehicular manslaughter case in which the deceased victim was a friend of the judge's wife and the judge's brother-in-law was a witness for the defense.[123] Citing to *Griffiths*, the appellate court first held that the judge was not required to recuse himself since there was no statutory disqualification under section 14.[124] The court also held that the judge was not required to recuse himself since there was a lack of "any serious question of the Judge's impartiality."[125] Again, it is debatable whether the trial court judge was biased against either party because of his relationship with the victim and witness. However, in a sensitive case such as this where the victim is deceased and the judge's wife was a friend of the victim, the better

119. 548 N.Y.S.2d 89, 90 (App. Div. 1989).

120. *Id.*

121. *Id.*

122. *Id.*

123. 586 N.Y.S.2d 316, 318 (App. Div. 1992).

124. *Id.*

125. *Id.*

practice would be for the judge to recuse rather than creating an appearance of impropriety.

A final type of judicial interest is found in *Borrell v. Hanophy*.[126] In *Borrell*, the judge who presided over the defendant's arraignment was a witness to the crime allegedly committed by the defendant.[127] The appellate court subsequently refused to stop the trial from proceeding since there was no statutory provision requiring the judge's recusal.[128] Although the trial court judge in *Borrell* merely arraigned the defendant, it likely would have been a simple procedure for the judge to transfer the case to another judge. By refusing to do so, the judge not only created grounds for the defendant to appeal the recusal decision, but also allowed his actions to be scrutinized. Again, the better practice would have been for the trial court judge to recuse.

When the three types of cases examined in this section—where the judge is familiar with the party, familiar with the attorney, and appears to be interested in the matter—are considered as a whole, the breadth of the dual holdings of *Moreno* can be fully appreciated. Not only is a judge allowed to sit in cases in which her impartiality is in question, but the appellate courts also essentially rubberstamp the judge's decision not to remove herself from the case.[129] While these cases do not suggest that the judge is actually biased, they give the impression that the judge may be allowing other factors besides the merits of the case to guide her decision making. It should be the goal of New York State to prevent this type of situation. To achieve this goal and promote judicial ethics, the state created the ACJE.

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126. 667 N.Y.S.2d 312 (App. Div. 1998).

127. *Id.* at 313.

128. *Id.*

129. As previously mentioned, appellate courts rarely overturn a judge's decision not to recuse herself. However, an appellate court did find that the court should have recused itself when the judge heard twenty-one matters brought by an attorney who was the judge's "close friend, business associate and personal attorney." *In re* Intemann, 540 N.E.2d 236, 237 (N.Y. 1989). A second example was when the judge heard a case brought by a party whom the judge had borrowed money from in the past. *In re* Murphy, 626 N.E.2d 48, 50 (N.Y. 1993). It should be noted that these two cases involved investigating judicial misconduct, not recusal.

C. *New York State Advisory Committee on Judicial Ethics Advisory Opinions*

As previously mentioned, the ACJE issues opinions in response to questions asked by judges, justices, and quasi-judicial officers concerning recusal.[130] Although some of the ACJE opinions suggest that the Committee endorses the use of the objective standard found in the Rules of Judicial Conduct, others allow a judge to use her discretion in deciding whether to recuse herself. Similar to Section B above, this section analyzes advisory opinions that involve both a judge's relationship with a party and a judge's relationship with an attorney. Unlike Section B, it will not analyze advisory opinions concerning a judge's interest in the matter before her. This section is by no means a complete list of recusal advisory opinions. Instead, the opinions chosen for discussion highlight the fact that although the ACJE is at times more objective than the appellate divisions, it is still not completely supportive of the objective standard found in the Rules of Judicial Conduct. Even worse, these opinions show that the ACJE is at times inconsistent when it comes to recusal.

1. *A Judge's Relationship with a Party*. The relationship between a judge and a party sometimes raises questions regarding the judge's impartiality. Advisory opinions issued by the ACJE reflect the fact that a judge should recuse herself if she is *too* familiar with a party. For example, the ACJE suggests recusal when a judge is on the board of directors for a hospital that appears as a party;[131] when a party was a client of the judge's law firm within the last two years;[132] and when a party appearing in front of the judge is a town councilperson in charge of adjusting the judge's salary.[133] These opinions show that the ACJE favors recusal

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130. *See supra* notes 85-88 and accompanying text; *see also* George D. Marlow, *Opinions of the New York State Advisory Committee on Judicial Ethics: Their Language and Rhetoric*, N.Y. ST. B.J., Nov. 1997, at 32.

131. N.Y. Advisory Comm. on Judicial Ethics, Op. 00-18 (2000), http://www.courts.state.ny.us/ip/judicialethics/opinions/00-18_.htm.

132. N.Y. Advisory Comm. on Judicial Ethics, Op. 97-85 (2000), http://www.courts.state.ny.us/ip/judicialethics/opinions/97-85_.htm.

133. N.Y. Advisory Comm. on Judicial Ethics, Op. 94-96 (1994), http://www.courts.state.ny.us/ip/judicialethics/opinions/94-96.htm.

without allowing a judge to even consider whether she is capable of being impartial.

In spite of the above opinions, the ACJE does not always require recusal when a judge is familiar with a party. For example, one ACJE opinion provides that a judge need not recuse herself even if she has filed a criminal harassment complaint against the party appearing before her.[134] Besides conflicting with other opinions, this opinion is also factually similar to *Wallis*, where the appellate court affirmed a judge's decision not to recuse even though the judge had previously referred to the party as being "scum" and "a predator."[135] Instead of allowing these inconsistencies to occur, the ACJE would be better off taking a completely objective stance on judge-party relations as set forth in the Rules of Judicial Conduct.

2. *A Judge's Relationship with an Attorney*. Similar to a judge's relationship with a party, some advisory opinions for judge-attorney relationships require recusal while others make it discretionary. For example, the ACJE suggests recusal when a judge's landlord appears as an attorney before the judge;[136] when a town board member in charge of the judge's salary appears as an attorney;[137] and when a judge has previously consulted the attorney for private legal advice over a period of two years.[138]

The ACJE does not, however, require a judge to recuse herself if an attorney has filed a complaint against the judge with the Commission on Judicial Conduct,[139] or if the attorney commenced a suit against the judge for her conduct as a county official before the judge came to the

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134. N.Y. Advisory Comm. on Judicial Ethics, Op. 99-78 (1999), http://www.courts.state.ny.us/ip/judicialethics/opinions/99-78_.htm.

135. *See* People v. Wallis, 806 N.Y.S.2d 760, 762 (App. Div. 2005).

136. N.Y. Advisory Comm. on Judicial Ethics, Op. 92-110 (1992), http://www.courts.state.ny.us/ip/judicialethics/opinions/92-110_.pdf.

137. N.Y. Advisory Comm. on Judicial Ethics, Op. 94-61 (1994), http://www.courts.state.ny.us/ip/judicialethics/opinions/94-61_.pdf.

138. N.Y. Advisory Comm. on Judicial Ethics, Op. 06-16 (2006), http://www.courts.state.ny.us/ip/judicialethics/opinions/06-16.htm.

139. N.Y. Advisory Comm. on Judicial Ethics, Op. 08-36 (2008), http://www.courts.state.ny.us/ip/judicialethics/opinions/08-36.htm.

bench.[140] Instead, the ACJE allows the judge to preside so long as she believes she can remain impartial.[141] Whereas the first set of opinions are good examples of the ACJE believing a reasonable person would object to a judge sitting in those situations, the opinions that allow a judge to use her discretion are nearly identical to *Daly*, a case that uses the *Moreno* standard.

Both of the above subsections show that while the ACJE occasionally suggests a judge recuse herself regardless of whether the judge believes she can be impartial, it is also willing to put the recusal decision in the judge's hands. The ACJE should certainly be applauded for trying to bring a level of objectivity to the issue of recusal. However, when reading its opinions one gets the sense that the ACJE is torn between applying the standard found in the Rules of Judicial Conduct—the Rules it was designed to interpret—and complying with the *Moreno* standard set forth by the Court of Appeals. This tension shows that the ACJE is receptive to the idea of an objective standard of recusal, but might not believe that it has total authority to apply such a standard.

The ACJE, although partly to blame, is just part of a larger problem. New York recusal law is broken and in dire need of a clear and effective system of recusal. Without a clear standard, New York recusal law will continue to be a crazy quilt consisting of an outdated statute, unenforced regulations, disillusioned courts, and an ethics committee that is both powerless and inconsistent.

III. A NEW SYSTEM OF RECUSAL FOR NEW YORK

As this Comment strives to point out, there is much to dislike about New York recusal law. This does not mean the law is arbitrary, and there are a few benefits to New York's recusal law worth noting. First, it limits the amount of frivolous recusal motions. For example, if New York allowed a party to secure a judge's recusal upon demand, a litigant might be tempted to continuously file recusal motions until she ends up with a judge she believes is favorable to her

140. N.Y. Advisory Comm. on Judicial Ethics, Op. 06-110 (2006), http://www.courts.state.ny.us/ip/judicialethics/opinions/06-110.htm.

141. *Id.*

cause.[142] Second, and similar to the first benefit, if recusal became a common practice, the judicial system would be flooded with recusal requests and become more stressed than it already is.[143]

In spite of these legitimate concerns, New York's system of recusal is insufficient and needs to be changed. It is the goal of Part III of this Comment to provide a blueprint for how New York can fix its recusal law without hurting the efficiency and effectiveness of the judicial system. Section A sets forth a new system of recusal that ensures recusal motions are decided both objectively and efficiently. Section B explains the judicial pay raise controversy and how a new system would alleviate concerns about judicial recusal in respect to the controversy. Part III concludes with why it is in New York's best interest to act quickly in changing its law.

A. *Independent Review of Recusal Motions Using an Objective Standard*

1. *Codifying the Regulations.* The first step New York needs to take to update its recusal law is to change Judiciary Law section 14. Realizing the inherent inadequacy of a completely subjective recusal provision, the federal government amended its own subjective statute in 1974 and adopted the objective model language of the American Bar Association's *Code of Judicial Conduct*. Furthermore, the ABA continues to critique the federal standard and is currently preparing a report analyzing recusal law throughout the country.[144] Instead of following the ABA and the federal government's initiative, New York has continued to rely on section 14—a statute that has remained unaltered since 1945.[145] Fortunately, since New York has adopted the federal standard as part of its Rules of Judicial Conduct, a quick fix for section 14 would be to completely replace it with the standard found in the Rules

142. *See* Pearson, *supra* note 44, at 1811-12; *see also In re* Mason, 916 F.2d 384, 386 (7th Cir. 1990) (Easterbrook, J.) (warning against a system of recusal that allows "preemptory strikes and judge-shopping").

143. *See* Sample et al., *supra* note 38, at 32.

144. *Id.* at 18.

145. *See* N.Y. JUD. LAW § 14 (McKinney 2005).

and add to it the reasonable person language from *Liljeberg*. The non-mandatory part of the amended statute would thus read like this:

> Any justice or judge of the State of New York shall disqualify herself in any proceeding in which her impartiality might reasonably be questioned by a reasonable person.

The second part of the statute would then consist of the traditional areas of mandatory recusal.

Anything short of replacing section 14 with the objective standard would be an inadequate solution to fixing New York's recusal law. Although New York attempted to make recusal more objective when it adopted its Rules of Judicial Conduct, the Rules have little impact because of *Moreno*. The Court of Appeals' reliance on section 14 in spite of the Rules is especially troubling since it was the goal of the Rules to encourage New York judges to adhere to a new set of "high standards."[146] Amending New York statutory law and removing the subjective language of section 14 is the only way to give an objective standard the actual force of law and have it recognized by New York courts.

Replacing section 14 with the objective language found in the federal standard and the Rules would also have the effect of statutorily superseding *Moreno*, which was based in large part on the fact that section 14 only required a judge's recusal in four specific instances. In deciding whether the judge in *Moreno* should have recused himself, the Court of Appeals was likely attempting to fill the void created by the narrow language of section 14 and thus adopted a standard that applied to areas outside of the mandatory language of the statute. As a result of the new standard, trial court judges were under little pressure to recuse themselves in cases in which they might appear interested.[147]

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146. Advisory Comm. on Judicial Ethics, *supra* note 85.

147. One New York judge has likened a judge's discretionary decision to recuse as "allow[ing] judicial foxes to continue to watch the hen house." People v. T & C Design, Inc., 680 N.Y.S.2d 832, 835 (Just. Ct. 1998). The judge in *T.C. Design* took the unprecedented step of referring the question of whether he should recuse to an associate justice. *Id.* Unfortunately, *T.C. Design* is only a Justice Court case. *Id.* at 832. Although Shepardizing the case reveals that it has had little to no impact on the way a trial court judge views a recusal motion, the opinion serves as a good reference to how one judge believes New York's recusal law is inadequate and in need of change. *See id.*

Furthermore, some judges took the position that they had an affirmative obligation *not* to recuse themselves.[148] Replacing section 14 with an objective standard will have the effect of ending *Moreno*'s provision that a judge is the "sole arbiter" of recusal and will also take discretion out of the decision making process.

It will likely be argued by supporters of the current New York recusal law that an objective standard would lead to a rash of recusals that strains the already burdened court system. While it is true that an objective standard will likely disqualify more judges than a subjective standard, the system will not be strained. There are currently more than 3,000 full- and part-time judges in the state of New York, most of which preside in trial courts.[149] In the Eighth Judicial District alone, there are twenty-six state Supreme Court judges.[150] Due to the high number of judges, it will not be a problem for a judge to transfer the case to a judge from the same court.[151] If for some reason it is a problem, an arrangement can be made to move the case to a different venue where an impartial judge can preside. In any event, the importance of deciding all cases on the merits without bias outweighs the slight inconvenience posed by an

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148. Spremo v. Babchik, 589 N.Y.S.2d 1019, 1022 (Sup. Ct. 1992) ("A judge has an obligation not to recuse himself or herself, even if sued in connection with his or her duties, unless he or she is satisfied that he or she is unable to serve with complete impartiality, in fact or appearance."). *Spremo* refers to a doctrine known as "the duty to sit." *See* Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813 (2009) (describing the prevalence of the duty to sit in both federal and state law); *see also* Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107 (2004) (describing the duty to sit in federal law).

149. Advisory Comm. on Judicial Ethics, *supra* note 85.

150. Buffalo Law Journal, Judges & Court Calendars, http://www.lawjournal buffalo.com/content/pages/judges#nys_supreme_court (last visited Sept. 3, 2009). There are also eight counties in the Eighth Judicial District. N.Y. State Unified Court Sys., 8th Judicial District, http://www.nycourts.gov/ courts/8jd/index.shtml (last visited Sept. 3, 2009).

151. It is because of the volume of qualified judges that the rule of necessity is now seldom invoked. *See* McKevitt, *supra* note 23, at 832-34 (giving examples of modern applications of the rule of necessity); *see also* United States v. Will, 449 U.S. 200, 212 (1980) ("[T]he disqualified judge simply steps aside and allows the normal administrative processes of the court to assign the case to another judge not disqualified.").

increase in recusals resulting from the use of an objective standard.

2. *Giving the ACJE the Authority to Decide Recusal Motions*. Although an objective standard of recusal is designed to take a judge's own opinions out of the recusal process and instead ask what a reasonable person thinks, a judge deciding a recusal motion often misapplies the reasonable person standard and instead considers whether *she* believes her impartiality might be in question.[152] Having a judge rule on her own recusal has become "one of the most heavily criticized features of United States disqualification law."[153] Thus, in addition to adopting an objective standard of recusal, New York must also change the way recusal motions are decided.

One common solution to the problem of having a judge decide her own recusal is for the judge to request that another judge from the same court hear and decide the motion.[154] Although this procedure is better than having a judge rule on her own recusal, it is still flawed. First, a certain collegiality exists between judges on the same bench[155]—a judge may be unwilling to rule that a colleague of hers is biased and unfit to preside over the case in question.[156] Second, asking a judge to apply a reasonable person standard to her colleague is problematic because a judge is somewhat detached from how a reasonable person views the court.[157] For example, the judge may be out of touch with whether a layperson believes there is an appearance of impropriety and whether the judge is capable of presiding impartially.

Instead of allowing a judge or a judge's colleague to decide recusal motions, New York needs to establish a new type of independent review. The ACJE should be given the power to decide recusal motions and issue binding opinions

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152. *See, e.g.*, FREEDMAN & SMITH, *supra* note 3, at 265 (explaining how Scalia misapplied the objective standard found in § 455(a)).

153. Sample et al., *supra* note 38, at 31.

154. *See id.*

155. FREEDMAN & SMITH, *supra* note 3, at 244.

156. *See id.*

157. *See* Pearson, *supra* note 44, at 1812 ("[T]he reasonable person is, at the very least, not a judge.").

that either compel a judge to recuse herself or allow her to continue to preside over the case. Giving the ACJE this authority would result in both efficient and effective review of recusal motions.

The ACJE is currently comprised of a total of twenty-four active and retired judges.[158] Whereas allowing a single judge to decide a recusal motion is problematic in that a judge might not think like a "reasonable person,"[159] the number of judges on the ACJE and their combined experience would ensure that New York's new objective test is applied rationally. The ACJE also has nothing to lose or gain by requiring a judge's recusal since its members would be removed from the underlying case. If for some reason one ACJE member was interested, her potential bias would likely be a non-factor due to the sheer number of judges on the Committee.

Granting the ACJE the power to decide recusal motions would not be difficult. First, the ACJE is already codified in the Judiciary Law.[160] Simple changes to the section providing for the creation of the ACJE and the new objective statute could vest the ACJE with the power to both hear recusal motions and issue binding opinions. Second, the ACJE already has experience deciding recusal inquiries.[161] Instead of trying to make sense of section 14, the Rules of Judicial Conduct, and appellate case law, the ACJE would now only have to apply the newly codified objective standard to the facts presented in each recusal motion. The ACJE could also issue opinions using a per curiam-type format where no single judge takes credit for granting or denying the recusal motion. A per curiam process would promote fairness and prevent a decision from being attributed to an individual Committee member.

Allowing the ACJE to decide recusal motions would not require a significant change to the procedure currently used to secure a judge's recusal. Currently, a judge can either recuse herself sua sponte, or a party can file a motion

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158. Advisory Comm. on Judicial Ethics, Current Roster, http://www.courts.state.ny.us/ip/acje/roster.shtml (last visited Sept. 3, 2009).

159. *See* Pearson, *supra* note 44, at 1812.

160. N.Y. JUD. LAW § 212(2)(*l*) (McKinney 2005).

161. *See infra* Part II.C.

seeking the judge's recusal.[162] The same procedure can be used under the amended law, except that instead of the judge deciding the motion, the motion will immediately be transferred to the ACJE. For efficiency's sake, a procedural deadline should be established so that a party has to file the motion before a certain point in the case. For example, a motion should not be made after the commencement of the trial. Not allowing a motion to be made after this point would require parties to be diligent about recognizing a potential conflict and also ensure that a party does not submit a recusal motion merely to buy more time or delay a proceeding.

After the motion is transferred to the ACJE, the Committee should quickly issue a brief opinion either granting or denying the motion and provide its reasoning. In addition to supporting the Committee's reasoning, a written opinion will create solid recusal precedent for future ACJE opinions. Thus, when a party files a recusal motion in the future, it can rely on the ACJE's opinions in making its case. A party would also be able to consider recusal precedent in determining whether to bother with a recusal motion. Developing precedent may also have the additional benefit of reducing the number of future recusal motions, since a judge will have something to guide her when deciding whether to recuse sua sponte. This new system of precedent will finally bring predictability to recusal and create a solid foundation of law—something that is lacking under current recusal law.

Some judges and commentators may question the soundness of vesting the power of deciding recusal motions in an independent body. In response to this legitimate worry, the new recusal standard will allow parties to appeal ACJE decisions to the Court of Appeals. If this power of review is given, care should be taken to make such appeals a rare occurrence. First, the appeal should only be allowed to be made at the conclusion of the underlying case. Second, the Court of Appeals should give great deference to the ACJE's decision, since the ACJE has the most experience deciding recusal motions and has the unique ability to be objective.[163] Finally, if the Court of Appeals decides that the

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162. *See* People v. T & C Design, Inc., 680 N.Y.S.2d 832, 833 (Just. Ct. 1998).

163. Despite criticism of the abuse of discretion standard of review throughout this Comment, it would be a good standard to apply if the Court of Appeals were

ACJE wrongly granted or denied recusal, the court should be required to issue an opinion thoroughly explaining its decision. Since the Court of Appeals is the highest court in New York State, its decisions would also be binding on the ACJE. Although appeals to the Court of Appeals should be rare, giving the court the power of review will ensure that the ACJE stays true to the newly adopted statutory language.

If the ACJE is given the power to decide recusal motions, its new authority may be challenged on constitutional grounds. For example, a separation of powers argument may be made contending that a legislatively-created body that decides recusal motions improperly encroaches on the judicial branch. This argument can be countered in two ways.

First, the ACJE is made up in part by judges. Having a different judge decide a recusal motion is a procedure currently used in some states, including Texas,[164] and is very similar to the procedure set forth in this Comment. Second, under the new system of recusal, ACJE decisions can be appealed to the Court of Appeals. Thus, while the power to decide recusal motions will be taken away from a judge and given to a legislatively-created body, the judicial branch will still have final say over whether recusal is proper and will also be in control over this part of judiciary law. In any event, transferring recusal motions to the ACJE is a very slight impingement on judicial freedom, and is one that is needed to ensure confidence in the judiciary.

Although this Comment is primarily about recusal of trial court judges, part of the proposed system of recusal can also be applied to appellate judges. Like federal law, all New York judges should be subject to an objective standard of recusal. But, because the Court of Appeals has final say over decisions made by the ACJE, it may not be practical to allow recusal motions from that court to be transferred to the ACJE. At the appellate level, therefore, it will be best to allow each judge to decide her own recusal motion using the

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allowed to review decisions of the ACJE. It would give the ACJE some breathing room to develop precedent, but would also allow the Court of Appeals to correct any egregious errors made by the ACJE.

164. *See* Sample et al., *supra* note 38, at 31 (explaining that Texas allows a judge faced with a recusal motion to refer the motion to another judge).

new objective criteria. Appellate judges should, however, be bound by any precedent created by the Court of Appeals resulting from its review of ACJE opinions.

Recusal is a sensitive subject in that it challenges a judge's integrity and ability to decide cases on the merits. While giving an independent body the authority to decide recusal motions is a radical proposal, it is the most effective way to ensure that the objective language of a recusal statute is correctly applied. It will also protect the integrity of the judicial system in that the press and public will be able to rest assured that a judge is not sitting in a case in order to further her own interest.[165] Finally, giving the ACJE the power to apply an objective standard to recusal motions will also help alleviate concerns shared by current judges that they should recuse themselves from a variety of cases that are in some way connected to the judicial pay raise controversy in New York.

B. *Recusal and the Judicial Pay Raise Controversy*

At the time of this Comment's publication, the New York judiciary is embroiled in a dispute with the New York State Legislature regarding pay raises for state judges.[166] On April 10, 2008, former Chief Judge of the New York Court of Appeals Judith Kaye sued leaders of the New York State Assembly and Senate as well as Governor David Paterson, demanding a pay raise on behalf of all state judges.[167] Kaye's lawsuit seeks to raise the salary of state supreme court justices from $136,700 to $169,300,[168] the latter figure being the current salary of federal district court judges.[169] In addition to Kaye's lawsuit, two other lawsuits

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165. The recent uproar over Judge Benjamin's decision not to recuse himself in *Caperton* comes to mind here. *See, e.g.*, Editorial, *Honest Justice*, N.Y. TIMES, June 9, 2009, at A26; Editorial, *Justice Not for Sale*, N.Y. TIMES, Mar. 3, 2009, at A26.

166. *See* Eligon, *supra* note 6.

167. Golding, *supra* note 6. Despite Kaye's recent retirement, newly appointed Chief Judge Jonathan Lippman has also begun to lobby for pay raises for New York's judges. Robert Gavin, *Chief Judge Set to Tackle Pay Issue*, ALBANY TIMES UNION, Feb. 12, 2009, at A3.

168. Daniel Wise, *Recusals Could Lead to Discipline, Conduct Commission Forewarns*, N.Y. L.J., May 13, 2008, at 1.

169. *Id.*

brought by state court judges seeking a salary increase have recently been decided by two different appellate divisions.[170]

In *Maron v. Silver*, the Appellate Division, Third Department, heard an appeal from plaintiff judges who brought a proceeding seeking a writ of mandamus compelling the state to "maintain judicial salaries apace with inflation" and to disburse funds that had previously been appropriated by the Legislature for a pay raise.[171] In support of their requested relief, the plaintiffs made claims based on: (1) the Compensation Clause of the New York Constitution; (2) separation of powers; (3) the Equal Protection Clause; and (4) mandamus.[172]

New York's Compensation Clause provides that the compensation of a judge "shall not be diminished during [his or her] term of office."[173] The plaintiffs argued that because the level of judicial compensation—which had not been increased since 1999—did not compensate for inflation or an increase in cost of living, salaries were effectively diminished.[174] The court rejected this claim, reasoning that mere inflation "cannot be deemed a sufficient basis for a claim under New York's Compensation Clause."[175]

The plaintiffs' second argument was based on separation of powers. To support a claim for a violation of separation of powers, the judicial branch must show that the Legislature's actions were designed to influence the

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170. *See* Larabee v. Governor, 880 N.Y.S.2d 256 (App. Div. 2009); Maron v. Silver, 871 N.Y.S.2d 404 (App. Div. 2008).

171. 871 N.Y.S.2d at 406. The 2006-2007 state budget included a $69.5 million appropriation for salary adjustments. *Id*. at 406. Similarly, the 2009 state budget includes a $48 million appropriation for salary adjustments, but no authorization for the increase. Noeleen G. Walder, *First Department Backs Judicial Pay Raise*, N.Y. L.J., June 3, 2009, at 1.

172. *Maron*, 871 N.Y.S.2d at 406-07.

173. *Id.* (alteration in original) (quoting N.Y. CONST. art. VI, § 25(a)). A similar provision is contained in the U.S. Constitution. *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

174. *Maron*, 871 N.Y.S.2d at 406, 409.

175. *Id.* at 414.

judiciary or attack its independence.[176] The plaintiffs contended that the Legislature's failure to grant a pay increase was designed to influence the judiciary because it demonstrated the Legislature's displeasure over certain decisions, and also caused a number of judges to resign from the bench or to not seek re-election.[177] The Third Department rejected this argument, reasoning that the judges' failure to cite to any hard evidence in support of these claims made their arguments merely speculative.[178]

Finally, the court quickly rejected both the Equal Protection and mandamus arguments. There was no denial of Equal Protection since the plaintiffs "failed to negate every conceivable rational basis for the Legislature's inaction,"[179] and there was no basis for mandamus compelling the state comptroller to release the appropriated funds in part since the previous legislation did not provide for their dispersal, but instead only made the funds available.[180]

Less than seven months after *Maron* was decided the Appellate Division, First Department, held in *Larabee v. Governor* that the Legislature's failure to grant judicial pay raises *violated* separation of powers.[181]

Like *Maron*, the First Department looked to whether the Legislature interfered with the judicial branch's "own ability to function."[182] Unlike *Maron*, the court did not require specific evidence showing a "present impairment of the judicial system."[183] Instead, the court held that the Legislature had improperly subordinated the judicial branch by "linking" judicial salaries with other issues.[184]

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176. *Id.*

177. *Id.* at 416.

178. *Id.* at 416-17.

179. *Id.* at 420.

180. *Id.* at 421-22.

181. 880 N.Y.S.2d 256, 273 (App. Div. 2009). The court did agree with the *Maron* court in that there was no violation of the Compensation Clause. *Id.* at 265.

182. *Id.* at 272.

183. *Id.* at 274.

184. *Id.* at 274-75.

"Linkage" is the practice of combining two different platforms in one piece of legislation.[185] The Legislature engaged in this practice when it combined judicial pay raises with unrelated issues, such as legislative salaries and campaign finance reform.[186] The First Department believed that linkage turned judicial pay raise legislation into a mere "tactical weapon," and, as a result, made the judiciary an "inferior governmental entity."[187] The court thus affirmed summary judgment in favor of the plaintiffs and ordered judicial compensation adjusted to reflect increases in the cost of living that occurred since the last pay raise over ten years ago.[188]

Kaye's lawsuit, *Chief Judge v. Governor*, was decided by the same state supreme court that issued the lower court opinion in *Larabee*.[189] Like *Larabee*, the court held that linkage violated the doctrine of separation of powers and ordered the state to increase judicial salaries.[190] A motion is now pending before the Court of Appeals to take the case on direct appeal.[191] The Court of Appeals has already agreed to hear appeals in *Maron* and *Larabee*, and is expected to combine those cases and issue a decision in late 2009 or early 2010 on whether the state must grant a judicial pay raise.[192]

The judicial pay raise controversy and the above three cases have raised a slew of recusal issues. For example, as a result of these lawsuits, several state judges have recused themselves from cases where a state legislator's law firm

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185. *See id.* at 261.

186. *Id.*

187. *Id.* at 274.

188. *Id.* at 275.

189. *See* Daniel Wise, *News in Brief: Lehner Again Orders Albany to Raise Judges' Salaries*, N.Y. L.J., June 16, 2009, at 1. The case was decided by Supreme Court, New York County less than two weeks after the First Department's decision in *Larabee*. *See id.*

190. Chief Judge v. Governor, No. 400763/08, 2009 WL 1652845, at *2-3 (N.Y. Sup. Ct. June 15, 2009).

191. *See* Stashenko, *supra* note 7.

192. *See id.*; *see also* Walder, *supra* note 171 (stating that judicial pay raises will likely not be granted by the state in 2009 because of the "grim economy," thus making it likely that the issue will not be resolved until the Court of Appeals has its say).

represents a party.[193] Instead of basing their recusals on bias, it has been suggested that the judges are recusing themselves in protest of the Legislature's failure to grant the pay raise.[194] Even worse, one court insider noted that judges were playing "hardball" and threatening to tie up cases connected to lawmakers.[195]

In response to a wave of recusals by state court judges, the ACJE has already issued several advisory opinions concerning the pay raise controversy,[196] the most recent of which stating that Kaye's lawsuit did not require a judge to recuse herself in a case involving a state legislator.[197] In addition to the ACJE opinions, the Commission on Judicial Conduct—the state body in charge of disciplining judges—recently issued a statement warning judges that a violation of one of the ACJE's opinions concerning recusal could be interpreted by the Commission as being a violation of the Rules Governing Judicial Conduct.[198] But, since the ACJE also provided in its pay raise advisory opinions that a judge must recuse herself if she is convinced she cannot be fair,[199] judges may still continue to recuse themselves from cases

193. Golding, *supra* note 6.

194. *Id.*

195. *Id.*

196. *See* N.Y. Advisory Comm. on Judicial Ethics, Op. 07-25 (2007), http://www.courts.state.ny.us/ip/judicialethics/opinions/07-25.htm; Op. 07-190 (2007), http://www.courts.state.ny.us/ip/judicialethics/opinions/07-90.htm; Op. 08-76 (2008), http://www.courts.state.ny.us/ip/judicialethics/opinions/08-76_08-84_08-88_08-89.htm.

197. N.Y. Advisory Comm. on Judicial Ethics, Op. 08-76 (2008), http://www.courts.state.ny.us/ip/judicialethics/opinions/08-76_08-84_08-88_08-89.htm.

198. N.Y. State Comm. on Judicial Conduct, Statement by the New York State Commission on Judicial Conduct Regarding Judicial Compensation (May 12, 2008), http://www.scjc.state.ny.us/Policy%20Statements/CJC_Statement.Judicial_Compensation.2008_05_12.pdf. The Commission also noted that recusal as a form of protest could violate section 100.3(B)(4) of the Rules, which provides that a "judge shall perform the duties of judicial office impartially and fairly." *Id.*; N.Y. COMP. CODES R. & REGS. tit. 22, § 100.3(B)(4) (2006)).

199. *See* N.Y. Advisory Comm. on Jud. Ethics, Op. 08-76 (2008), http://www.courts.state.ny.us/ip/judicialethics/opinions/08-76_08-84_08-88_08-89.htm; Op. 07-190 (2007), http://www.courts.state.ny.us/ip/judicialethics/opinions/07-90.htm.

involving legislators.[200] As one judge argued: "how could there not be a conflict if I were to sit upon a case involving a firm of one of the lawyers who sets my salary?"[201]

In addition to recusal, *Maron*, *Larabee*, and *Chief Judge* have resurrected debate over the rule of necessity. The rule of necessity, which provides that a judge can sit in a case in which she is interested if there is no other judge available, is seldom applicable due to the large number of judges in today's legal system.[202]

Despite its rarity, the rule of necessity has already been invoked in *Maron*. In *Maron*, the Third Department admitted that the court was interested in the outcome of the case, but stated that it was "required to hear and dispose of the[] cross appeals pursuant to the rule of necessity."[203] The rule of necessity will likely apply once *Maron* and *Larabee* are heard by the Court of Appeals, in that while the judges would benefit from an increase in judicial salaries, all other judges in New York would also benefit.[204]

Although the Court of Appeals will likely invoke the rule of necessity, Chief Judge Lippman has already stated that since he is the plaintiff in *Chief Judge*, he will recuse himself in any pay raise cases that come before the court.[205] While Lippman's recusal in the pay raise cases is appropriate since he is a named party and an activist for increasing judicial salaries, whether other judges should recuse themselves in cases involving state legislators and their respective law firms is not as cut and dry due to confusion over conflicting ACJE opinions and the state's subjective recusal standard. To compare, the new recusal standard set forth in this Comment would have eliminated any confusion over whether recusal was required in these types of cases.

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200. *See* Wise, *supra* note 168.

201. *Id.*

202. *See supra* note 23 and accompanying text; *see also* Joel Stashenko, *'Rule of Necessity' Could be Invoked in Judicial Pay Suits*, N.Y. L.J., July 21, 2009, at 1 (noting that the rule of necessity is rarely used by the Court of Appeals, but citing two cases in the last quarter century in which it was used).

203. Maron v. Silver, 871 N.Y.S.2d 404, 407 (App. Div. 2008).

204. *See* Stashenko, *supra* note 202.

205. Stashenko, *supra* note 7.

If the ACJE was allowed to issue binding opinions based on an objective standard, the current recusal controversy could have been quickly ended. First, at some point, a party likely would have motioned for a judge's recusal in a case involving a legislator's firm due to an alleged appearance of bias. Then, applying an objective standard, the ACJE would have held that the judge need not recuse herself since the relationship between the pay raise controversy and a legislator's law firm is tenuous at best—a reasonable person would not question a judge's impartiality simply because a legislator's firm, not the actual legislator, was appearing before the judge.

After this first recusal motion was decided, both judges and litigants would be faced with binding precedent providing that a judge should not recuse herself because of one of the three lawsuits. A party would not waste its time motioning for a judge's recusal in the face of such precedent, and a judge would risk discipline if she recused sua sponte in spite of the ACJE's decision.

As the law now stands, a judge can still recuse herself from a case involving a legislator's firm so long as the judge argues she is incapable of being fair.[206] Allowing a judge to use this loophole in spite of ACJE advisory opinions and the Commission on Judicial Conduct's warning is a contemporary example of the decrepit state of New York recusal law. Because of the strict standard of review and difficulty of disciplining judges, a judge who does recuse herself will face few, if any, consequences. Giving the ACJE legitimate power and allowing it to apply an objective recusal standard to judges would have put an early end to the possibility of judges using recusal as a strategy to secure a pay raise. Thus, the current deadlock between the judiciary and the state regarding pay raises is yet another example of why New York must act and change its recusal law.

CONCLUSION

Because of the sensitive nature of recusal, any change in New York recusal law will likely receive a fair amount of

206. *See, e.g.*, N.Y. Advisory Comm. on Judicial Ethics, Op. 08-76 (2008), http://www.courts.state.ny.us/ip/judicialethics/opinions/08-76_08-84_08-88_08-89.htm.

attention and criticism. In spite of this possibility, a change is imperative. New York can no longer rely on a statute that gives almost complete discretion to a judge in determining whether she should recuse herself. Instead, New York needs to abolish its subjective recusal standard and adopt an objective standard that is applied uniformly by a disinterested board of judges. Until then, full confidence in the judicial system will be lacking due to cases that raise the appearance of impropriety and call a judge's impartiality into question.

By no means will an objective recusal standard require a judge to act like a robot who merely applies the law to the facts. For one, it might very well be impossible for a judge to be completely impartial.[207] Further, it is beyond dispute that judges are indeed human and perfection on the part of the judiciary—although an admirable goal—is likely impossible. Recognizing these considerations, an objective recusal standard applied by an independent body will save judges from making difficult decisions regarding their impartiality. Although a judge may be against having her impartiality evaluated by an independent body, the new system will save a judge from the often unfair and undeserved criticism levied on her by the press and public when she declines to recuse herself. In any event, adopting the new system will help restore confidence in the judicial system by showing litigants, judges, and the public that New York fully supports the right to a fair trial and is working to protect that right. Perhaps more importantly, the new system will also prevent future uproars similar to today's pay raise controversy that have the potential to harm the reputations of the judicial system and the judges that have served it with honor and distinction since New York's inception.

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207. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 214 (1979) (stating that U.S. Supreme Court Justice Lewis Powell believed a "perfectly fair trial was an illusion").