CENTER *for* JUDICIAL ACCOUNTABILITY, INC.

P.O. Box 69, Gedney Station
White Plains, New York 10605-0069

Tel. (914) 421-1200
Fax (914) 428-4994

E-Mail: judgewatch@aol.com
Web site: www.judgewatch.org

Elena Ruth Sassower, Coordinator

BY MAIL

October 1, 1999

Judge Ronald A. Zweibel
Acting Justice of the Supreme Court
of the State of New York
100 Centre Street, Room 1731
New York, New York 10013

RE: Postponement of Oral Argument *Sine Die* Pending Determination of Recusal
Elena Ruth Sassower, Coordinator of the Center for Judicial Accountability, Inc., acting pro bono publico, v. Commission on Judicial Conduct of the State of New York (N.Y. Co. #99-108551)

Dear Justice Zweibel:

In light of the illness of the Court, necessitating postponement of today's oral argument to next Friday, October 8th, I take this opportunity to propose that argument be postponed *sine die* until the Court has ruled on whether, based on my June 14th oral recusal application, it will recuse itself, or whether, as inquired by my August 17th letter[1], it wants from me a written recusal motion.

Obviously, if the facts set forth in my June 14th oral recusal application[2] are "sufficient" to warrant the Court's recusal, where, in addition, those facts have been substantiated by evidence presented by my July 28th affidavit in support of my omnibus motion (¶¶7, 50)[3] and by my September 24th reply affidavit (¶¶4, 13-15),

---

[1] My August 17th letter to the Court and the other letters referred to herein are all annexed as exhibits to my September 24th reply affidavit.

[2] *See* pp. 8-16, 22-23 of the transcript of the June 14, 1999 court conference, annexed as Exhibit "O" to my July 28th affidavit in support of my omnibus motion.

[3] *See, in particular*, the Center for Judicial Accountability's March 26, 1999 ethics complaint, annexed as Exhibit "E" to my affidavit in support of my omnibus motion. The complaint which is against Governor Pataki, among others, particularizes (at pp. 14-22), *inter*

Ex "B"

the Court's duty is to recuse itself. Indeed, it appears that the very making of "a timely and sufficient disqualification motion" divests the Court of all jurisdiction "except to grant the motion and in some circumstances to make those orders necessary to effectuate the change." Flamm, Richard E., Judicial Disqualification, Recusal and Disqualification of Judges, Little, Brown & Co. 1996, at p. 646. For this reason,

> "[w]hen a judge presumes to take action in a case... after he should have recused himself but did not, any such action is often considered a nullity and any orders issued by such a judge are considered absolutely void for want of jurisdiction." *Id*, pp. 651-2.

For the convenience of the Court, a copy of pages 646-655 from the foregoing comprehensive treatise on judicial disqualification is annexed[4].

A judge's duty to confront a recusal application, irrespective of whether it is oral, and his duty to disclose facts bearing upon its lack of impartiality, independent of any recusal application, were identified in my August 17th letter (at p. 5), citing the Chief Administrator's Rules Governing Judicial Conduct, Section 100.3(E) "Disqualification", and Section 100.3(F) "Remittal of disqualification". That letter inquired whether the Court wanted me to embody my oral recusal application in a written recusal motion – since the transcript of the June 14th court conference, my first and only appearance before the Court, was ambiguous on the subject. In the event the Court did want from me a written recusal motion, my letter noted that the Attorney General was seeking "time to serve and file a reply", including if the Court deemed my August 16th letter to theAttorney General – to which the Court was an indicated recipient – as a written recusal motion. As to the Attorney General's request to be heard, I pointed out that not only did I not oppose it, but that my August 16th letter had invited his response, as "the People's Lawyer", to my oral

---

alia, his participation in the events giving rise to this proceeding, as well as his manipulation of the judicial selection process to the lower state courts, including the Court of Claims – to which this Court would, presumably, be seeking reappointment at the end of its term in two years.

[4] Such legal authority further establishes my contention that once Justice Lebedeff had recused herself she was *without* jurisdiction to grant substantive relief to Respondent – such as granting Ms. Olson's May 17th post-default extension application [*See, inter alia*, my Reply Memorandum of Law, pp. 36-38].

recusal application – as well as response from the Commission on Judicial Conduct.

The Court has not responded to my August 17th letter to it pertaining to the recusal issue nor to the Attorney General's August 16th letter to it requesting "time to serve and file a reply". According to the Court's law secretary, Lisa Rubin, the Court will rule at the outset of the oral argument. However, if the Court defers its ruling until then, no oral argument can take place at that time on the substantive motions: my omnibus motion and the Attorney General's dismissal motion. This is clearly so if the Court were to recuse itself based on my oral recusal application. Yet, even were the Court to deny my oral recusal application – which it could not do without disclosing the facts bearing upon its lack of impartiality which my oral application was designed to foster – I would still have a right to make a written motion based thereon[5] – thereby rendering oral argument on the substantive omnibus and dismissal motions premature, if not improper. Clearly, too, if the Court were to rule that rather than deciding my oral recusal application, I should be burdened with the necessity of submitting a written motion detailing the appearance and actuality of the Court's self-interest in these proceedings, I would need time to prepare it, with the Attorney General then needing "time to serve and file a reply", as he requested. Likewise, the Attorney General would need "time to serve and file a reply" if, as he suggested, the Court were to treat my August 16th letter as a written recusal motion.

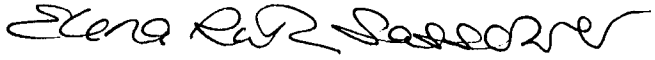
Under such circumstances, pending resolution of the threshold recusal issues, it would make more sense for the Court to hold off scheduling oral argument on my omnibus motion and the Attorney General's dismissal motion – as to which, if my recusal application is "sufficient", the Court has no jurisdiction, *Flamm, supra*, pp. 646, 651-2.

---

[5] See enclosed pages 578-581 from *Flamm, supra*, "Burden to Disclose Grounds for Disqualification", "...the judge is ordinarily obliged to disclose to the parties those facts that would be relevant to the parties and their counsel in considering whether to file a judicial disqualification motion." *id*, p. 578; "Judges who are aware of possible grounds for their disqualification must disclose them because members of the judiciary are charged with a duty to know what their own interests are and to avoid intermingling those interest with litigation that is pending before them.", *id*, p. 579.

If the Commission on Judicial Conduct, whose expertise on judicial disqualification is unique among litigants appearing before this Court or most any Court, disagrees with my view as to the proper procedure to be followed, it should so notify the Court and provide substantiating legal authority.

Yours for a quality judiciary,



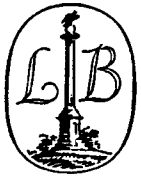
ELENA RUTH SASSOWER
Petitioner *Pro Se*

cc: David Nocenti, Counsel to Attorney General Spitzer
Assistant Attorneys General Carolyn Cairns Olson and Michael Kennedy
New York State Commission on Judicial Conduct

Judicial Disqualification

Recusal and Disqualification of Judges

Richard E. Flamm
Member, California, New York,
and New Jersey Bars



Little, Brown and Company
Boston New York Toronto London

§22.1 Introduction

Until a challenged judge has recused himself, been disqualified by another, or been presented with a motion for disqualification that he should have granted but did not, he has full power and authority to act in the cause.[1] If the motion is denied, the case simply proceeds on the merits.[2]

As a general rule, however, once a challenged judge has recused himself,[3] been disqualified,[4] or been made the target of a timely and sufficient disqualification motion,[5] he immediately loses all jurisdiction in the matter except to grant the motion[6] and in some circumstances to make those orders necessary to effectuate the change.[7] Thus, a disqualified judge ordinarily may not rule on any further

§22.1 [1]*See, e.g.*, Urias v. Harris Farms, Inc., 234 Cal. App. 3d 415, 423, 285 Cal. Rptr. 659 (1991); St. Landry Homestead Assn. v. Bertrand, 497 So. 2d 31 (La. App. 1986). *Cf.* Whack v. Seminole Memorial Hosp., Inc., 456 So. 2d 561, 564 (Fla. App. 1984).

[2]*See* Stempel, Rehnquist, Recusal and Reform, 53 Brook. L. Rev. 589, 634 (1987). *Cf.* People in Interest of A.L.C., 660 P.2d 917, 918 (Colo. App. 1982).

[3]*See, e.g.*, Mixon v. Moye, 860 S.W.2d 209 (Tex. Ct. App. 1993); Thacker v. State, 563 N.E.2d 1307, 1309 (Ind. App. 1990); Martinez v. Carmona, 95 N.M. 545, 624 P.2d 54 (N.M. Ct. App. 1980), *writ quashed*, 95 N.M. 593, 624 P.2d 535. *Cf.* Ex parte Hill, 508 So. 2d 269, 271 (Ala. Civ. App. 1987) (once a judge has recused himself, a contention by the party opposing recusation that the motion does not state facts sufficient to support the judge's recusal is "beside the point").

[4]*See, e.g.*, State v. Purdy, 766 S.W.2d 476, 478 (Mo. App. 1989).

[5]*See, e.g.*, Cuyahoga Cty. Bd. of Mental Retardation v. Association of Cuyahoga Cty. Teachers of Trainable Retarded, 47 Ohio App. 2d 28, 351 N.E.2d 777 (1975).

[6]*See, e.g.*, Medawar v. Gaddis, 779 S.W.2d 323 (Mo. App. 1989); Patterson v. Butler, 187 Ga. App. 740, 371 S.E.2d 268, 269 (1988). *But see* State ex rel. Ramblin' Intl., Inc. v. Peters, 711 S.W.2d 597 (Mo. App. 1986) (when a court has a motion or other pending matter under consideration, an attempt to remove the judge does not destroy the court's power and jurisdiction to complete the pending matter).

[7]*See, e.g.*, People v. Banks, 213 Ill. App. 3d 205, 571 N.E.2d 935, 940 (1991).

motions,[8] at least where such rulings would involve an exercise of judicial discretion,[9] or issue any order that relates to the substantive merits of the case.[10] This is so even though a party may have moved for the requested relief before the judicial disqualification request was lodged.[11]

Likewise, except for good cause shown,[12] a disqualified judge may not preside over any subsequent proceedings in the case[13] or perform any other judicial actions with respect to it.[14] For example, a disqualified judge generally has no power to vacate a contingent fee agreement[15] or cite a party for contempt.[16]

In some jurisdictions, however, even after a judge has been disqualified, he retains the authority to rule on matters taken under submission and not ruled on before disqualification,[17] as well as to

[8]*See, e.g.*, State v. Purdy, 766 S.W.2d 476, 477 (Mo. App. 1989); Vilar v. Fenton, 382 S.E.2d 352, 353 (W. Va. 1989). *Cf.* Birt v. State, 255 Ga. 693, 342 S.E.2d 303, *rev'd on other grounds*, 256 Ga. 483, 350 S.E.2d 241 (1986).

[9]*See, e.g.*, Johnson v. District Court, 674 P.2d 952 (Colo. 1984) (it would be incongruous to permit a disqualified judge to rule on discretionary motions that affect the substantial rights of the parties). *See also* Kilgarlin & Bruch, Disqualification and Recusal of Judges, 17 St. Mary's L.J. 599, 634 (1986).

[10]*See, e.g.*, Moody v. Simmons, 858 F.2d 137, 143 (3d Cir. 1988), *reh'g denied, cert. denied*, 109 S. Ct. 1529, 103 L. Ed. 2d 835; Arnold v. Eastern Airlines, Inc., 712 F.2d 899 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 703; Minnesota State Bar Assn. v. Divorce Educ. Assn., 300 Minn. 323, 219 N.W.2d 920, *cert. denied*, 419 U.S. 1023, 95 S. Ct. 500, 42 L. Ed. 2d 297 (1974).

[11]*See, e.g.*, Vacura v. Haar's Equipment, Inc., 364 N.W.2d 387, 393 (Minn. 1985). *But see* Breazeale v. Kemna, 854 S.W.2d 631, 633 (Mo. App. 1993) ("[a] trial judge has no discretion but to grant a timely application for change of judge, except to rule on pre-trial motions which have already been submitted").

[12]Dunn v. County of Dallas, 794 S.W.2d 560, 562 (Tex. Ct. App. 1990).

[13]*See, e.g.*, Margulies v. Margulies, 528 So. 2d 957 (Fla. App. 1988); State ex rel. Johnson v. Mehan, 731 S.W.2d 887, 888 (Mo. App. 1987); State v. Smith, 106 Wis. 2d 17, 315 N.W.2d 343 (1982).

[14]*See, e.g.*, Moody v. Simmons, 858 F.2d 137, 138 (3d Cir. 1988) (once a judge has disqualified himself, or should have done so, he may not perform any judicial actions), *reh'g denied, cert. denied*, 109 S. Ct. 1529, 103 L. Ed. 2d 835; Adkins v. Winkler, 592 So. 2d 357 (Fla. App. 1992); Johnson v. District Court, 674 P.2d 952 (Colo. 1984); People v. Davis, 114 Ill. App. 3d 537, 449 N.E.2d 237, 239 (1983) (upon the filing of a motion that is in compliance with the applicable judicial disqualification provision, the trial judge loses all power and authority over the case except to make whatever orders are necessary to effectuate the substitution); Acadian Heritage Realty v. City of Lafayette, 425 So. 2d 388, 391 (La. App. 1982).

[15]Moody v. Simmons, 858 F.2d 137, 143 (3d Cir. 1988), *reh'g denied, cert. denied*, 109 S. Ct. 1529, 103 L. Ed. 2d 835.

[16]*See* Thacker v. State, 563 N.E.2d 1307, 1309 (Ind. App. 1990).

[17]*See, e.g.*, State v. Purdy, 766 S.W.2d 476, 477 (Mo. App. 1989).

perform certain limited functions with the consent of all parties.[18] In addition, while a disqualified judge is generally precluded from taking any further action in a case, jurisdiction lies in the court and not in any individual judge;[19] thus, judicial disqualification does not deprive the court itself of subject matter jurisdiction.[20] In the absence of a statute or constitutional provision to the contrary,[21] where one judge has been disqualified, the other judges of the court on which the disqualified judge sits ordinarily retain the authority to hear the matter unless and until they have either disqualified themselves or been properly challenged under the applicable judicial disqualification provisions.[22]

§22.2 Housekeeping Orders

Despite the general rule that a judge who has been disqualified from presiding over a case may take no further action in it, such a judge is ordinarily not prohibited from taking actions of a purely ministerial nature[1] or from entering "housekeeping orders";[2] where such ministerial actions have been taken or housekeeping orders have been issued,[3] they ordinarily are not deemed to invalidate the proceedings[4] unless actual bias[5] or prejudice to the complaining party can be shown.[6]

It is not always easy to tell, however, whether a particular action taken by a judge is a substantive action or a purely ministerial one.[7] For example, some doubt has been expressed as to whether a court's decision to issue an order on a matter that was tried or heard prior to disqualification is a judicial or ministerial act.[8]

[18] *See, e.g.*, Morgan v. State, 635 P.2d 472 (Alaska 1981), *appeal after remand*, 673 P.2d 897.

[19] *See, e.g.*, Winslow v. Williams, 749 P.2d 433, 436 (Colo. App. 1987) (an individual judge's lack of authority to determine substantive issues is not equivalent to a lack of subject matter jurisdiction), *cert. denied*, 109 S. Ct. 63, 102 L. Ed. 2d 40, *reh'g denied*, 109 S. Ct. 824, 102 L. Ed. 2d 813 (1989). *Cf.* Anderson v. Tucker, 68 F.R.D. 461, 463 (D. Conn. 1975) (the bias of a judge is not a question affecting jurisdiction); In re Marriage of Regnery, 214 Cal. App. 3d 1367, 1378, 263 Cal. Rptr. 243 (1989).

[20] *See generally* United States v. Will, 449 U.S 200, 212, 101 S. Ct. 471, 479, 66 L. Ed. 2d 392 (1980) ("[o]n its face, §455 provides for disqualification of individual judges under specified circumstances; it does not affect the jurisdiction of a court"); Ellentuck v. Klein, 570 F.2d 414 (2d Cir. 1978).

[21] *See* Lyon v. State, 764 S.W.2d 1, 1-2 (Tex. Ct. App. 1988).

[22] *See, e.g.*, Ex parte Holland, 807 S.W.2d 826, 828 (Tex. App. 1991) (if a judge of a court with continuing jurisdiction finds it necessary to disqualify himself, the proper procedure is generally to have another judge of that court preside rather than to transfer the case to a different court); City of Cleveland v. Willis, 63 Ohio Misc. 40, 410 N.E.2d 823, 826 (1980).

§22.2 [1] *See, e.g.*, United States v. Moody, 977 F.2d 1420, 1423 (11th Cir. 1992); Moody v. Simmons, 858 F.2d 137, 143 (3d Cir. 1988), *reh'g denied, cert. denied*, 109 S. Ct. 1529, 103 L. Ed. 2d 835 (the disqualified judge entered an order converting a Chapter 11 bankruptcy proceeding to Chapter 7 proceeding); People v. Banks, 213 Ill. App. 3d 205, 571 N.E.2d 935, 940 (1991); Evans v. Dayton Newspapers, Inc., 57 Ohio App. 3d 57, 566 N.E.2d 704, 706 (1989); In re Estate of Risovi, 429 N.W.2d 404, 406 (N.D. 1988); State v. Schrock, 149 Ariz. 433, 719 P.2d 1049 (1986); Glasgow v. State, 68 Tenn. 485 (1976). *Cf.* Fischer v. Knuck, 497 So. 2d 240, 243 (Fla. 1986) (when a judge has heard the testimony and rendered an oral ruling, he retains the authority to perform the ministerial act of reducing that ruling to writing; however, any substantive change in the judge's ruling would not be a ministerial act). *See generally* Kilgarlin & Bruch, Disqualification and Recusal of Judges, 17 St. Mary's L.J. 599, 633 (1986).

[2] *See, e.g.*, In re Cement Antitrust Litig., 673 F.2d 1020, 1024-1025 (9th Cir. 1982); Application of Scott, 379 F. Supp. 622, 624 (S.D. Tex. 1974). *Cf.* Cavanagh v. Cavanagh, 118 R.I. 608, 623, 375 A.2d 911, 918 (1977) (conferences on housekeeping items show neither a prejudicial state of mind nor a denial of a fair hearing).

[3] *See, e.g.*, Evans v. Dayton Newspapers, Inc., 57 Ohio App. 3d 57, 566 N.E.2d 704 (1989).

[4] *See, e.g.*, Steadman v. State, 806 S.W.2d 780, 785 (Tenn. Crim. App. 1990).

[5] *See* Stebbins v. White, 190 Cal. App. 3d 769, 784 n.9, 235 Cal. Rptr. 656 (1987).

[6] *See, e.g.*, Citizens Bank & Trust Co. v. Carr, 583 So. 2d 864, 865 (La. App. 1991); State v. Neeley, 748 P.2d 1091 (Utah 1988). *But see* In re Estate of Risovi, 429 N.W.2d 404, 407 (N.D. 1988) (a party seeking to set aside a judgment as void need not show a meritorious claim or defense).

[7] *See, e.g.*, Evans v. Dayton Newspapers, Inc., 57 Ohio App. 3d 57, 566 N.E.2d 704, 706 (1989) (a pretrial conference and follow-up pretrial orders were no more than ministerial actions).

[8] *Compare* Geldermann, Inc. v. Bruner, 229 Cal. App. 3d 662, 664-665 (1991) (holding that the process of moving from a tentative decision to a statement of decision is not a ministerial act, since the tentative decision is not binding on the court) *with* Airborne Cable Television, Inc. v. Storer Cable TV of Fla., Inc., 596 So. 2d 117 (Fla. App. 1992) (holding that a trial judge may not rule on a pending motion even though the court had heard evidence and argument of counsel where the court has not indicated its decision prior to the disqualification motion being presented to the court). *Cf.* Lanford v. Fourteenth Court of Appeals, 847 S.W.2d 581, 586 n.5 (Tex. Ct. App. 1993) (noting that a so-called "discretionary" function may become a "ministerial" one when the facts and circumstances dictate but one rational conclusion); Loevinger v. Northrup, 624 So. 2d 374, 376 (Fla. App. 1993).

§22.3 Actions Relating to the Transfer of the Case

§22.3.1 Introduction

While some jurisdictions permit a disqualified judge to perform certain duties incidental to transferring the case to another judge,[1] the act of selecting a successor is typically not thought of as being ministerial in nature. Consequently, proper procedure ordinarily requires that a disqualified judge should not attempt to intervene in the selection of his successor[2] or give unsolicited advice to another judicial officer about how to decide the case,[3] much less assign it to another judge.[4] On the contrary, once a judge has been disqualified, he should ordinarily step aside and allow the normal administrative process of the court to assign the case to another judge.[5]

§22.3.2 Rationale for the Rule

The reasons for the rule prohibiting a disqualified judge from having any input into the reassignment of the case are plain. To per-

§22.3 [1]*See, e.g.*, Moody v. Simmons, 858 F.2d 137, 143 (3d Cir. 1988), *reh'g denied, cert. denied*, 109 S. Ct. 1529, 103 L. Ed. 2d 835; Helton Constr. Co., Inc. v. Thrift, 865 S.W.2d 419, 422 (Mo. App. 1993); People v. Marshall, 629 N.E.2d 64, 70 (Ill. App. 1993). *Cf.* In re Aetna Cas. & Sur. Co., 919 F.2d 1136, 1145 (6th Cir. 1990) (even where a judge is disqualified, his order need not be vacated where such order was ministerial only and was necessary to transfer the case to another judge).

[2]*See, e.g.*, 20 Okla. Stat. Supp. 1980 ch. 1, app. 2, rule 9 (no judicial officer who has disqualified himself, been requested to disqualify himself, or ordered disqualified in a case shall participate in the selection of another judicial officer for assignment to that case). *See also* Beckford v. District Court, 698 P.2d 1323, 1329 n.7 (Colo. 1985) (it would be incongruous to permit a disqualified judge to pick his successor to decide the case); Arnett v. State, 638 P.2d 1133 (Okla. Crim. 1982).

[3]*See* Gubler v. Commission on Judicial Performance, 37 Cal. 3d 27, 54, 207 Cal. Rptr. 171, 688 P.2d 551 (1984) (if a disqualified judge was permitted to circumvent disqualification by initiating advice to another judicial officer on how to decide the matter, the right to disqualify a judge would be undermined).

[4]*See, e.g.*, In re Marriage of Fifi, 776 P.2d 1167, 1168 (Colo. App. 1989); Cuyahoga Cty. Bd. of Mental Retardation v. Association of Cuyahoga Cty. Teachers of Trainable Retarded, 47 Ohio App. 2d 28, 351 N.E.2d 777 (1975) (if a judge cannot lawfully exercise any judicial function in a case, neither can he validly appoint an agent to act in his stead nor can the agent acquire any legitimate power through any purported appointment by that particular judge).

[5]United States v. Will, 449 U.S. 200, 213, 101 S. Ct. 471, 66 L. Ed. 2d 392 (1980).

mit a disqualified judge to participate in the selection of his successor judge would violate the rule that a disqualified judge must be removed from all participation in the case, and might also create suspicion that the disqualified judge will select a successor whose views are consonant with his.[6]

§22.3.3 Procedure Where Judge Has Been Disqualified

Once a judge has been disqualified, the case is ordinarily referred back to the clerk of the applicable court for random reassignment.[7] In some jurisdictions, however, when an assigned judge has been disqualified, a special judge may be appointed,[8] or a designated procedure may exist for determining the judge to whom the case should be reassigned.[9]

§22.4 Actions by Disqualified Judge

§22.4.1 Void Orders

When a judge presumes to take substantive action in a case despite having recused himself from it,[1] or after he should have recused himself but did not,[2] any such action is often considered a

[6]McCuin v. Texas Power & Light Co., 538 F. Supp. 311, 317 (E.D. Tex. 1982) ("Congress intended the statutory antisepsis to be absolute in order to avoid any bacterium of impugnment"), *case remanded*, 714 F.2d 1255 (5th Cir. 1983).

[7]Stempel, Rehnquist, Recusal and Reform, 53 Brook. L. Rev. 589, 633-634 (1987).

[8]*See, e.g.*, Thacker v. State, 563 N.E.2d 1307, 1309 (Ind. App. 1990) (in Indiana the proper procedure to follow after disqualification is the certification for appointment of a special judge).

[9]*See, e.g.*, State v. Evans, 187 Ga. App. 649, 371 S.E.2d 432, 434 (1988) (in Georgia, the chief judge of the requesting circuit is required to make a written request to the chief judge of the circuit receiving the request who, in turn, should designate the replacement judge).

§22.4 [1]*See, e.g.*, Woods v. Durkin, 183 Ill. App. 3d 870, 539 N.E.2d 920, 923 (1989).

[2]*See, e.g.*, In re Darnell J., 196 Ill. App. 3d 510, 554 N.E.2d 313, 316 (1990); City of Hanford v. Superior Court, 208 Cal. App. 3d 580, 589, 256 Cal. Rptr. 274 (1989).

nullity[3] and any orders issued by such a judge are considered absolutely void[4] for want of jurisdiction.[5]

Generally, void orders or judgments are subject to reversal and redetermination[6] and may be set aside by the court on its own motion.[7] Such orders may also be subject to collateral attack[8] upon application,[9] whenever they are brought into question[10] at any time prior to final judgment.[11]

[3] *See, e.g.*, Discovery Operating, Inc. v. Baskin, 855 S.W.2d 884, 888 (Tex. Ct. App. 1993); State v. Evans, 187 Ga. App. 649, 371 S.E.2d 432, 433 (1988); Jahnke v. Moore, 112 Idaho 944, 737 P.2d 465, 466 (1987).

[4] *See, e.g.*, State v. Ware, 115 N.M. 339, 850 P.2d 1042, 1045 (N.M. Ct. App. 1993); People v. Banks, 213 Ill. App. 3d 205, 571 N.E.2d 935, 940 (1991); Crawford v. State, 807 S.W.2d 597, 598 (Tex. App. 1991); Barber v. MacKenzie, 562 So. 2d 755, 757 (Fla. App. 1990); State v. American TV and Appliance of Madison, Inc., 151 Wis. 2d 175, 443 N.W.2d 662, 663 (1989); State v. Purdy, 766 S.W.2d 476, 477 (Mo. App. 1989); Beckford v. District Court, 698 P.2d 1323, 1330 (Colo. 1985); State v. Nossaman, 63 Or. App. 789, 666 P.2d 1351 (1983). *But cf.* Hull and Smith Horse Vans, Inc. v. Carras, 144 Mich. App. 712, 376 N.W.2d 392, 395 (1985) (where the assigned judge disqualified the trial judge because of a possible appearance of impropriety, but expressly found no reason to doubt the trial judge's statement that he could sit on the matter and serve impartially, the basis for disqualification was not so serious as to render the judge's prior rulings void), *cert. denied*, 479 U.S. 822, 107 S. Ct. 91, 93 L. Ed. 2d 43.

[5] *See, e.g.*, Guedalia v. Superior Court, 211 Cal. App. 3d 1156, 1161, 260 Cal. Rptr. 99 (1989). *Cf.* Cuyahoga Cty. Bd. of Mental Retardation v. Association of Cuyahoga Cty. Teachers of Trainable Retarded, 47 Ohio App. 2d 28, 351 N.E.2d 777 (1975); State v. Price, 274 So. 2d 194 (La. 1973).

[6] *See, e.g.*, Teehee v. Teehee, 798 P.2d 1095, 1096 (Okla. App. 1990); State v. Evans, 187 Ga. App. 649, 371 S.E.2d 432, 433 (1988); People v. Ash, 131 Ill. App. 3d 644, 476 N.E.2d 13, 15 (1985) (where defendant filed a timely and proper motion for substitution that was erroneously denied, his conviction must be reversed and the cause remanded for a new trial). *Cf.* Urias v. Harris Farms, Inc., 234 Cal. App. 3d 415, 424 (1991) (a party who seeks to declare a judgment void on the ground that the judge who rendered such judgment was disqualified must ordinarily allege and prove facts that clearly show that such disqualification existed). *See also* Cool Light Co., Inc. v. GTE Prods. Corp., 832 F. Supp. 449, 459 (D. Mass. 1993) (and citations therein).

[7] *See, e.g.*, Betz v. Pankow, 16 Cal. App. 931, 938, 20 Cal. Rptr. 2d 841 (1993).

[8] *See, e.g.*, Winslow v. Williams, 749 P.2d 433, 436 (Colo. App. 1987) (a judgment entered without jurisdiction is void and may be attacked in a collateral proceeding), *cert. denied*, 109 S. Ct. 63, 102 L. Ed. 2d 40, *reh'g denied*, 109 S. Ct. 824 (1989); Ex parte Miller, 696 S.W.2d 908, 910 (Tex. Crim. App. 1985).

[9] *See, e.g.*, In re Aetna Cas. & Sur. Co., 919 F.2d 1136, 1145 (6th Cir. 1990); New York City Dev. Corp. v. Hart, 796 F.2d 976, 979 (7th Cir. 1986); Starnes v. Chapman, 793 S.W.2d 104, 107 (Tex. Ct. App. 1990). *But cf.* Barber v. MacKenzie, 562 So. 2d 755, 756 (Fla. App. 1990) (under the common law it was required that the acts of a disqualified judge be moved against promptly; otherwise the right would be lost).

[10] *See, e.g.*, Urias v. Harris Farms, Inc., 234 Cal. App. 3d 415, 423, 285 Cal. Rptr. 659 (1991) (and cases cited therein).

[11] In re Christian J., 155 Cal. App. 3d 276, 280, 202 Cal. Rptr. 54 (1984).

§22.4.2 Voidable Orders

Though in many jurisdictions orders that have been rendered by a disqualified judge are deemed to be void, some courts in other jurisdictions have indicated that constitutional provisions, statutory provisions, and court rules pertaining to judicial disqualification do not necessarily render the actions and orders of a disqualified judge void in any fundamental sense. At most, such actions or orders are rendered voidable[12] if objections to the disqualified judge acting in the case are raised by an interested party[13] in a court that has subject matter jurisdiction[14] in a proper[15] and timely[16] fashion.

Unlike void orders, which are usually considered to be absolute nullities, voidable orders are generally deemed to be binding on the parties unless and until they have been vacated by the trial court or reversed by an appellate court.[17] Such orders are ordinarily not susceptible to collateral attack.[18]

[12] *See, e.g.*, Betz v. Pankow, 16 Cal. App. 931, 938, 20 Cal. Rptr. 2d 841 (1993) (and cases cited therein); Regional Sales Agency, Inc. v. Reichert, 830 P.2d 252, 260 (Utah App. 1992) (Howe, Associate C.J., dissenting); Barber v. MacKenzie, 562 So. 2d 755, 756 (Fla. App. 1990); Wilson v. State, 521 N.E.2d 363, 365 (Ind. App. 1988) (the rulings a disqualified judge makes are not void per se but simply voidable); City of Bedford v. Lacey, 30 Ohio App. 3d 1, 506 N.E.2d 224, 226 n.1 (1985). *Cf.* New York City Dev. Corp. v. Hart, 796 F.2d 976, 978-979 (7th Cir. 1986) (even if a judge errs in failing to disqualify himself promptly, the error does not call into question the substantive decisions of the court); Guedalia v. Superior Court, 211 Cal. App. 3d 1156, 1161 n.3, 260 Cal. Rptr. 99 (1989); Buckholts Independent School Dist. v. Glaser, 632 S.W.2d 146 (Tex. 1982) (the legislature did not intend that disqualification would make all of a judge's actions void).

[13] Polaroid Corp. v. Eastman Kodak Co., 867 F.2d 1415, 1418-1419 (Fed. Cir. 1989), *cert. denied*, 109 S. Ct. 1956, 104 L. Ed. 2d 425.

[14] *See, e.g.*, Betz v. Pankow, 16 Cal. App. 931, 938 20 Cal. Rptr. 2d 841 (1993).

[15] *See, e.g.*, Stebbins v. White, 190 Cal. App. 3d 769, 782, 235 Cal. Rptr. 656 (1987).

[16] Liljeberg v. Health Servs. Acquisitions Corp., 486 U.S. 847, 108 S. Ct. 2194, 2205-2207, 100 L. Ed. 2d 855 (1988).

[17] *See, e.g.*, Winslow v. Williams, 749 P.2d 433, 436 (Colo. App. 1987), *cert. denied*, 109 S. Ct. 63, 102 L. Ed. 2d 40, *reh'g denied*, 109 S. Ct. 824, 102 L. Ed. 2d 813 (1989).

[18] *See, e.g.*, Barber v. MacKenzie, 562 So. 2d 755, 756 (Fla. App. 1990); Winslow v. Williams, 749 P.2d 433, 436 (Colo. App. 1987), *cert. denied*, 109 S. Ct. 63, 102 L. Ed. 2d 40, *reh'g denied*, 109 S. Ct. 824, 102 L. Ed. 2d 813 (1989).

§22.4.3 *Rationale for Holding That Orders Issued by a Disqualified Judge Are Merely Voidable*

One reason for holding that orders issued by a disqualified judge are voidable rather than void is that an order is generally considered to be a nullity only when it has been issued by a judge who "lacks jurisdiction" to render such an order, and it is not clear that disqualification deprives a judge of jurisdiction in the fundamental sense of divesting him of the judicial power or authority to issue rulings or orders.[19] Indeed, while jurisdiction, in the strictest sense of that term, usually cannot be conferred by the parties to a proceeding, the jurisdiction of an otherwise disqualified judge is often subject to principles of remittal,[20] consent,[21] and waiver.[22]

Another problem with decreeing that the orders of disqualified judges are absolutely void stems from the fact that it is not always clear when a judge has disqualified himself, much less when he should have done so.[23] There are also some practical reasons for holding that orders issued by disqualified judges are merely voidable rather than void. For one thing, it is generally agreed that judges are free to vacate orders they have issued, including orders of disqualification,[24]

[19] In re Christian J., 155 Cal. App. 3d 276, 279, 202 Cal. Rptr. 54 (1984). *Cf.* Urias v. Harris Farms, Inc., 234 Cal. App. 3d 415, 424, 285 Cal. Rptr. 659 (1991).

[20] *See* Beer v. Griffith, 54 Ohio St. 2d 440, 377 N.E.2d 775, 777 (1978) (Locher, J., dissenting) (absent a written remittal, where the entire proceedings are suffused by a proscribed relationship, the entire proceedings should be deemed void). *Cf.* FDIC v. O'Malley, 249 Ill. App. 3d 340, 618 N.E.2d 818, 834 (1993).

[21] In re Christian J., 155 Cal. App. 3d 276, 279, 202 Cal. Rptr. 54 (1984).

[22] *See, e.g.*, Stebbins v. White, 190 Cal. App. 3d 769, 782, 235 Cal. Rptr. 656 (1987).

[23] *Compare* In re Lieb, 112 B.R. 830, 834 n.5 (Bankr. W.D. Tex. 1990) (the trial judge offered to recuse himself and indicated that, if the parties would not agree to waive the problem, he would "be out of the case in a New York nano-second"; the appellate court, however, concluded that a judge's decision as to whether he should recuse himself is "not a matter of contract law" and that "offer and acceptance" principles do not apply) *with* Dunn v. County of Dallas, 794 S.W.2d 560, 562 (Tex. Ct. App. 1990) (holding that a letter from the trial judge manifesting an intention to recuse himself was "a clear and unequivocal act" of the court).

[24] *See, e.g.*, United States v. Dalfonso, 707 F.2d 757 (3d Cir. 1983) (following an off-record conversation with counsel, the trial judge announced that he was recusing himself from the case; however, after further reflection, he changed his mind and vacated his recusal order); Hutchinson by Hutchinson v. Luddy, 611 A.2d 1280, 1288 (Pa. Super. 1992) ("[a] court has inherent power to reconsider its own rulings"). *But see* Deberry v. Ward, 625 So. 2d 992 (Fla. App. 1993) ("[a] judge may not reconsider

at least for some period of time.[25] Even if judicial disqualification were deemed to deprive a judge of "jurisdiction" in the fundamental sense, it is not entirely clear at what point a disqualified judge may be said to have become divested of such jurisdiction. In addition, a contrary rule could present problems with respect to the finality of judgments by allowing a party to overturn a judgment rendered months or even years earlier on the basis of a mere appearance of bias.[26] Indeed, a rule decreeing that any order issued by a disqualified judge is absolutely void could provide the challenging party with an intolerable windfall. If the judgment he ultimately receives is favorable, he has prevailed and the issue is moot; however, if the judgment is unfavorable, the judgment is "void" and he has lost nothing.[27] Such a rule could also work a hardship on the moving party's adversary who, because of the action or inaction of a judge, might be deprived of a judgment he has won fairly.[28]

However, while there are some sound reasons for holding that orders issued by disqualified judges are merely voidable rather than void, such a rule is not without its own problems. For example, since there are no hard and fast rules governing the time within which a request to vacate a voidable order must be made, it may be extremely difficult to determine as a practical matter how soon a party must have acted to vacate such an order to have done so in time.[29]

his decision to disqualify"); Thacker v. State, 563 N.E.2d 1307, 1309 (Ind. App. 1990) (a judge's vacating of his prior grant of a petition for relief is improper).

[25] *See* Micro/Vest Corp. v. Superior Court, 150 Cal. App. 3d 1085, 1090, 198 Cal. Rptr. 404 (1984).

[26] Health Servs. Acquisition Corp. v. Liljeberg, 796 F.2d 796, 802 (5th Cir. 1986), *reh'g denied*, 800 F.2d 262, *cert. granted*, 480 U.S. 915, 107 S. Ct. 1368, 94 L. Ed. 2d 684, *aff'd*, 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988).

[27] *See, e.g.*, Guedalia v. Superior Court, 211 Cal. App. 3d 1156, 1162, 260 Cal. Rptr. 99 (1989) (an unsuccessful challenge to a judge would provide "two bites at the apple").

[28] *See, e.g.*, Madsen v. Prudential Fed. Sav. and Loan Assn., 767 P.2d 538, 544 (Utah 1988) (plaintiffs contended that a Code violation should not result in a penalty to an innocent party who may have expended large amounts of time and money only to have a large part of the lawsuit invalidated because of a judge's disqualification).

[29] *See* Polaroid Corp. v. Eastman Kodak Co., 867 F.2d 1415, 1419 (Fed. Cir. 1989), *cert. denied*, 109 S. Ct. 1956, 104 L. Ed. 2d 425. *Also compare* United States v. Kelley, 712 F.2d 884, 887-888 (1st Cir. 1983) (an objection was deemed to be untimely when it was made three months after the complaining party learned of the basis for disqualification) *with* United States v. Conforte, 624 F.2d 869, 879 (9th Cir. 1980) (the complaining party learned the facts pretrial, but made its motion post-trial), *cert. denied*, 449 U.S. 1012, 101 S. Ct. 568, 66 L. Ed. 2d 470.

§19.10 Burden to Disclose Grounds for Disqualification

§19.10.1 *Introduction*

In some cases the issue is not whether the judge should have disqualified himself, but whether he should have disclosed material facts to the parties that would have permitted them to make an informed decision as to whether to request that he step aside.[1] While it is ordinarily the burden of the party who challenges a judge's qualification to sit to adduce evidence that is legally sufficient to support its challenge, parties ordinarily have no duty to doubt a judge's impartiality or to ferret out whether there may exist some fact — known to the judge, but unknown to the parties — that might warrant such relief.[2] On the contrary, the judge is ordinarily obliged to disclose to the parties those facts that would be relevant to the parties and their counsel in considering whether to file a judicial disqualification motion.[3]

Some courts have espoused the view that, should a judge feel that a matter is of sufficient concern that it ought to be revealed to the parties, the necessary implication is that he feels it is one that could reasonably lead the parties to question his impartiality; in this view, where a party requests that the judge disqualify himself on the basis of what he has disclosed, the judge may be duty-bound to step

§19.10 [1] *See, e.g.*, Forsmark v. State, 349 N.W.2d 763 (Iowa 1984).

[2] *See, e.g.*, Gulf Maritime Warehouse Co. v. Towers, 858 S.W.2d 556, 562 (Tex. Ct. App. 1993). *Cf.* Regional Sales Agency, Inc. v. Reichert, 830 P.2d 252, 257 n.7 (Utah App. 1992) (noting that the objections of the dissenting chief justice "foist the burden to disqualify the judge onto counsel," and adding that courts should not require counsel to display a detailed grasp of judicial genealogies); State v. Carlson, 66 Wash. App. 909, 833 P.2d 463, 466 (1992) (counsel is not expected to monitor Public Disclosure Commission filings every day).

[3] *See, e.g.*, In re Fiftieth Dist. Court Judge, 193 Mich. App. 209, 483 N.W.2d 676, 679 (1992) (in matters in which a judge has a financial interest with a law firm appearing before him that is more than de minimis, the judge has a duty to disclose the relationship on the record and to recuse unless the parties ask the judge to proceed); Urias v. Harris Farms, Inc., 234 Cal. App. 3d 415, 425, 285 Cal. Rptr. 659 (1991). *Cf.* Reilly v. Southeastern Pa. Transp. Auth., 330 Pa. Super. 420, 479 A.2d 973, 988 (1984) (if a legally recognized ground for disqualification exists, it is the judge who has the burden of either recusing himself sua sponte or disclosing to the parties the disqualifying ground and then presiding only if no party objects to his participation), *vacated on other grounds*, 507 Pa. 204, 489 A.2d 1291 (1985).

down.[4] While a rule that would equate disclosure with disqualification has some superficial appeal, adopting such a rule on a universal basis would pose a serious practical dilemma for the trial bench.[5]

§19.10.2 *Reasons for Rule Requiring Judges to Disclose Grounds for Disqualification*

Judges who are aware of possible grounds for their disqualification must disclose them because members of the judiciary are charged with a duty to know what their own interests are and to avoid intermingling those interests with litigation that is pending before them.[6] In addition, if the rule were otherwise, the parties or their counsel would be obliged in each instance in which bias was suspected to undertake a factual investigation of the judge in order to unearth possible reasons for objecting to his participation. Apart from the fact that it is not entirely clear what procedures would be available for gathering such information, the process of doing so would be undesirable; it would necessarily transform the judge from a neutral presiding officer into an adversary — or at least a potential adversary — of the investigating party.[7]

§19.10.3 *Grounds for Disqualification Not Disclosed*

If a judge fails to disclose facts that suggest the existence of a substantial and serious issue concerning his duty to disqualify himself and, as a result, the parties were denied an opportunity to raise the

[4] *See, e.g.*, Pool Water Prods. v. Pools By L.S. Rule, 612 So. 2d 705, 706 (Fla. App. 1993); Richard v. Richard, 146 Vt. 286, 501 A.2d 1190, 1191 (1985) (if a relationship is substantial enough to merit disclosure by the judge and invite a motion for recusal, when such a motion is made the disclosing judge should as a general rule disqualify himself).

[5] *See* Pool Water Prods. v. Pools By L.S. Rule, 612 So. 2d 705, 707 (Fla. App. 1993).

[6] Gulf Maritime Warehouse Co. v. Towers, 858 S.W.2d 556, 562 (Tex. Ct. App. 1993).

[7] *See* Commonwealth v. Hammer, 508 Pa. 88, 494 A.2d 1054, 1059 (1985) (it would indeed be a contemptible system that required counsel to ferret out the potential conflicts of interest residing, for example, in a judge's financial interests in order to obtain the judge's disqualification; that duty resides expressly with the judge).

issue or be heard on it, this failure may be deemed to warrant reversal of any judgment rendered by that judge.[8]

§19.10.4 *Possible Voir Dire of the Judge*

Though a judge has the burden of making disclosure to the parties, she is ordinarily required to disclose only the basis for disqualification — not every incident or factual detail that might contribute to the overall impression of bias.[9] Furthermore, the applicable judicial disqualification provisions generally contemplate voluntary disclosure rather than compulsory discovery from the judge.[10] Thus, parties are not entitled to extract blood oaths from trial judges attesting to their fairness.[11]

Permitting voir dire of a judge every time the possibility of bias could arise within the course of a proceeding would effectively emasculate the presumption of impartiality that is typically bestowed on the judiciary and would also subject the orderly function of the judicial system to repeated attacks and unwarranted disrepute.[12] Therefore, a litigant ordinarily may not require an unwilling judge to disclose facts or opinions that might be germane to a judicial disqualification application[13] or to an appeal seeking to set

[8] *See, e.g.*, Forsmark v. State, 349 N.W.2d 763 (Iowa 1984).

[9] *See, e.g.*, Hall v. Small Business Administration, 695 F.2d 175, 180 (5th Cir. 1983); United States v. Conforte, 457 F. Supp. 641, 655 (D. Nev. 1978), *aff'd*, 624 F.2d 869 (9th Cir. 1980), *cert. denied*, 499 U.S. 1012, 101 S. Ct. 568, 66 L. Ed. 2d 470.

[10] *See, e.g.*, Cheeves v. Southern Clays, Inc., 797 F. Supp. 1570, 1582 (M.D. Ga. 1992).

[11] People v. Mercado, 244 Ill. App. 3d 1040, 614 N.E.2d 284, 290 (1993). *Cf.* Cheeves v. Southern Clays, Inc., 797 F. Supp. 1570, 1575 n.8 (M.D. Ga. 1992) (a party's disqualification motion was accompanied by written interrogatories addressed to the three judges of the district).

[12] State v. Rossi, 154 Ariz. 245, 741 P.2d 1223, 1226 (1987). *Cf.* State v. Cruz, 517 A.2d 237, 241 n.1 (R.I. 1986).

[13] *See, e.g.*, Cheeves v. Southern Clays, Inc., 797 F. Supp. 1570, 1578-1579 (M.D. Ga. 1992) (there is simply no precedent for deposing the presiding judge pursuant to compulsory process in aid of a motion to disqualify; for a number of practical as well as legal and policy considerations, there is no need or justification for such a procedure); State v. Stanley, 167 Ariz. 519, 809 P.2d 944, 952 (1991) ("a request to voir dire a judge based upon the mere possibility of bias, without more, is not encompassed within the Constitutional right to a fair trial before an impartial judge"); State v. Garner, 799 S.W.2d 950, 955 (Mo. App. 1990) (it is not permissible for a defendant to probe the trial judge's mind about possible bias when the record is devoid of any reasonable basis for such inquiry); Garcia v. Superior Court, 156 Cal. App. 3d 670, 681, 203 Cal. Rptr. 290 (1984) ("[a] defendant's right to a

aside a sentence on the ground of bias,[14] even in a death penalty case.[15]

Moreover, there are practical impediments to permitting parties to obtain compulsory discovery from judges regarding their impartiality. For one thing, such discovery would tend to embroil the judge in the adversarial processes of a case — a prospect that is not only unseemly but would likely give rise to an appearance of bias against the initiating litigant.[16] In addition, pursuant to the Federal Rules of Evidence as well as a number of analogous state provisions, the judge who presides over a trial is forbidden to testify in that trial as a witness.[17] The word "trial" has sometimes been deemed broad enough to encompass any evidentiary hearing conducted within the framework of a case, including a hearing on a judicial disqualification motion.[18]

While a party may not be able to compel discovery regarding a judge's alleged bias in aid of a motion to disqualify, this fact does not necessarily mean that, should the disqualification motion be denied, the aggrieved party is without any recourse. On the contrary, the party who does not prevail on such a motion is ordinarily permitted to appeal the judge's ruling; when it does, the appellate court may remand for further factual development of the record if such develop-

fair and impartial trial, guaranteed as an element of due process, does not mandate such an intrusive inquiry"). *Cf.* Cool Light Co., Inc. v. GTE Prods. Corp., 832 F. Supp. 449 (D. Mass. 1993). *See generally* Leubsdorf, Theories of Judging and Judge Disqualification, 62 N.Y.U. L. Rev. 237, 242 (1987) (litigants must therefore rely on the judge's acts and statements and on whatever their counsel may glean from newspaper articles and gossip); Stempel, Rehnquist, Recusal and Reform, 53 Brook. L. Rev. 589, 633 (1987) ("many litigants do not press the issue, and most judges probably prefer it that way in order to save time or potential embarrassment"). *But see* Health Servs. Acquisition Corp. v. Liljeberg, 796 F.2d 796 (5th Cir. 1986), *reh'g denied*, 800 F.2d 262, *cert. granted*, 480 U.S. 915, 107 S. Ct. 1368, 94 L. Ed. 2d 684, *aff'd*, 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988) (during the proceedings on remand, apparently the presiding judge voluntarily submitted to the taking of his deposition).

[14] *See, e.g.*, State v. Laughlin, 508 N.W.2d 545, 547 (Minn. App. 1993) ("[a] judge's state of mind cannot be explored by a litigant, as can a prospective juror's attitudes at voir dire").

[15] State v. West, 176 Ariz. 432, 862 P.2d 192, 213 (1993).

[16] *See* Cheeves v. Southern Clays, Inc., 797 F. Supp. 1570, 1582-1583 (M.D. Ga. 1992).

[17] *See* Fed. R. Evid. 605.

[18] *See* Cheeves v. Southern Clays, Inc., 797 F. Supp. 1570, 1582 (M.D. Ga. 1992).

ment is found to be necessary to the making of the ultimate decision on review.[19]

§19.11 Judge Seeks Advice in Deciding Motion

The disqualification decision is one that the challenged judge ordinarily should — and, in some jurisdictions, must — make personally.[1] Nevertheless, before deciding a disqualification motion, judges have sometimes solicited opinions as to the propriety of disqualification in the circumstances of the case either from an ethical advisory body[2] or from the parties or counsel themselves.[3]

Though seeking the advice of an independent ethical organization is not proscribed per se, judges should generally refrain from asking the parties or their counsel for their views on issues of judicial disqualification. The judge does not need the approval of the parties or counsel to preside;[4] moreover, the practice of asking the participants in a legal proceeding to indicate whether they approve or disapprove of a judge's continued involvement in a case is fraught with potentially coercive elements that make this practice undesirable.[5]

Generally, a judge should neither state for the record possible disqualifying circumstances and then ask the parties[6] or their counsel[7] to decide whether they want him to continue[8] nor require the parties to join in a motion that he disqualify himself.[9] Even an offer by a judge to recuse himself immediately if any party so desires may be deemed improper because that is a decision that the litigants should not be forced to make.[10] The better practice is that the judge disclose the details that he deems significant, then make a decision "by his own lights,"[11] letting the parties and counsel speak or keep silent as they will.[12]

Where a challenged judge fails to heed this admonition, he may be required to step aside.[13] It should be noted, however, that some judges continue to ask the parties or their counsel to submit their views as to the propriety of judicial disqualification in the circumstances of the case.[14]

[19] *Id.* at 1583.

§19.11 [1] *See, e.g.*, Liberty Lobby, Inc. v. Dow Jones & Co., Inc., 838 F.2d 1287, 1301 (D.C. Cir. 1988) ("[i]n the end, disqualification is a highly personal decision"), *cert. denied*, 109 S. Ct. 75, 102 L. Ed. 2d 51.

[2] *See, e.g.*, In re National Union Fire Ins. Co. of Pittsburgh, 839 F.2d 1226, 1228 (7th Cir. 1988).

[3] *See, e.g.*, Schurz Communications, Inc. v. FCC, 982 F.2d 1057, 1059 (7th Cir. 1992); National Union Fire Ins. Co. of Pittsburgh, Pa. v. Continental Ill. Corp., 639 F. Supp. 1229 (N.D. Ill. 1986). *Cf.* Keeton v. American Tel. & Tel. Co., 836 F. Supp. 171, 181 (S.D.N.Y. 1993).

[4] Hewlett-Packard Co. v. Bausch & Lomb Inc., 882 F.2d 1556, 1569 (Fed. Cir. 1989).

[5] *See* Resolution L of the Judicial Conference of the United States, Interest in Litigation (adopted October 1971). *See also* In re Tip-Pa-Hans Enterprises, Inc., 27 B.R. 780, 785 (Bankr. W.D. Va. 1983). *But cf.* In re National Union Fire Ins. Co. of Pittsburgh, 839 F.2d 1226, 1231 (7th Cir. 1988) (any transgression against the policies underlying Resolution L is not itself a ground for disqualification).

[6] United States ex rel. Britz v. Thieret, 737 F. Supp. 59, 60 (C.D. Ill. 1990). *Cf.* Andros Compania Maritima, S.A. of Kissavos v. Marc Rich & Co., A.G., 579 F.2d 691, 699 (2d Cir. 1978).

[7] People v. Taylor, 126 Misc. 2d 537, 482 N.Y.S.2d 968, 971 (1984) (a judge should reach his own determination as to whether he should recuse himself from a particular case without calling on counsel to express their views as to the desirability of his remaining in the case).

[8] *See, e.g.*, Hewlett-Packard Co. v. Bausch & Lomb, Inc., 882 F.2d 1556, 1569 (Fed. Cir. 1989); In re National Union Fire Ins. Co., 839 F.2d 1226, 1230 (7th Cir. 1988).

[9] In re Conduct of Jordan, 290 Or. 669, 624 P.2d 1074 (1981).

[10] Wernowsky v. Economy Fire & Cas. Co., 122 Ill. App. 3d 891, 461 N.E.2d 628, 630 (1984), *aff'd*, 106 Ill. 2d 49, 477 N.E.2d 231.

[11] Little Rock School Dist. v. Arkansas Bd. of Educ., 902 F.2d 1289, 1291 (8th Cir. 1990).

[12] In re National Union Fire Ins. Co. of Pittsburgh, 839 F.2d 1226, 1231 (7th Cir. 1988).

[13] Wernowsky v. Economy Fire & Cas. Co., 122 Ill. App. 3d 891, 461 N.E.2d 628, 630 (1984), *aff'd*, 106 Ill. 2d 49, 477 N.E.2d 231.

[14] *See, e.g.*, United States ex rel. Britz v. Thieret, 737 F. Supp. 59, 60 (C.D. Ill. 1990).