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# Current Issues in Judicial Disqualifications Symposium 2011

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# Current Issues in Judicial Disqualifications

Michael W. Martin\*

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## I. INTRODUCTION

In connection with the January 2011 Annual Meeting of the Association of American Law Schools (AALS) held in San Francisco, California, the AALS Section on Litigation (Litigation Section) sponsored a panel discussion on “Current Issues in Judicial Disqualification” (the Program). The AALS Sections on Professional Responsibility and Civil Procedure co-sponsored the Program, which featured a call for papers—the winners of which follow here.

Our judicial branch of government is critical to the nation’s stability, and its legitimacy has allowed it to weigh in on many of this country’s most divisive issues, not the least of which being *Bush v. Gore*,<sup>1</sup> the United States Supreme Court decision that effectively decided the 2000 presidential election. However, the legitimacy of our judicial branch depends on the impartiality of our judges.

Ten years ago, the Litigation Section spotlighted judicial bias in its 2001 annual program when it questioned the impartiality of the Louisiana Supreme Court. The court limited Louisiana’s law student practice rule, effectively barring the Tulane University Law School’s Environmental Clinic (Tulane Clinic) from representing community groups that had successfully blocked construction of chemical plants

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1. 531 U.S. 98 (2000).

in low-income, largely African-American communities overburdened with environmentally hazardous businesses.<sup>2</sup> The Tulane Clinic's success in a string of such representations mobilized the business community, which heavily contributed to the electoral campaigns of the popularly elected Louisiana Supreme Court justices. The business community lobbied heavily for a change to the student practice rule.<sup>3</sup> A classic follow-the-money chart could then be drawn from the business lobbyists to the chambers of the chief justice of the Louisiana Supreme Court, who then changed the student practice rule in Louisiana to effectively bar the Tulane Clinic from representing these types of communities.<sup>4</sup> The Tulane Clinic case spotlighted how campaign contributions could create an appearance of bias in a judiciary reliant on such funds for re-election. More generally, it cast doubt on judges' impartiality and whether judges can be trusted to step aside if their impartiality could reasonably be called into question.

The media attention on this<sup>5</sup> and other examples of judges acting with apparent questionable impartiality<sup>6</sup> has helped fuel a potential crisis in the public's confidence in our judiciary, particularly over the question of whether our judiciary is truly impartial. This concern has spurred interesting shifts in the judicial recusal landscape in the decade that has followed the Litigation Section's 2001 Tulane Clinic-inspired program.

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2. Adam Glaser, *The Implications of Changes to Louisiana's Law Clinic Student Practice Rule*, 12 GEO. J. LEGAL ETHICS 751, 751–52 (1999); Sam A. LeBlanc III, *Debate over the Law Clinic Practice Rule: Redux*, 74 TUL. L. REV. 219, 225 (1999).

3. LeBlanc, *supra* note 2, at 223.

4. Glaser, *supra* note 2, at 751. The changes to the amended Rule XX were almost identical to those proposed by the business groups. *Id.* at 760.

5. *E.g.*, *Frontline, Justice for Sale* (PBS television broadcast Nov. 23, 1999); *60 Minutes II, Justice for Sale?* (CBS television broadcast Mar. 24, 2000); Ralph Blumenthal, *DeLay Case Turns Spotlight on Texas Judicial System*, N.Y. TIMES, Nov. 8, 2005, at A1; Cary Goldberg, *Judge's Speech at Abortion Rally Sets Off Dispute on Free Speech and Impartiality*, N.Y. TIMES, Mar. 22, 1997, § 1, at 18.

6. Other high profile examples include the following: *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009); Dan Collins, *Scalia-Cheney Trip Raises Eyebrows*, CBS News Politics (Jan. 17, 2003), available at <http://www.cbsnews.com/stories/2003/12/15/politics/main588582.shtml>.

## II. SHIFTS IN THE JUDICIAL RECUSAL LANDSCAPE SINCE 2001

Seismic shifts in the judicial recusal landscape since 2001—an area known for its glacial pace of change—led the Litigation Section to return to the topic of judicial bias this year. Three U.S. Supreme Court cases have provided much of the momentum. First, in June 2002, the Court invalidated many restrictions on judicial campaign speech in *Republican Party of Minnesota v. White*.<sup>7</sup> In *White*, the Court held that judicial candidates have a First Amendment right to announce their views on issues that they may decide as judges<sup>8</sup> and, in doing so, opened up a debate as to whether such pronouncements threaten to undermine public confidence in judicial impartiality.

Next, in 2009, the Court ruled in *Caperton v. A.T. Massey Coal Co.*<sup>9</sup> that due process required disqualification of a West Virginia Supreme Court justice whose campaign received \$3 million in campaign support from A.T. Massey Coal Company's CEO.<sup>10</sup> The CEO contributed via independent expenditures, rather than direct campaign contributions, which were limited to \$1,000 under state law.<sup>11</sup> With Justice Kennedy writing for a 5–4 majority, the Court decided that due process required state judges to recuse themselves from cases in which a financial donor, who has played a significant monetary role in the judge's successful electoral bid to serve on the very bench before which the donor's case is pending, is a party before the court.<sup>12</sup> Justice Kennedy wrote that without an objective rule that requires a "realistic appraisal of psychological tendencies and human weaknesses"<sup>13</sup> of the judicial mind, "there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case."<sup>14</sup> Justice Kennedy's calling for an objective rule prevailed over the Justice Roberts-led dissent, which pointedly argued, "[t]here is a 'presumption of honesty and integrity in those serving as adjudicators.' All judges take an oath to uphold the Constitution and

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7. 536 U.S. 765, 788 (2002).

8. *Id.* at 781–82.

9. 129 S. Ct. 2252 (2009).

10. *Id.* at 2263–64.

11. *Id.* at 2257.

12. *Id.*

13. *Id.* at 2255 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

14. *Caperton*, 129 S. Ct. at 2263.

apply the law impartially, and we trust that they will live up to this promise.”<sup>15</sup>

Lastly, in 2010, *Citizens United v. Federal Election Commission*<sup>16</sup> invalidated restrictions on direct corporate expenditures concerning political issues.<sup>17</sup> Though not dealing directly with judicial recusal, *Citizens United* struck down a carefully crafted congressional statute meant to limit direct corporate electioneering and sent a message that campaign finance laws cannot hope to limit such electioneering. In doing so, it raised the stakes with regard to potential appearances of partiality resulting from judicial electoral processes. The scope of *Citizens United* remains a matter of debate, as reflected in the famous dustup between President Obama and Justice Alito during the 2010 State of the Union address.<sup>18</sup> Nonetheless, as Justice Stevens suggests in his ninety-page *Citizens United* dissent,<sup>19</sup> the floodgates have opened for shareholder and union money to pour into judicial elections, with only *Caperton*'s narrow limits stemming the flow.<sup>20</sup>

The Supreme Court's decisions in *White* and *Citizens United* exacerbated the potential for crisis in the public's confidence in the

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15. *Id.* at 2267 (Roberts, J., dissenting) (citations omitted).

16. 130 S. Ct. 876 (2010).

17. *Id.* at 896–98.

18. See Emily Bazelon, *Mysterious Justice*, N.Y. TIMES, Mar. 20, 2011, at MM13 (reporting the instance in which Justice Alito mouthed “not true” when President Obama referred to the *Citizens United* ruling as reversing long-standing precedent to benefit corporate interests).

19. *Citizens United*, 130 S. Ct. at 968 (Stevens, J., concurring in part and dissenting in part) (“The majority of the States select their judges through popular elections. At a time when concerns about the conduct of judicial elections have reached a fever pitch, the Court today unleashes the floodgates of corporate and union general treasury spending in these races.” (citation omitted)). Justice Stevens also noted that, after *Citizens United*, states “may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems.” *Id.*

20. Indeed, this term, in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 611 F.3d 510 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 64 (U.S. Nov. 29, 2010) (No. 10-238), and *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 644 (U.S. Nov. 29, 2010) (No. 10-239), the Supreme Court is expected to strike down, on First Amendment grounds, a provision in Arizona's campaign finance law that would allow a publicly-financed candidate to receive public funds that would match the sum of a privately-financed opponent's contributions and the value of independent expenditures on behalf of the opponent. *Court Skeptical of Ariz. Campaign Finance Law*, NAT'L PUB. RADIO (Mar. 28, 2011), <http://www.npr.org/templates/story/story.php?storyId=133961588>.

judiciary by invalidating laws that protected the perceived impartiality of elected state judges. In recent years, the American Bar Association has attempted to address this crisis by amending its Model Code of Judicial Conduct (the Code), which since 1924 has been the model on which states base their codes of judicial ethics.<sup>21</sup> Since 1999, the ABA has added two enumerated presumptive categories of disqualification to the section of the Code addressing judicial disqualification,<sup>22</sup> including the disqualification of judges from (1) hearing cases involving significant campaign contributors<sup>23</sup>

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21. The history of the ABA's involvement with a code of ethics for judges extends back to 1924, when an ABA Committee chaired by then Chief Justice of the Supreme Court William Taft produced the Canons of Judicial Ethics, which the ABA House of Delegates adopted in 1924. *See* Preface, MODEL CODE OF JUD. CONDUCT (2004), *available at* [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_code\\_of\\_judicial\\_conduct/model\\_code\\_of\\_judicial\\_conduct\\_preamble.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_preamble.html) (noting that the Code replaced the Canons of Judicial Ethics). Though the Canons represented the first cohesive framework to inform judges of their ethical obligations, their language was aspirational and not mandatory. In 1972, the ABA House of Delegates replaced the Canons with the Code of Judicial Conduct, which contained "mandatory standards." CODE OF JUD. CONDUCT, Preamble (1972). In 1990, the House of Delegates adopted an amended Code of Judicial Ethics (*see* MODEL CODE OF JUDICIAL CONDUCT, Preface (2004) (discussing publication of the Code)), and did so again in 2007. *See* MODEL CODE OF JUD. CONDUCT, Preface (2007) (incorporating the "housekeeping" revisions approved by the ABA Standing Committee on Ethics and Professional Responsibility).

22. Rule 2.11 of the 2007 ABA Code of Judicial Conduct, entitled "Disqualification," captures a total of six presumptive categories of disqualification and includes a residuary clause addressing when the judge's impartiality might reasonably be questioned, regardless as to whether it is covered in the six presumptive categories. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007). The six presumptive categories are: (1) personal bias in favor of or against a party or lawyer, or personal knowledge of facts relevant to the controversy; (2) the judge (or a close relation) is counsel, a party, a person with a more than *de minimis* interest, or a material witness in the case; (3) the judge (or a close relation) has an economic interest in the outcome of the case; (4) the judge has received political contributions from a lawyer or party in a case; (5) the judge has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result in a case; and (6) the judge participated as a lawyer, party, or material witness in the case prior to joining the bench. *Id.* at R. 2.11(A)(1)–(6).

23. *Id.* at R. 2.11(A)(4). The Canon left to states how many previous years contribution were made and the threshold amounts of the contributions. *Id.* Even if the amount of the donation was under the proscribed amount or the donation occurred outside of the proscribed period, a motion for recusal could still be made under Rule 2.11(A)'s residuary clause.

and (2) issues on which they had made prior public statements that would appear to commit them to the issues' resolutions.<sup>24</sup> In addition, in 2007, the ABA's Standing Committee on Judicial Independence launched the Judicial Disqualification Project to evaluate state judicial disqualification around the country and recommend reforms.<sup>25</sup>

However, also in 2007, the ABA almost downgraded the avoiding-the-appearance-of-impropriety standard from an enforceable standard to an aspirational goal, given the vagueness of the standard. Ultimately, at the urging of the Conference of Chief Justices and a number of legal organizations, the ABA retained the "appearance of impropriety" as an enforceable rule.<sup>26</sup>

Following the ABA's lead, states have responded to these shifts in the judicial recusal landscape. Some have revised rules to bar elected judges from hearing cases involving lawyers and others who make significant contributions to their campaigns.<sup>27</sup> Yet, of the twenty-nine states that have adopted the revised 2007 ABA Code of Judicial Conduct, only ten have included the provision on campaign contribution limits.<sup>28</sup> Although some states may have omitted the campaign contribution limit provision for purely practical reasons, such as their judges not being popularly elected, most of the states omitted the provision to avoid either the contribution limit itself or the political fight over the contribution limit.<sup>29</sup>

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24. *Id.* at R. 2.11(A)(5).

25. ABA Judicial Disqualification Project, *Taking Disqualification Seriously*, 92 JUDICATURE 12, 12 (2008).

26. *See generally* Charles Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 695 (2011); CHARLES E. [SIC] GEYH & W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 17-18 (2007) (noting the inclusion of the "appearance of impropriety" language). *See also* Editorial, *The A.B.A.'s Judicial Ethics Mess*, N.Y. TIMES, Feb. 9, 2007, at A18 (describing reinstatement of the "appearance of impropriety" standards).

27. William Glaberson, *State is Cutting Judges' Ties to Lawyers Who Are Donors*, N.Y. TIMES, Feb. 13, 2011, at A1.

28. CTR. FOR JUDICIAL ETHICS, AM. JUDICATURE SOC'Y, JUDICIAL DISQUALIFICATIONS BASED ON COMMITMENTS AND CAMPAIGN CONTRIBUTIONS 1-2 (2011), available at <http://www.ajs.org/ethics/pdfs/Disqualificationcommitmentscontributions.pdf>; Joel Stashenko, *State Bar Adopts Updated Judicial Conduct Code*, N.Y.L.J., Apr. 6, 2011, at 1.

29. The New York State Bar Association (NYSBA) adopted amendments to its Judicial Code of Conduct that brought it into conformity with the 2007 ABA Code of Judicial Conduct, but it did not include the contribution limit provision. Stashenko, *supra* note 28, at 1. Instead, the NYSBA chose to debate a

These developments, along with the zealous assertions of interest groups into judicial elections<sup>30</sup> and emerging research on the risk of judges' unconscious biases,<sup>31</sup> reveal that issues of judicial disqualification are more prominent than ever in litigation. The Litigation Section's 2011 Program spotlighted this shift in momentum on judicial recusal. The Program (1) explored the current landscape of the recusal rules in state and federal court; (2) reviewed the path that future revisions to the judicial recusal rules would likely take; and (3) ended with a focus on the practical effects that judicial recusal motions raise for the litigators who must make these motions. The papers that follow here are the fruits of that discussion.

### III. OVERVIEW OF THE PAPERS

Four papers follow herein and focus on (1) the current state of the recusal rules and law in the federal courts; (2) a vision of the recusal rules moving towards a more procedural-based regime, where discretion is lessened and the goal of the appearance of impartiality trumps the aim for judicial efficiency; (3) a more tempered view of change with procedural-based reform, but otherwise maintaining the current appearances-based model that allows for greater discretion and judicial efficiency; and (4) a call for First Amendment protection for lawyers making colorable recusal

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contribution limit separately, as it is now entertaining a rule proposed by the chief judge of the state's highest court to require recusal of judges in cases involving parties or lawyers who have contributed \$2500, or law firms that have contributed \$3500, to the judge's campaign. *Id.*

30. See Press Release, Brennan Ctr. for Justice at New York University School of Law, TV Ad Spending By Special Interest Groups Tops \$1 Million in Wisconsin Judicial Election (Mar. 3, 2011), *available at* [http://www.brennancenter.org/content/resource/tv\\_ad\\_spending\\_by\\_special\\_interest\\_groups\\_tops\\_1\\_million\\_in\\_wisconsin\\_judic/](http://www.brennancenter.org/content/resource/tv_ad_spending_by_special_interest_groups_tops_1_million_in_wisconsin_judic/) (identifying three interest groups which spent more than \$1.14 million on TV ads during the last Wisconsin Supreme Court election).

31. See generally Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (concluding that judges are not immune from implicit biases); Michael H. LeRoy, *Do Partisan Elections of Judges Produce Unequal Justice When Courts Review Employment Arbitrations?*, 95 IOWA L. REV. 1569, 1592–95 (2010) (discussing how partisan elections may cause judges to distribute justice based on political contributions).

motions to preserve their clients' rights to an impartial judge.

A. *Honorable M. Margaret McKeown's Overview of the Federal Recusal Scheme*

The Honorable M. Margaret McKeown, a distinguished federal appeals judge on the Court of Appeals for the Ninth Circuit and the Chair of the Committee on Codes of Conduct of the Judicial Conference of the United States (Judicial Conference Committee on Codes of Conduct), provides an overview of the recusal rules in the federal courts, while also cautioning against overreaction to episodic publicity that obscures the effectiveness of the current recusal regime. Judge McKeown, who has testified before Congress on judicial disqualification issues, summarizes 28 U.S.C. §§ 144 and 455(a), which formally govern judicial recusal for federal judges.<sup>32</sup> Judge McKeown then shows how the recusal statutes dovetail with the Codes of Conduct for United States Judges, which apply to all federal judges, except for the Justices of the United States Supreme Court. She also reviews the functioning of the Judicial Conference Committee on Codes of Conduct, which annually issues approximately 100 advisory opinions and 1,000 responses to informal requests, giving fascinating insight into how the committee assists judges around the country with ethical quandaries, often within days. Practically speaking, the issue of recusal in the federal judiciary is far less controversial than in the state system because of the lack of publicly elected judges. Nonetheless, as Judge McKeown notes, the substantial procedural requirements in the federal system, coupled with the high degree of professionalism among the federal judiciary, minimizes the potential for judicial recusal controversy in the federal system. Indeed, even where a recusal issue may be less clear, Judge McKeown's Committee assists in ensuring that the judges get it right. Judge McKeown's analysis suggests that further procedural reform at the federal level is unnecessary and may come at the cost of inefficiencies of frivolous motions, if not outright judge shopping.

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32. 28 U.S.C. §§ 144 & 455(a) (2006).

B. *Professors Charles Geyh and Jeffrey Stempel Debate  
Future Approaches to the Recusal Rules*

Professors Charles Geyh<sup>33</sup> and Jeffrey Stempel<sup>34</sup> offer competing views on the future of judicial recusal rules. Both see error in the commonly held view that disqualification motions and attorney allegations of partiality or bias are an affront to the individual judge's personal judicial integrity and find this dynamic to be at the core of the problem. They differ in that Professor Geyh seeks procedural reform to rein in a judiciary unable to believe that reasonable jurors might question its impartiality, while Professor Stempel, perhaps quixotically, holds out hope that judges can move away from viewing recusal motions as personal attacks.

Professor Geyh first reviews the history of judicial disqualification to highlight four distinct regimes: (1) an almost iron-clad common-law presumption of impartiality, in which courts refused to entertain even the possibility of judicial bias; (2) a statutory approach based on conflict of interest, in which judges were required to disqualify themselves when confronted with specifically enumerated conflicts of interest in a statute; (3) a disqualification procedure that required judges to recuse themselves automatically if aggrieved parties made specified allegations pursuant to specified procedures; and (4) an appearances-based regime that organizes disqualification standards around the principle that a judge should step aside when her impartiality "might reasonably be questioned."<sup>35</sup> Professor Geyh notes how vestiges from each regime remain, "coexisting peacefully at some times and uneasily at others."<sup>36</sup>

Professor Geyh then spotlights the "disqualification paradox" for judges: in taking their judicial oath of office, judges commit themselves to being and appearing to be impartial, and yet, the disqualification rules require judges to find themselves not to be, or

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33. Professor Geyh is the Associate Dean for Research and John F. Kimberly Professor of Law at Indiana Bloomington School of Law, the Director of the ABA Judicial Disqualification Project, and the Reporter to four ABA Commissions relevant to judicial recusal, including the Joint Commission to Evaluate the Model Code of Judicial Conduct.

34. Professor Stempel is the Doris S. and Theodore B. Lee Professor of Law at the University of Nevada at Las Vegas.

35. Geyh, *supra* note 26, at 675.

36. *Id.*

not to appear, impartial. This inherent tension suggests that most judges would find themselves to be impartial despite facts that might cause parties to reasonably question the judges' impartiality. As such, the paradox favors procedural-based reform that creates greater distance between the judge and the decision to recuse, through such procedures as assigning disqualification petitions to a different judge; subjecting disqualification to the adversarial process; requiring reasoned explanations for disqualification rulings; adopting substitution procedures for trial judges; subjecting non-disqualification decisions to *de novo* review; establishing a process for review of non-disqualification by appellate judges; and devising procedures to replace disqualified appellate judges. In suggesting these procedures, Professor Geyh attempts to manage the judiciary's chronic ambivalence to disqualification by encouraging judges to appreciate the dual psychological impediments to judicial self-evaluation: a lack of recognition of their own biases and an inability to see themselves and their actions as the public might reasonably perceive them. Thus, the innocuous behavior that gives rise to an appearance of partiality should not result in an inference of impropriety. Professor Geyh also makes a persuasive case for procedural reform by suggesting that ensuring judicial impartiality and the public's confidence in the judiciary is worth the inefficiencies procedural reforms will likely engender.

Professor Stempel would not abandon an appearance-based review in favor of Professor Geyh's call for a procedural-based regime. He accepts Professor Geyh's call for procedural reform but only as a buttress to an appearance-based model. The appearance-based regime focuses on what reasonably objective people might feel about a judge's impartiality in a given situation, and, according to Professor Stempel, this construct appropriately underlies the recusal analysis. Both Professors Geyh and Stempel agree that "traditionalist judges"—those less likely to recuse themselves and a substantial majority of judges overall—hold a strong presumption of judicial impartiality and look for overwhelming evidence that their impartiality can reasonably be called into question. These judges either dismiss or are otherwise unaware of cognitive biases that cast doubt on this traditionalist notion of presumed impartiality. Both professors also believe only that a modest presumption of judicial impartiality should reign. Professor Stempel breaks with Professor Geyh by insisting that judges can and should change their views as to this presumption of impartiality and, consequently, should recuse

when an appearance-based review requires them to step away.

Professor Stempel argues that judges must accept an enhanced conception of a “reasonable question” as to impartiality and that “consensus—or even a clear majority view”—is unnecessary to justify recusal.<sup>37</sup> Professor Stempel believes judges must be significantly more aware of their biases. With this awareness, judges will be far less inclined to adopt such a strong presumption of their impartiality. Thus, both a stronger definitional sense of the appearance of fairness and some substantial judicial consciousness-raising are necessary. In addition, Professor Stempel would use the procedural reforms identified by Professor Geyh to improve upon the dominant appearance-based review currently in use. Professor Stempel acknowledges that a strengthened procedural approach to judicial disqualification is critical to enhancing judicial impartiality and public confidence in the courts, even at the cost of some attendant logistical burdens. However, he insists that there must also be a broadened definition of the existence of a “reasonable question” as to impartiality and greater sensitivity on the part of the bench, the bar, and the public.

While Professor Geyh might agree with Professor Stempel that judges should change their enhanced presumption of their own impartiality, he is less optimistic that judges will in fact do so. Therefore, Professor Geyh relies on procedural reforms to overcome this bias in favor of finding impartiality. Professor Stempel concedes that his vision for improving the recusal regime may not be attainable in the current climate: “Jurists—particularly at the Supreme Court level—have occasionally shown a disturbing defensiveness, insensitivity, and even some seeming ignorance regarding the area . . . . Until the judiciary accepts this notion, litigants are inadequately protected from potential judicial bias and public confidence is inadequately nurtured.”<sup>38</sup>

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37. Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification—and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 REV. LITIG. 733, 739 (2011).

38. *Id.* at 740.

C. *Professor Margaret Tarkington's Call for First Amendment Protection for Lawyers Who Impugn Judicial Integrity in the Context of Recusal Motions*

Akin to Alice's needing to be able to tell the Queen of Hearts that her croquet game is fundamentally flawed without fearing the Queen's wrath ("Off with her head!"),<sup>39</sup> Professor Margaret Tarkington<sup>40</sup> argues that lawyers should have a free speech right to make colorable arguments in court proceedings and to preserve the constitutional rights of clients. Recusal motions are ripe for this protection. The Court in *Caperton* found that an individual's due process rights could be violated if a judge declined to recuse herself.<sup>41</sup> A lawyer's duty to protect her client includes making motions that would ensure the due process rights of her client. As Professor Tarkington notes, judges tend to react sharply to having their impartiality questioned, and, in a number of instances, judges have punished attorneys for speech questioning judicial impartiality, even when done as part of a motion to disqualify a judge. Professor Tarkington also shows that the *Caperton* majority rightfully viewed disqualification as being disassociated with reputational harm to the judiciary and, as such, not warranting punishment.

The inherent risks associated with the recusal motion further suggest that punishment for such motions is unnecessary. Any litigator knows that to question a judge's impartiality is to take an enormous *strategic* risk in the litigation, given there is no guarantee that the motion will be granted. This is a powerful deterrent to unwarranted recusal motions. But even if that were not enough, attorneys also face the strictures of Federal Rule of Civil Procedure 11 and Model Rule of Professional Conduct 3.1, which require a reasonable basis in fact for such motions. Thus, as Professor Tarkington persuasively argues, Free Speech Clause rights in the

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39. LEWIS CARROLL, ALICE IN WONDERLAND 121–25 (The MacMillan Co. 1897).

40. Professor Tarkington is an Associate Professor of Law at Brigham Young University School of Law. Her scholarship has examined the punishment of attorney speech, which in the context of good faith representation of clients, is critical of the judiciary. See Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, 51 B.C. L. REV. 363, 363 (2010) (discussing why a free speech right to impugn judicial integrity must be recognized for attorneys when acting as officers of the court and making statements in court proceedings).

41. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2259 (2009).

context of recusal motions would only eliminate the lawyer's personal risk that such motions might fall within the bounds of Rule 11 and the Model Rules of Professional Conduct—*i.e.*, motions made with a good faith basis.

#### IV. CONCLUSION

Public confidence in the judiciary's integrity is critical, and public trust that judges will remain impartial is crucial to that integrity. All of the authors in this symposium recognize the need to ensure that judges, attorneys, litigants, and the public cease equating disqualification with reputational harm and thus with potential discipline for impugning judicial integrity. This may be the lynchpin in ensuring that judicial impartiality—in fact and appearance—remains a hallmark of our judicial branch. Until that re-education is accomplished, it may be time to pass procedural reforms that seek to limit the discretion of judges less inclined to find that a reasonable observer might find a lack of impartiality in recusal motions.

