Loyola University Chicago Law Journal

Volume 54
Issue 3 *Spring 2023*

Article 7

2023

Mandatory Judging

Douglas R. Richmond
University of Kansas

Mandatory Judging

*Douglas R. Richmond***

As a matter of judicial ethics, judges must disqualify themselves in matters in which their impartiality may reasonably be questioned. This key principle implicates two additional aspects of judicial ethics: the duty to sit and the rule of necessity.

The duty to sit basically describes a judge's duty to preside over a case unless disqualified as a matter of judicial ethics. Or, phrased another way, a judge must hear a case if her impartiality cannot reasonably be questioned. Recognition of the duty to sit means that judges may not disqualify themselves based on their unease with cases, personal or professional burdens, or desire to avoid controversial, difficult, or demanding litigation. Nor may they yield their decisional responsibilities to litigants' attempts to manipulate the judicial system.

In contrast, the rule of necessity overrides litigants' general entitlement to an impartial judge. The rule of necessity is a pragmatic doctrine which essentially holds that a judge's alleged partiality—normally compelling her disqualification—will be excused and disqualification denied, where necessary. It assumes that denying parties access to the courts is a substantially greater wrong than permitting judges to hear cases in which they are interested.

∗ Managing Director, Aon Professional Services, Olathe, KS. J.D., University of Kansas. Opinions expressed here are solely those of the author.

INTRODUCTION

Not all that long ago, the late Justice Antonin Scalia found himself the target of a disqualification motion filed by the Sierra Club.[1] The Sierra Club sought Justice Scalia's disqualification on the basis that his impartiality might reasonably be questioned in a case then before the Supreme Court, *Cheney v. United States District Court for the District of Columbia*.[2] The case involved a challenge by the Sierra Club and others to anonymous oil industry executives' possible roles in the Vice President's National Energy Policy Development Group, which, as the group's title suggests, was chaired by Vice President Richard Cheney.[3] The source of the Sierra Club's concern was a duck hunting trip to Louisiana hosted by an oilman where Justice Scalia and Vice President Cheney—who, in his official capacity, was the petitioner in *Cheney*—were companions.[4] As Justice Scalia acknowledged, he and Vice President Cheney were friends—Justice Scalia invited the vice president to join the excursion, and they flew to Louisiana together on Air Force Two.[5]

Justice Scalia declined to disqualify himself for several reasons.[6] One of them he articulated in his initial response to the Sierra Club's argument that he "should 'resolve any doubts in favor of recusal'" given the apparent favoritism toward the petitioner that his trip with Vice President Cheney allegedly created.[7] Justice Scalia wrote:

> That might be sound advice if I were sitting on a Court of Appeals. There, my place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different: The Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to

---

1. Lawyers and courts often use the terms "recuse" or "recusal" interchangeably with "disqualify" or "disqualification" where a judge exits a case for ethical reasons. ABA Comm. on Ethics & Pro. Resp., Formal Op. 488, at 1 n.2 (2019). They may also use "recusal" to describe a judge's voluntary withdrawal from a case and "disqualification" to characterize a judge's removal ordered by another court. Because judicial ethics rules and related statutes—as well as many court opinions—employ "disqualification" to describe judges' replacement in all contexts, this Article does the same.

2. Cheney v. U.S. Dist. Ct. for D.C., 541 U.S. 913, 916 (2004).

3. Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 900 (2009).

4. *Cheney*, 541 U.S. at 914–15.

5. *Id.*

6. For competing views on Justice Scalia's refusal to disqualify himself, *compare* Lawrence J. Fox, *I Did Not Sleep with That Vice President*, 15 PROF. LAW., no. 2, 2004, at 1 (contending that Justice Scalia should have disqualified himself), *with* W. William Hodes, *Nino Protested Too Much, but Larry Created the Appearance of Politicizing Judicial Ethics*, 15 PROF. LAW., no. 3, 2004, at 1 (arguing that Justice Scalia's impartiality could not reasonably have been questioned and that his disqualification was therefore unnecessary).

7. *Cheney*, 541 U.S. at 915.

> resolve the significant legal issue presented by the case. . . . Moreover, granting the motion is . . . effectively the same as casting a vote against the petitioner. The petitioner needs five votes to overturn the judgment below, and it makes no difference whether the needed fifth vote is missing because it has been cast for the other side, or because it has not been cast at all.[8]

In offering this rationale for remaining on the case, Justice Scalia was apparently attempting to invoke judges' "duty to sit."[9] The duty to sit's roots trace back centuries,[10] but its modern application is generally attributed to the late Circuit Judge Richard Rives's opinion in *Edwards v. United States*.[11] In deciding that he should not disqualify himself from the court's en banc consideration of the case, Judge Rives explained that "[i]t is a judge's duty to refuse to sit when he is disqualified but it is equally his duty to sit when there is no valid reason for recusation."[12] Judge Rives preferred not to participate in the case given the procedural posture and his role as member of the panel that rendered the opinion under en banc review, but concluded that his preference did not constitute a "legal excuse."[13] Consequently, he had no right to disqualify himself and was required to sit.[14] Perhaps ironically, he became the author of the en banc opinion in which the court affirmed the panel's decision.[15]

The duty to sit as framed in *Edwards* is basically a duty to preside over a case unless disqualified as a matter of judicial ethics.[16] Or, phrased another way, a judge must hear a case if her impartiality cannot reasonably be questioned.[17] Judges may not disqualify themselves based

---

8. *Id.* at 915–16 (citation omitted).

9. In doing so, he arguably misconstrued his duty. *See* Stempel, *supra* note 3, at 905–06 (discussing how Justice Scalia erroneously used the duty to sit doctrine to justify his failure to recuse himself).

10. *See id.* at 846 ("[T]he roots of the doctrine can be traced to Blackstone and the pre-1800 English attitude that only [a] direct financial stake in a case disqualified a judge . . . .").

11. Edwards v. United States, 334 F.2d 360 (5th Cir. 1964).

12. *Id.* at 362 n.2.

13. *Id.*

14. *Id.*

15. *Id.* at 362–63.

16. *See id.* at 362 n.2; *see also* Millen v. Eighth Jud. Dist. *ex rel.* Cnty. of Clark, 148 P.3d 694, 700 (Nev. 2006) (summarizing the law as providing that judges have a duty to sit unless judicial canons, statutes, or rules require their disqualification).

17. *See* United States v. Snyder, 235 F.3d 42, 46 (1st Cir. 2000) (footnote omitted) ("Thus, under [28 U.S.C.] § 455(a) a judge has a duty to recuse himself if his impartiality can reasonably be questioned; but otherwise, he has a duty to sit."); Sharkey v. J.P. Morgan Chase & Co., 251 F. Supp. 3d 626, 632 (S.D.N.Y. 2017) ("As much as a district judge is required to recuse themselves if they are biased, 'where the standards governing disqualification have not been met, disqualification is not optional; rather, it is prohibited.'" (quoting *In re* Aguinda, 241 F.3d 194, 201 (2d Cir. 2001))); *In re* Vascular Access Ctrs., L.P., 630 B.R. 137, 152 (Bankr. E.D. Pa. 2021)

on their unease with particular cases, perceived personal or professional burdens, desire to avoid difficult or demanding litigation, wishes to avoid controversial cases, or other individual preferences.[18] Allowing judges to do so would unnecessarily burden their colleagues.[19] Nor should judges disqualify themselves where the party seeking their disqualification is apparently attempting to manipulate the legal system,[20] even though jettisoning such a case may be the path of least resistance from the judge's perspective. In this way, the duty to sit either animates or is embodied in Rule 2.7 of the Model Code of Judicial Conduct, which provides that judges must hear their assigned cases unless disqualification is required under Model Rule 2.11, which is the general rule on disqualification, or other law.[21] Indeed, several courts have stated that Rule 2.7 imposes a duty to sit.[22]

In the federal courts, the duty to sit is often thought to have been

---

("Ultimately, just as a judge must recuse herself if her impartiality might reasonably be questioned, she also has a duty not to recuse herself if there are no grounds for disqualification."); *In re* People in Int. of A.P., 526 P.3d 177, 183 (Colo. 2022) (quoting Smith v. Dist. Ct., 629 P.2d 1055, 1056 (Colo. 1981)).

18. *See, e.g.*, Ark. Tchrs. Ret. Sys. v. State St. Bank & Tr. Co., 404 F. Supp. 3d 486, 520 (D. Mass. 2018) ("It is evident that this will continue to be a demanding case. As careful consideration has persuaded me that my disqualification is not justified, recusal would be an abdication of professional responsibility, which judges have been urged to avoid."); *In re* Wirebound Boxes Antitrust Litig., 724 F. Supp. 648, 651 (D. Minn. 1989) ("A judge cannot disqualify herself simply because a case is difficult, controversial, or unpleasant.").

19. *See* Go4Play, Inc. v. Kent Cnty. Bd. of Adjustment, No. K21A-01-003 NEP, 2021 WL 2495149, at *4 (Del. Super. Ct. June 15, 2021) ("If this judge were to disqualify himself in the absence of either genuine or apparent bias, he would impose upon his colleagues an unnecessary burden.").

20. *See, e.g.*, Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., 956 F.3d 1228, 1241 (10th Cir. 2020) ("[A] judge is not required to recuse himself because of 'baseless personal attacks on or suits against the judge by a party,' or 'threats or other attempts to intimidate the judge.'" (quoting United States v. Cooley, 1 F.3d 985, 994 (10th Cir. 1993))); United States v. Crawford, 665 F. App'x 539, 543 (7th Cir. 2016) ("Crawford insists that the district judge should have recused himself after receiving a threatening letter from Crawford. But recusal is not required if a defendant has made a threat for the very purpose of forcing a recusal and the sentencing transcript suggests that this was Crawford's aim."); *In re* Byers, 509 B.R. 577, 580 (Bankr. S.D. Ohio 2014) ("In her Motion, Ms. Byers has engaged in such a vehement and scurrilous attack on the judge, that it is tempting to recuse if only to escape Ms. Byers' vitriol. However, an appointed judge has a responsibility to preside over the cases which are assigned to her, and cannot simply recuse herself in order to ease her burden."); *Go4Play*, 2021 WL 2495149, at *4 (stating that "unwarranted disqualification" would encourage "judge shop[ping]," impeding "the administration of justice"); Disaster Restoration Dry Cleaning, L.L.C. v. Pellerin Laundry Mach. Sales Co., 927 So. 2d 1094, 1099–1100 (La. 2006) (footnote omitted) ("[A] judge should not recuse himself if a litigant challenges him because the litigant believes that the prospect of success would be greater before a different judge."); *In re* Est. Boland, 450 P.3d 849, 860 (Mont. 2019) (criticizing a party and lawyer for attempting to manipulate the trial court and stating and anyone who deliberately attempts to cause a judge to become biased or prejudiced is not entitled to disqualify the judge).

21. MODEL CODE JUD. CONDUCT r. 2.7 (AM. BAR ASS'N 2020).

22. *See, e.g.*, *Go4Play*, 2021 WL 2495149, at *4; *In re* Krull, 860 N.W.2d 38, 47 (Iowa 2015).

abolished by the 1974 amendments to 28 U.S.C. § 455,[23] which, under subpart (a), empowers judges to disqualify themselves whenever their "impartiality might reasonably be questioned."[24] But that view is not wholly accurate.[25] As the First Circuit explained in *United States v. Snyder*, section 455(a) modified the duty to sit rather than extinguished it.[26] According to the *Snyder* court, "[t]he duty to sit doctrine originally not only required a judge to sit in the absence of any reason to recuse, but also required a judge to resolve close cases in favor of sitting rather than recusing."[27] Section 455(a) erased only the latter aspect of the duty to sit.[28] Or, as an Arizona federal court similarly explained, section 455(a) reconstructed the duty to sit, such that judges were no longer required to disqualify themselves only when there was "a clear demonstration of bias or prejudice," but instead must disqualify themselves when their impartiality might reasonably be questioned.[29]

Understanding that judges must still hear cases unless there is a proper basis for disqualification, the duty to sit remains operative in federal courts.[30] Certainly, federal judges continue to recognize a duty to sit.[31]

---

23. *See* CHARLES G. GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 4.03, at 4–9 (6th ed. 2020) (describing the impact of the 1974 amendments to 28 U.S.C. § 455).

24. 28 U.S.C. § 455(a) (2018).

25. Congress apparently intended the amendments to 28 U.S.C. § 455 to abolish the duty to sit, *Blizard v. Frechette*, 601 F.2d 1217, 1220 (1st Cir. 1979), but the amendments did not fully accomplish that goal.

26. United States v. Snyder, 235 F.3d 42, 46 n.1 (1st Cir. 2000) (citing *In re* Martinez-Catala, 129 F.3d 213, 221 (1st Cir. 1997)).

27. *Id.*

28. *Id.* (citing *Blizard*, 601 F.2d at 1220–21); *see also* Potashnik v. Port City Constr. Co., 609 F.2d 1101, 1112 (5th Cir. 1980) ("[T]he new statute requires a judge to exercise his discretion in favor of disqualification if he has any question about the propriety of his sitting in a particular case. Under the prior version of section 455, a judge faced with a close question on disqualification was urged to resolve the issue in favor of a 'duty to sit.' . . . [T]he new statute eliminates the so-called 'duty to sit.' The use of 'might reasonably be questioned' in section 455(a) clearly mandates that it would be preferable for a judge to err on the side of caution and disqualify himself in a questionable case."). Although the *Potashnik* court declared that the amendments to 28 U.S.C. § 455 eliminated the duty to sit, it interpreted section 455(a) as merely modifying the duty to sit along the lines that the *Snyder* court explained two decades later. *See id.* (highlighting the preference for disqualification in close cases rather than sitting).

29. Palmer v. City of Prescott, No. CV-10-8013-PCT-DGC, 2010 WL 4102923, at *2 (D. Ariz. Oct. 18, 2010).

30. *See Snyder*, 235 F.3d at 46 n.1 (quoting *Blizard*, 601 F.2d at 1221).

31. *See, e.g.*, United States v. Mobley, 971 F.3d 1187, 1205 (10th Cir. 2020) (quoting United States v. Wells, 873 F.3d 1241, 1251 (10th Cir. 2017)); United States v. Caramadre, 807 F.3d 359, 374 (1st Cir. 2015) ("Judges have a duty to sit unless some compelling reason for recusal exists."); Clemens v. U.S. Dist. Ct. for Cent. Dist. Cal., 428 F.3d 1175, 1179 (9th Cir. 2005) (quoting Nichols v. Alley, 71 F.3d 347, 351 (10th Cir. 1995)); Ark. State Conf. NAACP v. Ark Bd. of Apportionment, 578 F. Supp. 3d 1011, 1016 (E.D. Ark. 2022) ("The second obligation implicated by a recusal question is the obligation of a judge to hear cases to which he or she has been assigned. This is known as the duty to sit.").

State courts regularly recognize the duty to sit as well.[32] Model Rule of Judicial Conduct 2.11(A), which provides that judges must disqualify themselves when their impartiality might reasonably be questioned, sets the disqualification standard in state courts like 28 U.S.C. § 455(a) does in federal courts.[33]

In addition to their duty to sit, judges sometimes must hear cases under "the rule of necessity." The duty to sit and the rule of necessity are separate and distinct doctrines.[34] Also of ancient origin,[35] the rule of necessity is a common law exception to the general rule that judges must disqualify themselves in proceedings in which their impartiality might reasonably be questioned.[36] The pragmatic rule establishes that a judge's alleged partiality that would normally compel her disqualification will be

---

32. *See, e.g.*, *Ex parte* Siegel, 347 So. 3d 245, 249–51 (Ala. Civ. App. 2021) (enforcing the trial judge's duty to sit); Robinson Nursing & Rehab. Ctr., LLC v. Phillips, 502 S.W.3d 519, 523 (Ark. 2016) ("All judges have a duty to recuse when the situation warrants but we also have an equal duty to sit when the facts do not justify doing otherwise."); Briggs v. Super. Ct., 104 Cal. Rptr. 2d 445, 450 (Ct. App. 2001) (stating that the judge had a duty to sit); People v. Sanders, 515 P.3d 167, 172 (Colo. App. 2022) ("Unless the law precludes her participation, a judge has a duty to sit on a case once it is assigned."); State v. Desmond, No. 91009844DI, 2011 WL 91984, at *9 (Del. Super. Ct. Jan. 5, 2011) ("Thus, there remains an inherent 'duty to sit' that is integral to the role of a judge."); *In re* Krull, 860 N.W.2d 38, 47 (Iowa 2015) (stating that "[t]he duty to sit is set forth in our judicial canons" and quoting Iowa's version of Rule 2.7); Clay v. WesBanco Bank, Inc., 589 S.W.3d 550, 557 (Ky. Ct. App. 2019) ("[J]udges have a 'duty to sit' absent valid reasons for recusal."); *In re* Turney, 533 A.2d 916, 920 (Md. 1987) ("[A] judge's duty to sit where not disqualified is equally as strong as the duty not to sit where disqualified."); Hyundai Motor Am. v. Applewhite, 319 So. 3d 987, 1006 (Miss. 2021) (quoting Edwards v. United States, 334 F.2d 360, 362 n.2 (5th Cir. 1964)); Canarelli v. Eighth Jud. Dist. Ct., 506 P.3d 334, 337 (Nev. 2022) (quoting Millen v. Eighth Jud. Dist. Ct., 148 P.3d 694, 700 (Nev. 2006)); Goldfarb v. Solimine, No. A-3740-16T2, 2019 WL 2635918, at *4 (N.J. Super. Ct. App. Div. June 26, 2019) ("A judge's duty to sit where appropriate is as strong as is the duty to disqualify oneself where sitting is inappropriate."); State v. Trujillo, 222 P.3d 1040, 1043 (N.M. Ct. App. 2009) (quoting State v. Hernandez, 846 P.2d 312, 326 (N.M. 1993)); Simpson v. Simpson, 660 S.E.2d 274, 278 (S.C. Ct. App. 2008) ("Having found no evidence that could question the impartiality of [the judge], or any other reason requiring her recusal, we find Canon 3B(1) to be controlling, which imposes a 'duty to sit.'"); *Ex parte* Donovan, 541 S.W.3d 196, 200 (Tex. App. 2017) ("All judges have the duty to sit and decide matters before them unless a basis exists for disqualification or recusal."); Tennant v. Marion Health Care Found., Inc., 459 S.E.2d 374, 385 (W. Va. 1995) ("Also important, however, is the rule that a judge has an equally strong duty to sit where there is no valid reason for recusal."); Wis. Jud. Comm'n v. Prosser, 817 N.W.2d 830, 834 (Wis. 2012) (Crooks, J.) (recognizing the duty to sit); Hopkinson v. State, 679 P.2d 1008, 1031 (Wyo. 1984) ("The duty-to-sit obligation is especially strong in complex, long, drawn out cases, where the disqualification request is not made at the threshold . . . but after the trial judge has gained a valuable background.").

33. *See* MODEL CODE OF JUD. CONDUCT r. 2.11(A) (AM. BAR ASS'N 2020) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . .").

34. Citizens Protecting Mich.'s Const. v. Sec'y of State, 755 N.W.2d 147, 149 n.5 (Mich. 2008).

35. *See* United States v. Will, 449 U.S. 200, 213 (1980) (recounting that the rule of necessity was first invoked in England in 1430).

36. *In re* Howes, 880 N.W.2d 184, 201 (Iowa 2016).

excused and disqualification denied where necessary.[37] It reflects the principle that denying parties access to the courts to vindicate their rights is a far greater injustice than permitting judges to hear matters in which they are interested.[38]

A comment to Model Rule 2.11 offers two examples where the rule of necessity may trump the general rule of disqualification.[39] The first is where a judge is presented with a case involving the compensation of all judges in the same court or jurisdiction.[40] Although not mentioned in the comment, a nearly identical situation occurs where the issue is not judges' compensation but instead their benefits.[41] Indeed, these two scenarios are archetypal rule of necessity cases. After all, "any judge within the jurisdiction assigned to hear such a case would have a financial interest in its outcome, and no judge could be found who is truly impartial."[42] In *United States v. Will*, for example, the Supreme Court discussed the rule of necessity in deciding related cases brought by federal district judges challenging the constitutionality of federal statutes that repealed formulaic judicial salary increases previously set to take effect automatically.[43] All federal judges, including the Supreme Court Justices, had an obvious interest in the outcome of the cases.[44] If the district judges who originally heard the cases, or now the Justices, were disqualified under 28 U.S.C. § 455, the public would suffer:

> The declared purpose of § 455 is to guarantee litigants a fair forum in which they can pursue their claims. Far from promoting this purpose, failure to apply the Rule of Necessity would have a contrary effect, for without the Rule, some litigants would be denied their right to a forum. The availability of a forum becomes especially important in these cases. As this Court has observed elsewhere, the Compensation Clause is designed to benefit, not the judges as individuals, but the public interest in a competent and independent judiciary. The public might be denied resolution of this crucial matter if first the District Judge, and now all the Justices of this Court, were to ignore the mandate of the Rule of Necessity and decline to answer the questions presented. On balance,

37. GEYH ET AL., *supra* note 23, § 4.04, at 4–11.
38. McLaughlin v. Mont. State Legis., 489 P.3d 482, 488 (Mont. 2021).
39. MODEL CODE OF JUD. CONDUCT r. 2.11 cmt. 3 (AM. BAR ASS'N 2020).
40. *Id.*
41. *See, e.g.*, Fields v. Elected Officials' Ret. Plan, 320 P.3d 1160, 1164 (Ariz. 2014) (invoking the rule of necessity where the justices were all members of the retirement plan at issue); Moro v. State, 320 P.3d 539, 546–47 (Or. 2014) (applying the rule of necessity in a case involving judges' retirement benefits).
42. GEYH ET AL., *supra* note 23, § 4.04, at 4–11.
43. United States v. Will, 449 U.S. 200, 211–17 (1980).
44. *Id.* at 210.

> the public interest would not be served by requiring disqualification under § 455.[45]

The second example of the rule of necessity involves a proceeding requiring immediate judicial action, like a probable cause hearing or a hearing on a temporary restraining order, where the only judge available to preside would otherwise be disqualified.[46] In this context, it is important to consider that in addition to being a pragmatic rule, the rule of necessity is a rule of last resort.[47] That is, it will not apply where there are reasonable alternatives that would allow an impartial or disinterested judge to hear the matter in question.[48] Where the rule of necessity does apply, "the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as possible."[49]

In summary, judges' duty to sit and the rule of necessity are distinctly different doctrines. The former operates where a judge's impartiality cannot reasonably be questioned, while the latter elevates necessity over a judge's actual or apparent partiality. Both doctrines, though, mandate that judges hear cases that fall within their contours.

This Article examines these essential doctrines in a practical fashion intended to be useful to courts and lawyers alike. Part I outlines the judicial impartiality framework, which is built around 28 U.S.C. § 455(a) in federal courts and Rule 2.11(A) in state courts. Part II reviews judges' duty to sit, including a succinct analysis of the so-called "pernicious"

---

45. *Id.* at 217 (citation omitted).

46. MODEL CODE OF JUD. CONDUCT r. 2.11 cmt. 3 (AM. BAR ASS'N 2020).

47. *See* Stein v. State, 995 So. 2d 329, 345 (Fla. 2008) (stating that the rule of necessity applies only when no other judge is available); Olszewski v. Ogden, No. 922666, 1995 WL 808889, at *2 (Mass. Super. Ct. Jan. 27, 1995) (noting this characterization of the rule's use in an administrative proceeding); Gen. Motors Corp.-Delco Prods. Div. v. Rosa, 624 N.E.2d 142, 144 (N.Y. 1993) ("The Rule of Necessity provides a narrow exception to [parties' entitlement to an impartial adjudicator], requiring a biased adjudicator to decide a case if and only if the dispute cannot otherwise be heard."); State *ex rel.* Brown v. Dietrick, 444 S.E.2d 47, 55 (W. Va. 1994) ("[The rule of necessity] allows a judge who is otherwise disqualified to handle the case to preside if there is no provision that allows another judge to hear the matter.").

48. *See, e.g.*, Huffman v. Ark. Jud. Discipline Comm'n, 42 S.W.3d 386, 393 (Ark. 2001) (rejecting the judge's rule of necessity claim where another judge was available in the courthouse and, even if that judge was unavailable, there was no showing that the matter could not wait until another judge was located); *In re* Howes, 880 N.W.2d 184, 202–03 (Iowa 2016) (rejecting the rule's application where other judges were available in the courthouse and the judge failed to consider whether it would have been practicable to transfer the matter to another judge before hearing it herself); *In re* Disqualification of Swenski, 160 N.E.3d 736, 738–39 (Ohio 2020) (explaining that the rule of necessity did not apply because there were other judges to whom the conflicted judge's matters could be redistributed); Sw. Bell Tel. Co. v. Okla. Corp. Comm'n, 873 P.2d 1001, 1023 (Okla. 1994) (explaining that there was no need to apply the rule of necessity because there was a mechanism for replacing a disqualified commissioner).

49. MODEL CODE OF JUD. CONDUCT r. 2.11 cmt. 3 (AM. BAR ASS'N 2020).

version of the duty. Finally, Part III explores the rule of necessity through a discussion of representative cases, including those (a) in which all judges in a court or jurisdiction would be disqualified were it not for the rule's application; and (b) allegedly requiring immediate judicial action.

I. THE JUDICIAL IMPARTIALITY FRAMEWORK

Understanding the duty to sit and the rule of necessity begins with a fundamental grasp of the judicial impartiality framework.[50] To start, judges' impartially is mandated by the Model Code of Judicial Conduct.[51] Canon 2 states that "[a] judge shall perform the duties of judicial office impartially, competently, and diligently."[52] Rule 2.11(A) provides that judges must disqualify themselves in any proceedings in which their impartiality "might reasonably be questioned, including but not limited to" the circumstances specified in the rule's subparts.[53] Under Rule 2.11(A), however, "a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether" any of the rule's specific provisions apply.[54] "Impartiality" for judicial ethics purposes describes the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before [the] judge."[55]

A party may move to disqualify a judge based on the judge's alleged partiality, but such a motion is not required for disqualification under Rule 2.11(A).[56] Judges must disqualify themselves whenever their impartiality might reasonably be questioned, regardless of whether a party seeks their disqualification on that basis.[57] Rule 2.11(A) is thus self-enforcing.[58]

Attorney General v. Board of State Canvassers provides an interesting example of a judge's voluntary disqualification in line with Rule

---

50. This Part is adapted from Douglas R. Richmond, *Judicial Impartiality and the Extrajudicial Divide*, 2022 U. ILL. L. REV. 1539, 1545–47. All text has been updated and remains the author's original work.

51. MODEL CODE OF JUD. CONDUCT Canon 2 (AM. BAR ASS'N 2020); *id.* r. 2.11(A).

52. *Id.* Canon 2.

53. *Id.* r. 2.11(A).

54. *Id.* r. 2.11 cmt. 1; *see also* Advisory Op. No. 12, 2012 WL 3144430, at *1 (Advisory Comm. Jud. Conduct D.C. Cts. 2012) ("A judge is disqualified whenever the judge's impartiality might reasonably be questioned, even if none of the specific rules in Rule 2.11(A) applies.").

55. MODEL CODE OF JUD. CONDUCT Terminology (AM. BAR ASS'N 2020).

56. Cook v. State, 606 S.W.3d 247, 254 (Tenn. 2020).

57. MODEL CODE OF JUD. CONDUCT r. 2.11 cmt. 2 (AM. BAR ASS'N 2020).

58. *See In re* Marriage of O'Brien, 958 N.E.2d 647, 660 (Ill. 2011) ("All judges in Illinois are expected to consider, *sua sponte*, whether recusal is warranted as a matter of ethics under the Judicial Code."); State v. Van Huizen, 435 P.3d 202, 206 (Utah 2019) ("[I]t is the judge's obligation to recuse when it is required, regardless of whether a motion to disqualify is filed.").

2.11(A).[59] There, Michigan Supreme Court Chief Justice Robert Young disqualified himself in a case challenging President Trump's victory in Michigan's presidential election because he was on "the president-elect's infamous list of United States Supreme Court potential appointees . . . ."[60] Although Chief Justice Young thought that his appointment to the Supreme Court was improbable and believed himself to be impartial, and the intervenor seeking his disqualification did not allege that he was actually biased, he still disqualified himself on appearance grounds so that the court's decision would "not be *legitimately* challenged by base speculation and groundless innuendo by the partisans in this controversy and beyond."[61]

In federal courts, judges' impartiality is mandated by 28 U.S.C. § 455, which is modeled on Rule 2.11.[62] Section 455(a) states: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[63] Section 455(b), like Rule 2.11(A),[64] then identifies specific grounds for disqualification.[65] A federal judge may be disqualified for actual or perceived partiality under section 455(a) even if none of the specific grounds listed in section 455(b) applies in the case.[66] In this way, section 455(a) is also self-enforcing.[67]

A judge's decision whether to disqualify herself is generally entrusted to the judge's sound discretion.[68] Reviewing courts presume judges to

---

59. Att'y Gen. v. Bd. of State Canvassers, 888 N.W.2d 57 (Mich. 2016) (Young, C.J.).

60. *Id.* at 57.

61. *Id.* at 58.

62. CHARLES G. GEYH, FED. JUD. CTR., JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 14 (3d ed. 2020); *see also* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION § 2.6, at 28–29 (3d ed. 2017) (explaining that section 455 was amended to conform it to the Model Code of Judicial Conduct).

63. 28 U.S.C. § 455(a) (2018).

64. Rule 2.11(A)(1)–(6) and § 455(b)(1)–(4) differ in that Rule 2.11(A) treats the specific grounds for disqualification as a non-exclusive list of situations in which a judge's impartiality might reasonably be questioned, while section 455(b) treats them as bases for disqualification separate from, and in addition to, disqualification based on a judge's suspect impartiality. GEYH, *supra* note 62, at 14. This is normally "a distinction without a difference—disqualification is required if the specific or general provisions are triggered, regardless of whether they are characterized as a subset of or separate from the general." *Id.*

65. 28 U.S.C. § 455(b)(1)–(4) (2018).

66. GEYH, *supra* note 62, at 14.

67. Jenkins v. Anton, 922 F.3d 1257, 1271 (11th Cir. 2019) (quoting United States v. Kelly, 888 F.2d 732, 744 (11th Cir. 1989)); *In re* McCarthey, 368 F.3d 1266, 1269 (10th Cir. 2004); Aronson v. Brown, 14 F.3d 1581–82 (Fed. Cir. 1994).

68. Lee v. City of Troy, 559 F. Supp. 3d 73, 80 (N.D.N.Y. 2021) ("[R]ecusal motions are trusted to the district court's discretion."); Xyngular Corp. v. Schenkel, 160 F. Supp. 3d 1290, 1300–01 (D. Utah 2016) ("Federal courts have very broad discretion to excersice their inherent powers to

be impartial.[69] In fact, judges are "presumed to be impartial even after extreme provocation."[70]

Consistent with the presumption of impartiality and for good reasons—including judicial economy and efficiency, fairness to all litigants, and the avoidance of judge-shopping—judges are not easily disqualified.[71] A party who moves to disqualify a judge bears a heavy burden.[72] Whether a judge should be disqualified is measured against an objective standard.[73] The test for disqualification is whether "a reasonable person with knowledge and understanding of all the relevant

---

sanction a full range of litigation misconduct that abuses the judicial process."); Griswold v. Homer Advisory Plan. Comm'n, 484 P.3d 120, 130 (Alaska 2021) (affording a judge's discretionary power to recuse themselves "substantial weight"); Chawla v. Appeals Ct., 120 N.E.3d 326, 328 (Mass. 2019); State v. Rush, 975 N.W.2d 541, 546 (Neb. Ct. App. 2022) ("[A] judge's decision whether to recuse him or herself from a particular proceeding is . . . within the judge's discretion."); State v. McCabe, 987 A.2d 567, 573 (N.J. 2010) (explaining that motions for disqualification are entrusted to the sound discretion of the judge).

69. United States v. Williams, 949 F.3d 1056, 1061 (7th Cir. 2020) (noting that this presumption is rebuttable); United States v. Woods, 978 F.3d 554, 570 (8th Cir. 2020) (applying 28 U.S.C. § 455(a)); Chaidez v. Grant, 506 P.3d 807, 812 (Ariz. Ct. App. 2022); Isom v. State, 563 S.W.3d 533, 546 (Ark. 2018); Rochefort v. State, 177 N.E.3d 113, 118 (Ind. Ct. App. 2021); Capers v. NorthPro Props. Mgmt., LLC, 321 So. 3d 502, 516 (La. Ct. App. 2021); Batiste v. State, 337 So. 3d 1013, 1021 (Miss. 2022); Hendrix v. City of St. Louis, 636 S.W.3d 889, 898 (Mo. Ct. App. 2021); *In re* A.A., 951 N.W.2d 144, 176 (Neb. 2020); Canarelli v. Eighth Jud. Dist. Ct., 506 P.3d 334, 337 (Nev. 2022); *In re* Paternity of B.J.M., 944 N.W.2d 542, 547 (Wis. 2020).

70. People v. Jackson, 793 N.E.2d 1, 19 (Ill. 2001).

71. *See* Ark. State Conf. NAACP v. Ark Bd. of Apportionment, 578 F. Supp. 3d 1011, 1016 (E.D. Ark. 2022) ("Unless there is a true need for recusal, fairness dictates that litigants should get the judge randomly assigned to hear their case. Recusal in situations where it is not required incentivizes and facilitates the unfair and unseemly tactic of judge shopping."). For example, judges cannot be disqualified for alleged partiality based on the political affiliation of the presidents or governors who appointed them. *See* Straw v. United States, 4 F.4th 1358, 1363 (Fed. Cir. 2021) (referring to federal judges' presidential appointments). An adverse ruling by a judge, standing alone, is no basis for disqualification. Thomas v. Dart, 39 F.4th 835, 844 (7th Cir. 2022); Gilbert v. State, 509 P.3d 928, 933 (Wyo. 2022). This is true even where a judge errs. Erroneous rulings are grounds for appeal—not disqualification. *Thomas*, 39 F.4th at 844. Finally, for now, a judge's critical or stern remarks in the normal course of courtroom administration, or a judge's intemperate remarks toward a lawyer or party out of annoyance, impatience, or frustration with the lawyer's or party's conduct, generally will not support disqualification. Liteky v. United States, 510 U.S. 540, 555–56 (1994); Cohen v. Cohen, 270 A.3d 89, 94–96 (Conn. 2022).

72. *Woods*, 978 F.3d at 570 (quoting United States v. Minard, 856 F.3d 555, 557 (8th Cir. 2017)); Pearl River Cnty. Bd. of Supervisors v. Miss. State Bd. of Educ., 289 So. 3d 301, 309 (Miss. 2020); State v. Thomas, 977 N.W.2d 258, 269 (Neb. 2022).

73. Johnson v. Steele, 999 F.3d 584, 587 (8th Cir. 2021); *Williams*, 949 F.3d at 1061; Layton v. O'Dea, 515 P.3d 92, 101 (Alaska 2022) (quoting Downs v. Downs, 440 P.3d 294, 297 (Alaska 2019)); Mondy v. Magnolia Advanced Materials, Inc., 815 S.E.2d 70, 75 (Ga. 2018); Kondaur Cap. Corp. v. Matsuyoshi, 496 P.3d 479, 489 (Haw. Ct. App. 2021); *In re* Howes, 880 N.W.2d 184, 195 (Iowa 2016); Presbyterian Church (U.S.A.) v. Edwards, 594 S.W.3d 199, 200 (Ky. 2018); State v. Malone, 963 N.W.2d 453, 464 (Minn. 2021); State v. Jaeger, 970 N.W.2d 751, 768 (Neb. 2022); Cook v. State, 606 S.W.3d 247, 255 (Tenn. 2020); *In re* Keenan, 502 P.3d 1271, 1277–78 (Wash. 2022).

facts would question the judge's impartiality."[74] An Arkansas federal judge somewhat skeptically described a "reasonable person" in this context:

> Of course, the reasonable person is and always has been a legal fiction—a hypothesized observer who inhabits the *Goldilocks* zone of life. The reasonable person is not too credulous, nor too incredulous. The reasonable person does not make unfounded assumptions, nor does he hide his or her head in the sand. The reasonable person uses logic to analyze situations but is not devoid of emotion and common sense.[75]

In any event, the reasonable person referred to in judicial disqualification debates is not another judge.[76] Rather, the term describes an average layperson.[77] A judge does not qualify as a reasonable person for judicial disqualification purposes because judges' habit of "dispassionate decision making" and sensitivity to their responsibility to decide cases on the merits may cause them to consider bias or partiality allegations to be less credible or significant than average citizens would.[78] At the same time, the hypothetical reasonable person cannot be someone who is "unduly suspicious or concerned about a trivial risk that a judge may be biased."[79] Speculation about a judge's bias or partiality will not support disqualification.[80]

Because a judge's alleged partiality is evaluated objectively, disqualification may be required even where the judge subjectively believes that she is impartial,[81] or where there has been no showing that the judge is, in fact, biased or prejudiced.[82] Appearances are important here,[83] as Chief Justice Young's precautionary disqualification in

---

74. *In re* Russell, 211 A.3d 426, 432 (Md. 2019); *see also* Burke v. Regalado, 935 F.3d 960, 1054 (10th Cir. 2019) (citation omitted) ("The test under § 455(a) is . . . whether a reasonable person might question the judge's impartiality. Similarly, the test is not whether someone could conceivably question a judge's impartiality but whether a reasonable person, knowing all relevant facts, would harbor doubts."); State v. Wallace, 918 N.W.2d 64, 69 (N.D. 2018) ("[A court] 'must determine whether a reasonable person could, on the basis of all the facts, reasonably question the judge's impartiality.'").

75. *Ark. State Conf. NAACP*, 578 F. Supp. 3d at 1016–17.

76. United States v. DeTemple, 162 F.3d 279, 287 (4th Cir. 1999).

77. Mathis v. Huff & Puff Trucking, Inc., 787 F.3d 1297, 1310 (10th Cir. 2015).

78. *DeTemple*, 162 F.3d at 287.

79. *Id.*

80. People v. Jennings, 498 P.3d 1164, 1172 (Colo. App. 2021); Erlinger v. Federico, 242 So. 3d 1177, 1181 (Fla. Dist. Ct. App. 2018); Carter v. Carter, 957 N.W.2d 623, 644 (Iowa 2021); State v. Trujillo, 222 P.3d 1040, 1043 (N.M. Ct. App. 2009).

81. Davis v. State, 347 So. 3d 315, 322 (Fla. 2022); Arbuckle Simpson Aquifer Prot. Fed'n of Okla., Inc. v. Okla. Water Res. Bd., 343 P.3d 1266, 1271 (Okla. 2013).

82. Tilson v. Tilson, 948 N.W.2d 768, 783 (Neb. 2020).

83. *See* State v. Brunsen, 972 N.W.2d 405, 413 (Neb. 2022) ("The proper administration of the

Attorney General v. State Board of Canvassers,[84] discussed earlier,[85] exemplifies. In all cases, however, whether a judge should be disqualified for partiality is a fact-specific determination.[86]

II. THE DUTY TO SIT

A. Proper Application of the Duty to Sit

Judges at all levels owe a duty to sit, but the duty generally seems to be felt most acutely by those serving on courts of last resort.[87] As two Michigan Supreme Court justices thoughtfully explained in denying the plaintiffs' disqualification motion in *Adair v. State, Department of Education*:

> The issue of recusal by justices of the Supreme Court involves special considerations . . . . This is because, unlike members of the trial courts or the Court of Appeals, there can be no replacement of a justice who must recuse himself or herself. Unlike those courts in which a substitute judge can take the place of a recused judge, there is no such availability on the Supreme Court. Instead, upon a recusal by a justice, this Court must proceed with less than a full contingent of its members. Not only does this increase the likelihood of an even division of the Court's members—effectively rendering null and void the work of the Court and leaving intact lower court decisions that a majority of justices may view as wrongly decided—it also deprives the public and litigants of

---

law demands not only that judges refrain from actual bias, but that they avoid all appearances of unfairness."); People v. Novak, 88 N.E.3d 305, 307 (N.Y. 2017) ("Not only must judges actually be neutral, they must appear so as well."); Cook v. State, 606 S.W.3d 247, 254 (Tenn. 2020) ("Judges must be fair and impartial both in fact and in perception.").

84. Att'y Gen. v. Bd. of State Canvassers, 888 N.W.2d 57 (Mich. 2016).

85. See *supra* notes 59–61.

86. *See, e.g.*, United States v. Brocato, 4 F.4th 296, 302–03 (5th Cir. 2021) (quoting United States v. Jordan, 49 F.3d 152, 157 (5th Cir. 1995)); United States v. Holland, 519 F.3d 909, 913 (9th Cir. 2008) ("Disqualification under § 455(a) is necessarily fact-driven and may turn on subtleties in the particular case."); Fernández-Santos v. United States, 530 F. Supp. 3d 208, 221 (D.P.R. 2021) ("Each case implicating section 455(a) is *sui generis*, requiring a fact-specific analysis."); Powers v. Twp. of Mahwah, No. A-2302-19, 2022 WL 791433, at *5 (N.J. Super. Ct. App. Div. Mar. 16, 2022) ("Appearance of and actual fairness are essential, but whether upholding these necessitates disqualification generally requires a case-by-case analysis."); State v. Riordan, 209 P.3d 773, 775 (N.M. 2009) ("[D]isqualification requires an examination of the specific facts in the case"); *In re* Sullivan, 135 A.3d 1164, 1175 (Pa. Ct. Jud. Discipline 2016) ("Disqualification must be determined on a case-by-case basis.").

87. *See, e.g.*, Peterson v. Borst, 784 N.E.2d 934, 935 (Ind. 2003) (Boehm, J.) ("A judge has a 'duty to sit' under Canon 3B(1) and not to recuse 'unless disqualification is required.' That is a particularly powerful consideration for Justices of Supreme Courts, where there is no procedure to replace a recused Justice, and a recusal is in practical terms a vote for the party who prevailed in the last court."); Kendzierski v. Macomb Cnty., 921 N.W.2d 329, 330 (Mich. 2019) (Viviano, J.) ("Justices of this Court have also recognized a 'duty to sit' that constrains members of a court of last resort in particular."); State v. Henley, 778 N.W.2d 853, 862 (Wis. 2009) (Roggensack, J.) (discussing the duty to sit in denying the defendant's disqualification motion).

> the full collegial body that they have selected as the state's court of last resort. These unfortunate consequences do not mean that a justice must not recuse himself or herself in appropriate instances, but they do suggest that a justice must consider carefully the implications of a disqualification decision. That is, when it is not necessary to recuse, it is necessary not to recuse. Each unnecessary recusal adversely affects the functioning of the Court.[88]

In *Presbyterian Church (U.S.A.) v. Edwards*,[89] for example, Rev. Eric Hoey, the real party in interest, unsuccessfully sought to disqualify Kentucky Supreme Court Justice Laurance VanMeter on the theory that his participation in the case would create an appearance of impropriety.[90] Justice VanMeter's wife was a member of Stoll Keenan Ogden PLLC (Stoll Keenan), the law firm that represented the Presbyterian Church (the Church) in the case.[91]

Justice VanMeter's wife was not among the Stoll Keenan lawyers who represented the Church.[92] The lawyers who represented the Church worked in the firm's Louisville office, while Justice VanMeter's wife practiced in the firm's Lexington office.[93] Because Stoll Keenan was billing the Church hourly rather than charging a contingent fee, Justice VanMeter's wife would not profit if the Church prevailed in the litigation, nor would she suffer financially if the Church lost.[94] Plus, the Justice's wife was compensated through a predetermined annual salary, so there was no chance that the outcome of the case could either benefit or harm her economically under any circumstances.[95] Even so, Rev. Hoey's allegations caused Justice VanMeter to consider whether he should disqualify himself under Rule 2.11(A)(2)(c) of the Kentucky Code of Judicial Conduct, which provides that a judge should disqualify himself if he knows that his spouse "has more than a de minimis[] interest that could be substantially affected by the proceeding."[96]

There were no Kentucky cases discussing whether a judge's relative's financial interest in a case might require the judge's disqualification.[97] After studying authorities from other jurisdictions, however, Justice VanMeter easily concluded that his wife had no interest in the case, either

---

88. Adair v. State, 709 N.W.2d 567, 579 (Mich. 2006) (Taylor, C.J. & Markman, J.).
89. Presbyterian Church (U.S.A) v. Edwards, 594 S.W.3d 199 (Ky. 2018) (VanMeter, J.).
90. *Id.* at 200–01 (quoting Rev. Hoey's motion).
91. *Id.* at 200.
92. *Id.* at 201.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 202 (quoting Rule 2.11(A)).
97. *Id.*

financial or otherwise, that necessitated his disqualification under Rule 2.11(A)(2)(c).[98]

Next, Justice VanMeter considered whether he might have to disqualify himself under Rule 2.11(A) because his impartiality might reasonably be questioned.[99] Looking at the situation objectively, he determined that his impartiality was beyond doubt.[100]

Finally, but related to both prior issues, Justice VanMeter reached the "overarching consideration" of "a judge's obligation to decide" set forth in Rule 2.7.[101] Although judges obviously must disqualify themselves in some cases, "unnecessary disqualification has a disproportionate negative impact on a jurisdiction's highest court."[102] Disqualified justices are not replaceable and the court's remaining members may improvidently affirm a lower court's decision merely because they are equally divided.[103] In short, "absent good cause" for disqualification, judges are obligated "to remain on and decide" their assigned cases.[104] Bluntly, unless a judge's disqualification is required, it is prohibited.[105] Such was the case here and Justice VanMeter thus denied Rev. Hoey's disqualification motion.[106]

As noted earlier, lower court judges also owe a duty to sit, as was the situation in *Ex parte Siegel*.[107] That case arose out of family law litigation between Herrick Siegel and Joanna Siegel.[108] Judge Patricia Stephens entered a judgment in the Siegels's divorce case in January 2018, which, among other things, awarded the Siegels joint custody of their four minor children, with the children living with their mother and their father having visitation rights.[109] New custody litigation followed the divorce, and, in April 2021, the Siegels participated in an evidentiary hearing before Judge Stephens, to whom the new litigation was assigned.[110]

The first day of the hearing revolved around the lack of a relationship

---

98. *Id.* at 203–04.
99. *Id.* at 204.
100. *Id.*
101. *Id.*
102. *Id.* (citing Microsoft Corp. v. United States, 530 U.S. 1301, 1303 (2000)).
103. *See id.* (quoting *Microsoft*, 530 U.S. at 1303).
104. *Id.* at 204–05 (citing Pessin v. Keeneland Ass'n, 274 F. Supp. 513, 514–15 (E.D. Ky. 1967); Laird v. Tatum, 409 U.S. 824, 837 (1972) (Rehnquist, J.)).
105. *See id.* at 205 (quoting *In re* Aguinda, 241 F.3d 194, 201 (2d Cir. 2001)).
106. *Id.*
107. *Ex parte* Siegel, 347 So. 3d 245 (Ala. Civ. App. 2021).
108. *See id.* at 246 (describing the Siegels' dispute).
109. *Id.*
110. *Id.*

between Mr. Siegel and his children.[111] Indeed, Mr. Siegel had almost no contact with his children since the divorce over three years earlier.[112] In a post-hearing conference between Judge Stephens and the parties' lawyers in the judge's chambers, Judge Stephens commented on the children's relationships with Mr. Siegel based on her observations during the divorce proceeding and on testimony during the hearing.[113] At the start of the second day of the hearing, Mrs. Siegel's lawyer, Sara Senesac, announced that she needed to make a record.[114] After reciting her recollection of the lawyers' meeting with the judge in chambers the day before, Senesac said:

> "Now I am requesting that if the Court has prejudged this case and has made up its mind that the Court would recuse itself. I trust that if the Court does not recuse itself that it is because the Court will not prejudge this case and that it will make its decision based on the evidence introduced by the witnesses in this case."[115]

Senesac and Judge Stephens then engaged in a tense conversation about the reason for Senesac's professed concern about the judge's prejudgment of the case and, thus, her impartiality.[116] In that exchange, Judge Stephens defended her comments about the case and her associated observations and challenged Senesac's speculation that she had potentially prejudged the case.[117] Suffice it to say that Judge Stephens's explanation of her conduct was reasonable and that Senesac's defense of her supposed concern about the judge's possible favoritism of Mr. Siegel was, at best, weak.[118]

The parties then recessed.[119] Upon their return, Judge Stephens announced that she was reluctantly disqualifying herself from further participation in the litigation:

> "We are in a situation, I think, that does require me to go ahead and recuse. It is not a situation which I have prejudged this case, but I do believe because of the impression and the statements made by [Senesac]

---

111. *Id.*

112. *Id.* at 246.

113. *Id.* at 246–47 (quoting the exchange between the judge and Mrs. Siegel's lawyer in which Mrs. Siegel described the judge's comments from the prior day).

114. *Id.* at 246.

115. *Id.* at 247. Although a judge may form impressions or opinions about the parties during litigation, she may not prejudge a case. Dumas v. State, 331 So. 3d 307, 308 (Fla. Dist. Ct. App. 2021); *see also* People v. Lester, Nos. 01112040.1-9, 01112041.9, 2002 WL 553844, at *1 (N.Y. Just. Ct. Mar. 22, 2002) ("It is well established that a judge must keep an open mind and not prejudge a case.").

116. *Ex parte Siegel*, 347 So. 3d at 247–48.

117. *Id.*

118. *See id.* (quoting the conversation between Senesac and Judge Stephens).

119. *Id.* at 249.

> it will create an appearance that if I rule in favor of [Mr. Siegel] then [Senesac] is going to allege that I prejudged this case. If I rule for [Mrs. Siegel] then it will appear that I ruled in [her] favor because of the statements of [Senesac]. So I just feel that at this point because of the impression that has been created by the statements that I have to go ahead and recuse. So I will go ahead and enter that recusal order so that the case can be reset in front of someone else."[120]

After Judge Stephens entered her order effecting her disqualification, Mr. Siegel petitioned the Alabama Court of Civil Appeals for a writ of mandamus.[121] He contended that there was no statutory basis for the judge's disqualification and that Alabama judicial ethics rules did not require her disqualification.[122] After examining Alabama case law on judges' duty to sit, the appellate court agreed.[123]

The *Ex parte Siegel* court observed that there was no relationship between Judge Stephens and either party that provided reasonable grounds for questioning the judge's impartiality.[124] Neither side disputed the judge's characterization of her conversation with the lawyers after the first day of the hearing, during which she expressed her hope that Mr. Siegel and the children could reconcile and volunteered possible reasons for their alienation.[125] Judge Stephens assured everyone that she had not prejudged the case and that she was not biased against either party.[126] The court did not believe it was reasonable for Senesac to doubt Judge Stephens's impartiality simply because the judge offered her view as to why Mr. Siegel and his children were estranged.[127] It seemed clear to the court that Judge Stephens was attempting to collaborate with the lawyers for both sides to help the Siegel children reconnect with their father rather than favoring Mr. Siegel.[128]

The *Ex parte Siegel* court concluded that there was no basis for Senesac's allegation that Judge Stephens may have prejudged the case and, thus, there was no reason for the judge to have disqualified herself.[129] The court was unwilling to allow a trial judge to opt out of a case based on one litigant's claim of bias that was not objectively

---

120. *Id.* (quoting Judge Stephens).
121. *Id.*
122. *Id.*
123. *Id.* at 249–51.
124. *Id.* at 250.
125. *Id.* at 250–51.
126. *Id.* at 251.
127. *Id.*
128. *Id.*
129. *Id.*

reasonable.[130] Accordingly, the court ordered Judge Stephens "to set aside her order of recusal and to again preside over the actions that were previously before her."[131] In other words, the *Ex parte Siegel* court directed Judge Stephens to fulfill her duty to sit.

In summary, *Presbyterian Church (U.S.A.)* and *Ex parte Siegel* reflect the proper application of judges' duty to sit. Neither *Presbyterian Church (U.S.A.)* nor *Ex parte Siegel* presented a reasonable basis for questioning the judge's impartiality. In *Ex parte Siegel*, Judge Stephens's decision to disqualify herself despite believing that her ability to be fair to both parties could not reasonably be doubted simply overlooked the principle that judges' duty to disqualify themselves complements, but does not supersede, their duty to sit in the absence of any objective basis for disqualification.[132]

B. A Pernicious Version of the Duty to Sit?

The duty to sit is, like any doctrine, capable of being misapplied or misinterpreted by courts. That is the situation that Professor Jeffrey Stempel has characterized as the "pernicious" version of the duty to sit.[133] This misapplication or misinterpretation of the duty to sit "pushes judges in exactly the wrong direction, suggesting that they should decline to preside only if the grounds for disqualification are undeniably clear."[134] Basically, the pernicious version of the duty to sit leads judges to remain on cases when they should instead disqualify themselves.[135] This conception of the duty to sit runs afoul of the principle that the balance tips toward disqualification in close cases.[136] It also ignores the fact that 28 U.S.C. § 455(a) and Rule 2.11(A) require judges to disqualify themselves where their impartiality might reasonably be questioned to ensure public confidence in courts' fairness and integrity.[137] Professor Stempel capsulizes the pernicious version of the duty to sit and its

130. *Id.*
131. *Id.*
132. State v. Desmond, No. 91009844DI, 2011 WL 91984, at *9 (Del. Super. Ct. Jan. 5, 2011).
133. Stempel, *supra* note 3, at 815.
134. *Id.*
135. Justice Scalia's explanation for his refusal to disqualify himself in *Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913 (2004), briefly mentioned earlier, is the rare case that arguably exemplifies Prof. Stempel's pernicious version of the duty to sit. *See* Stempel, *supra* note 3, at 900–07.
136. United States v. Wedd, 993 F.3d 104 (2d Cir. 2021) (quoting Ligon v. City of N.Y., 736 F.3d 118, 124 (2d Cir. 2013), *vacated in part on other grounds*, 743 F.3d 362 (2d Cir. 2014)); Nichols v. Alley, 71 F.3d 347, 352 (10th Cir. 1995); *see* United States v. Kelly, 888 F.2d 732, 744 (11th Cir. 1989) (stating that 28 U.S.C. § 455(a) requires judges to resolve any doubts in favor of disqualification).
137. United States v. Amico, 486 F.3d 764, 775 (2d Cir. 2007) (discussing § 455(a)).

consequences this way:

> The presumption against disqualification created by the duty to sit doctrine is detrimental to the judicial system in that it reverses what should be the logical presumption in favor of disqualification in close cases. Where the decision of whether to recuse is uncertain or difficult, a ruling in favor of recusal logically enhances public confidence in the judiciary. . . . In contrast, to the degree that the duty to sit prompts a judge to remain presiding when there are good arguments for disqualification, the lay and legal communities have valid reason to wonder whether the outcome of the case turned in any significant part on favoritism by the judge.[138]

Concerns that judges may remain on cases rather than disqualifying themselves when their impartiality might reasonably be questioned are legitimate. But that problem, where it exists, can seldom be shown to lie in the judge's misunderstanding of the duty to sit. In fact, a judge's failure to disqualify in the face of a motion to do so under section 455(a) or Rule 2.11(A) is as likely due to the judge's failure to appreciate the possible appearance of her partiality to an average person or to her conviction that she will be impartial as it is to confusion about her duty to sit.[139] The judge might cite the duty to sit as the reason for her refusal to disqualify, but the duty is then an after-the-fact rationalization for her erroneous decision to keep the case rather than the cause for keeping it. In addition, while any doubts about a judge's impartiality should be resolved in favor of disqualification, it is equally true that a judge should not disqualify herself when there is an insufficient basis for her withdrawal.[140] Although judges sometimes make this final point in language that superficially seems too strong,[141] that does not necessarily mean they have twisted the duty to sit.

The problem here, as in other disqualification contexts, is that while there are clear cases for disqualification and others where it is plainly unjustifiable, there is a vast middle ground where reasonable judges can differ on whether disqualification is required.[142] Those cases turn on the facts and the individual judge's careful exercise of discretion. And

---

138. Stempel, *supra* note 3, at 895.

139. *See In re* Martinez-Catala, 129 F.3d 213, 220 (1st Cir. 1997) ("[W]here the appearance of partiality exists, recusal is required regardless of the judge's own inner conviction that he or she can decide the case fairly despite the circumstances.").

140. Conroy *ex rel.* Aflac, Inc. v. Amos, 785 F. App'x 781, 755 n.3 (11th Cir. 2019) (quoting *In re* Moody, 755 F.3d 891, 895 (11th Cir. 2014)).

141. *See, e.g.*, State v. Desmond, No. 91009844DI, 2011 WL 91984, at *12 (Del. Super. Ct. Jan. 5, 2011) (emphasis added) (recognizing a judge's "important 'duty to sit' unless and until *genuinely convinced* of the need for recusal or disqualification").

142. *See In re* United States, 666 F.2d 690, 695 (1st Cir. 1981) (observing that in many disqualification cases, "reasonable deciders may disagree").

appellate review of a trial judge's discretionary decision to sit is unlikely to result in reversal even if the appellate court believes that disqualification would "have been the wiser course and that many judges would have taken it . . . ."[143]

Long story short, whatever the reasons for judges' errant refusals to disqualify themselves when their impartiality may reasonably be questioned, the duty to sit is rarely among them and never should be. To reiterate, the duty to sit applies where a judge's impartiality *cannot* reasonably be questioned.[144] Only the rule of necessity allows a judge to remain on a case when her impartiality may reasonably be in doubt.[145]

III. THE RULE OF NECESSITY

A. Where All Judges Are Disqualified, None Are

The rule of necessity is a pragmatic doctrine that provides an exception to the requirement of judicial impartiality based on need.[146] The most common example of its application is a case where all judges on a court or in a jurisdiction would otherwise be disqualified.[147] Consider, for example, litigation over adjustments to salaries or benefits for the judges in the jurisdiction.[148] Because any judge assigned to hear the case would

143. *In re* United States, 158 F.3d 26, 35 (1st Cir. 1998).

144. See *supra* notes 16–22 and 26–30 and accompanying text.

145. See *infra* Part III.

146. *See, e.g.*, Lake v. State Health Plan for Tchrs. & State Emps., 861 S.E.2d 335, 336 (N.C. 2021) ("In light of the quorum requirement contained in N.C.G.S. § 7A-10(a) and the fact that a majority of the members of the Court are potentially disqualified from participating in . . . this case . . . on the grounds that one or more persons within the third degree of kinship by either blood or marriage not residing in their households could be a member of the plaintiff class, the Court hereby exercises its discretion to invoke the Rule of Necessity and will proceed to set this case for argument and decision."); Driscoll v. Corbett, 69 A.3d 197, 207 (Pa. 2013) ("[M]embers of this Court might benefit from a ruling favorable to Petitioners. Since, however, this potential advantage is common among commissioned Pennsylvania jurists, we proceed to discharge our constitutional duty to resolve the matter under the long-standing rule of necessity.").

147. *See, e.g.*, *In re* P.L. 2001, Chapter 362, 895 A.2d 1128, 1131, 1143 (N.J. 2006) (invoking the rule of necessity in a case challenging a statute that would compromise the independence of the judiciary by creating in the administrative office of the courts a law enforcement unit comprised of probation officers and directing the New Jersey Supreme Court to promulgate rules for the new unit).

148. *See, e.g.*, Jorgensen v. Blagojevich, 811 N.E.2d 652, 660 (Ill. 2004) (announcing that the rule of necessity obligated the court to hear a case involving cost of living adjustments for Illinois judges); Citizens Protecting Mich.'s Const. v. Sec'y of State, 755 N.W.2d 147, 149–52 (Mich. 2008) (involving an initiative that would have reduced all judges' pay by 15 percent and decreased their retirement benefits); DePascale v. State, 47 A.3d 690, 693 (N.J. 2012) (invoking the rule of necessity in deciding that the state's effective reduction of judges' salaries by increasing their pension contributions was unconstitutional); Maron v. Silver, 925 N.E.2d 899, 907 (N.Y. 2010) (relying on the rule of necessity to hear an appeal involving an unconstitutional reduction in judicial salaries).

have a financial interest in its outcome, no judge could be considered impartial.[149] To use another example, the rule of necessity applies where a litigant names all members of a state supreme court as defendants in a case challenging the court's authority and then moves to disqualify them.[150] Similarly, and as a final example, where a litigant sues a federal court, the judges of that court may hear the matter under the rule of necessity.[151] In these cases and others like them, the rule of necessity reflects the maxim that "where all judges are disqualified, none are."[152]

McLaughlin v. Montana State Legislature[153] richly illustrates this line of authority. *McLaughlin* took root when Beth McLaughlin, Montana's court administrator, facilitated a poll of Montana Judges Association (MJA) members regarding legislation that changed how judicial vacancies were filled.[154] After learning of the MJA poll, the Montana State Legislature (the Legislature) issued an investigative subpoena to the state's Department of Administration seeking McLaughlin's emails for two specified time periods.[155] By the time McLaughlin learned of the subpoena, thousands of judicial branch emails had been produced to the Legislature and thereafter disclosed to the public.[156] McLaughlin filed an emergency motion in the Montana Supreme Court to quash the subpoena, which the court granted for the time being.[157] She also filed a related petition for original jurisdiction in the supreme court that launched *McLaughlin*.[158]

In response to McLaughlin's petition, the Legislature asserted that it would not be bound by any orders of the court in the litigation on the theory that the court lacked jurisdiction to interfere in the

149. GEYH ET AL., *supra* note 23, § 4.04, at 4–11.

150. *See, e.g.*, Scheehle v. Justices of the Sup. Ct. of the State of Ariz., 120 P.3d 1092, 1106–07 (Ariz. 2005) ("[W]hen a litigant names each member of a state's highest court as a party to litigation. . . the rule of necessity obliges the individual members of the court to sit."); Vt. Sup. Ct. Admin. Directive No. 17 v. Vt. Sup. Ct., 576 A.2d 127, 132 (Vt. 1990) ("A judge cannot be disqualified merely because a *litigant* sues or threatens to sue him or her.").

151. *See, e.g.*, Miller v. Gaujot, 741 F. App'x 176, 176 n.1 (4th Cir. 2018) ("Although this court has been named as a defendant-appellee . . . we exercise our discretion to decide the appeal pursuant to the Rule of Necessity."); Haase v. Countrywide Home Loans, Inc., 838 F.3d 665, 666–67 (5th Cir. 2016) ("[T]he Rule of Necessity qualifies the judges of this court to both hear and decide this appeal.").

152. State v. Fuller, No. CR 10226195, 1996 WL 218207, at *3 (Conn. Super. Ct. Apr. 8, 1996) (citing Evans v. Gore, 253 U.S. 245 (1920)).

153. McLaughlin v. Mont. State Legislature, 489 P.3d 482 (Mont. 2021).

154. *Id.* at 483.

155. *Id*.

156. *Id.*

157. *Id.* at 483–84.

158. *Id.* at 484.

investigation.[159] Then, the Legislature subpoenaed all the justices, seeking their emails with McLaughlin during certain times, emails concerning 2021 legislation, and emails regarding the MJA.[160] Thereafter, the Legislature responded to McLaughlin's petition and revealed the ostensible purpose of its investigation:

> The purpose . . . is to investigate and determine whether legislation should be enacted concerning: the judicial branch's public information and records retention protocols; members of the judicial branch improperly using government time and resources to lobby on behalf of a private entity; judges' and justices' statements on legislation creating judicial bias; and the courts' conflict of interest in hearing these matters.[161]

The "private entity" mentioned in the Legislature's response, of course, was the MJA, in which all Montana judges—including the supreme court justices—were members.[162]

The Legislature also asserted that the court could not preside over McLaughlin's case because the court would be "unable to maintain its impartiality."[163] But the court had previously decided cases involving the court administrator without there being any suggestion of a conflict of interest.[164] Besides:

> In this case, the Court is called upon to assess, for the first time, the appropriate scope of the legislative subpoena power in Montana—not to judge the conduct of McLaughlin. Importantly, if the Court were to adopt the Legislature's argument, then Judicial Branch offinicers and employees, as well as parties seeking relief from their actions, would be denied access to justice, and their interests in having their rights vindicated would be frustrated in every court in Montana.[165]

The court then called out the Legislature, saying that its attempt to manufacture a conflict of interest by subpoenaing the entire supreme court should be exposed for what is was—a ploy "to disrupt the normal process of a tribunal whose function is to adjudicate the underlying dispute consistent with the law, the [Montana] constitution, and due process."[166] Morever, the conflict conjured up by the Legislature was particularly troublesome because all Montana judges were interested in the outcome of the case since it involved an investigation into alleged

---

159. *Id*.
160. *Id.*
161. *Id.* at 485 (quoting the Legislature's response).
162. *Id.*
163. *Id.* at 486.
164. *Id.*
165. *Id.*
166. *Id.* at 486–87.

judicial misconduct on a statewide level and the practices of a group (the MJA) to which they all belonged and which communicated with them via email.[167] As the *McLaughlin* court observed, it was just this sort of situation that spawned the rule of necessity.[168]

The court explained that where, as here, a case affects the interests of all judges qualified to hear it, the rule of necessity applies without any need for additional factual development.[169] In such circumstances, the disqualification of all judges means that none of them are disqualified.[170] But for the rule of necessity, litigants in a case in which all the judges were disqualified would be deprived of a forum for resolving their dispute.[171] The rule of necessity accordingly reflects the enduring "principle that to deny an individual access to the courts for vindication of his or her rights constitutes a far more egregious wrong than to permit a judge to hear a matter in which he or she has some interest."[172]

Because of the scope of the Legislature's investigation, every Montana judge had a disqualifying conflict of interest.[173] The *McLaughlin* court was therefore compelled to invoke the rule of necessity.[174] Indeed, if the court did not apply the rule of necessity and instead disqualified every justice in a case "involving co-equal branches of government and principles of separation of powers, the [c]ourt's ability to fulfill its constitutional duties to adjudicate difficult and controversial matters would be compromised."[175]

Finally, the court scolded the Legislature for trying to disqualify the court based on a manufactured conflict of interest:

> The Legislature has unilaterally attempted to create a disqualifying conflict for every . . . member of this Court . . . by issuing a subpoena to every presiding justice in the case which is nearly identical to the subject of the litigation—McLaughlin's subpoena. It is well recognized that a party's unilateral acts personally attacking or suing the judge for acts taken in his or her judicial capacity do not create a proper basis for recusal. Recusal under such circumstances would permit a party to avoid a particular judge simply by attacking or suing him. . . . The Legislature's unilateral act of issuing subpoenas to the justices during

167. *Id.* at 487.
168. *Id.*
169. *Id.* (citing State *ex rel.* Hash v. McGraw, 376 S.E.2d 634, 639 (W. Va. 1998)).
170. *Id*. (quoting Ignacio v. Judges of the U.S. Ct. of Appeals for the Ninth Cir., 453 F.3d 1160, 1165 (9th Cir. 2006)).
171. *Id.* at 488.
172. *Id.* (citing Weinstock v. Holden, 995 S.W.2d 408, 410 (Mo. 1999)).
173. *Id.*
174. *Id.*
175. *Id.*

> the pendency of this case is not ground for recusal of every member of this Court. . . . Were the Court to succumb to the Legislature's request and evade our responsibilities and obligations as a Court, we are convinced that public confidence in our integrity, honesty, leadership, and ability to function as the highest court of this State would be compromised.[176]

In conclusion, the *McLaughlin* court correctly denied the Legislature's motion to disqualify the court's justices.[177]

B. The Rule Where Immediate Judicial Action Is Required

In addition to cases in which an entire court would be disqualified were it not for the rule of necessity, the rule also applies in cases where immediate judicial action is required but the only judge available to hear the matter may reasonably be challenged for actual or apparent partiality.[178] In these cases, it is important for the litigants and the court to recognize that the rule of necessity is strictly construed; that is, it applies "if and only if" no other judge can hear the matter.[179] This is because the law favors delegating judicial authority over adjudication by judges whose impartiality may reasonably be questioned.[180]

*In re Howes*is a rare case in which this aspect of the rule of necessity was carefully evaluated.[181] *In re Howes* was a judicial discipline case that got its start in 2012 when Iowa trial court judge Mary Howes divorced her husband, Jack Henderkott.[182] Maria Pauly represented Judge Howes and Chad Kepros, of the law firm Bray & Klockau, represented Henderkott.[183]

Judge Howes and Henderkott later got into a dissolution-related tax dispute that lasted into 2013.[184] Pauly represented Judge Howes in the

---

176. *Id.* at 489 (citations omitted).

177. *Id.*

178. *See* MODEL CODE OF JUD. CONDUCT r. 2.11 cmt. 3 (AM. BAR ASS'N 2020) (offering as examples a hearing on probable cause or a hearing on a temporary restraining order).

179. Gen. Motors Corp.-Delco Prods. Div. v. Rosa, 624 N.E.2d 142, 144 (N.Y. 1993); *see, e.g.*, Huffman v. Ark. Jud. Discipline Comm'n, 42 S.W.3d 386, 393 (Ark. 2001) (rejecting the judge's rule of necessity claim where another judge was available in the courthouse and, even if that judge was unavailable, there was no showing that the matter could not wait until another judge was located); *In re* Disqualification of Swenski, 160 N.E.3d 736, 738–39 (Ohio 2020) (explaining that the rule of necessity did not apply because there were other judges in the court to whom the conflicted judge's matters could be redistributed).

180. *See Rosa*, 624 N.E.2d at 145 ("Given the principle at stake, 'necessity' must be construed strictly, in favor of delegating judicial authority to others whenever possible.").

181. *In re* Howes, 880 N.W.2d 184 (Iowa 2016).

182. *Id.* at 189.

183. *Id.*

184. *Id.* at 189–90.

tax dispute.[185]

While the judge's tax dispute was simmering, Pauly represented Farrakh Khawaja in obtaining a divorce from his wife, Shafaq Jadoon.[186] The couple's son was living with Khawaja in Iowa when Jadoon said that she planned to take the child to Pakistan to live with her.[187] Alarmed, Khawaja's fears increased when he learned from employees at his son's summer program that they were obligated to release him to Jadoon if she came to pick him up.[188] Pauly thus prepared an application for a temporary injunction to prevent Jadoon from spiriting the boy away to Pakistan.[189]

The next morning, one of Judge Howes's colleagues, Judge Mark Cleve, was the court's "designated assignment judge."[190] In that role, Judge Cleve was slated to hear unscheduled matters for one hour in the morning and another hour in the early afternoon.[191] Between these "order hours," he was scheduled to hear docketed motions every fifteen minutes.[192]

When Pauly went to the courthouse to apply for the temporary injunction, the morning order hour was over, and Judge Cleve was occupied with scheduled motions.[193] "Because the judges at the Scott County Courthouse adhere[d] to an open-door policy," Pauly looked for a free judge.[194] She quickly discovered that every judge in the courthouse had a full schedule, except for Judge Howes, who had fortuitously become available when the case she was to hear that day was rescheduled.[195]

Pauly asked Judge Howes if she would rule on the application for a temporary injunction.[196] Judge Howes agreed to do so and signed an order that temporarily enjoined both Jadoon and Khawaja from taking their son out of the area for thirty days and temporarily vested custody of the child in Khawaja.[197]

As fate would have it, Jadoon then hired Lori Klockau and Daniel Bray

---

185. *Id.*
186. *Id.* at 190.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 191.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*.

of Bray & Klockau—the same law firm that represented Henderkott—to represent her.[198] Klockau quickly figured out that Pauly was representing Judge Howes in her tax dispute with Henderkott.[199] Klockau was troubled by Pauly's representation of the judge and voiced her concerns to Jadoon, "who became distraught upon hearing that the same lawyer who was representing her husband was representing the very judge who had signed the order granting the temporary injunction."[200] Klockau and Bray subsequently filed a complaint against Judge Howes with the Iowa Commission on Judicial Qualifications.[201]

The Commission determined that Judge Howes violated several Iowa rules of judicial conduct and recommended that the Iowa Supreme Court publicly reprimand her.[202] In considering Judges Howes's case, the Iowa Supreme Court concluded that she was required to disqualify herself from Khawaja's case sua sponte under Iowa's version of Rule 2.11(a) unless the rule of necessity overrode that requirement.[203]

In analyzing the possible application of the rule of necessity, the *In re Howes* court began by noting that the rule is strictly construed.[204] Accordingly, while it may empower a judge to hear a case from which she would otherwise be disqualified, the rule of necessity extends that power "only when the occasion truly requires."[205]

A judge must be sure that it is necessary for her to consider a matter before she can use the rule of necessity to avoid disqualification based on other judges' unavailability.[206] To establish necessity, a judge must demonstrate that she reasonably tried to transfer the disqualifying case or matter "to another judge 'as soon as practicable.'"[207] It follows that when a judge can refer a disqualifying case or matter to another judge before hearing or deciding it, the rule of necessity does not apply.[208] "Stated another way, a judge with a duty of disqualification can only show he or she was the only judge available to decide a matter requiring immediate attention when the evidence shows it was *not* practicable for the judge to transfer the matter to another judge before deciding it."[209] As part of that

198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.* at 192–93.
203. *Id.* at 200.
204. *Id.* at 201 (citing State *ex rel.* Brown v. Dietrick, 444 S.E.2d 47, 55 (W. Va. 1994)).
205. *Id.*
206. *Id.* at 201–02.
207. *Id*. at 202 (quoting IOWA CODE OF JUD. CONDUCT r. 51:2.11 cmt. 3).
208. *Id.*
209. *Id.*

process, the judge must assess whether possible options for transferring the case or matter to another judge match the required level of urgency before trusting the rule of necessity to excuse her disqualification.[210]

Here, while a request for a temporary injunction certainly was the type of matter that can demand immediate judicial attention, the circumstances were such that the rule of necessity did not trump Judge Howes's duty to disqualify herself.[211] First, the court was not convinced that Judge Howes was the only judge who could have heard Khawaja's case.[212] At least six of the eight judges chambered in the Scott County Courthouse were there when Pauly presented Khawaja's ex parte application to Judge Howes.[213] Although the other judges seemingly had full morning dockets, that was not enough to justify Judge Howes's failure to disqualify herself:

> Ample testimony indicated the assignment schedule often included matters that had fallen off the schedule because they settled at the last minute. That was precisely the reason Judge Howes was available the morning she considered the application for a temporary injunction . . . . Additionally, the evidence demonstrated [that Judge Cleve] was scheduled to hear motions in fifteen-minute intervals for the remainder of the morning following the morning order hour. Thus, the evidence unequivocally established not only that at least one judge present in the courthouse was *not* in the midst of a jury trial, but also that it would be possible to interrupt [Judge Cleve] to request that he consider an emergency matter within fifteen minutes. We are confident any judge who had been informed by Judge Howes or a court administrator that he or she was the only judge without a conflict available to consider an emergency application for a temporary injunction would have agreed to take five minutes to consider it.[214]

Furthermore, there was no evidence that Judge Howes tried to verify whether she was the only judge available before entertaining Khawaja's application for injunctive relief.[215] There also was no evidence that Pauly told Judge Howes she had attempted to present the application to other judges or, for that matter, whether Judge Howes asked if she had done so.[216]

Second, Judge Howes did not make reasonable efforts to transfer Khawaja's matter to another judge or even consider whether transfer was

---

210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* at 202–03.
215. *Id.* at 203.
216. *Id.*

feasible.[217] She did not question Pauly concerning the urgency of Khawaja's application for a temporary injunction.[218] Nor did she check with the court administrator or the other judges' clerks to see if she might be able to refer the application before opting to consider it herself.[219] Given her admission in her disciplinary proceeding that considering the application for a temporary injunction initially looked to "take mere minutes," Judge Howes was not justified in deciding that referral to another judge was impracticable absent any investigation.[220] These lapses doomed her rule of necessity defense.[221]

In the end, the court publicly admonished Judge Howes for her misconduct, which was a lighter sanction than the public reprimand the Commission recommended.[222] In doing so, the court concluded that Judge Howes did not intend to unfairly benefit Pauly or Khawaja by entering the temporary injunction and that she truly believed immediate judicial action to be necessary.[223]

CONCLUSION

Litigants are entitled to have their cases decided by impartial judges. Judges' duty to sit does nothing to erode or impair litigants' expectations. The duty to sit is basically a duty to preside over a case unless disqualified as a matter of judicial ethics. Or, phrased another way, a judge must hear a case if her impartiality cannot reasonably be questioned. Recognition of the duty means that judges may not disqualify themselves based on their unease with cases, personal or professional burdens, or desire to avoid controversial, difficult, or demanding litigation. Nor may they yield their decisional responsibilities to litigants' attempts to manipulate the judicial system. Where judges' impartiality may reasonably be questioned, however, they must disqualify themselves regardless of their duty to sit.

In contrast, the rule of necessity overrides litigants' entitlement to an impartial judge. The rule of necessity is a pragmatic doctrine which essentially holds that a judge's alleged partiality that would normally compel her disqualification will be excused, and disqualification denied, where necessary. It assumes that denying parties access to the courts to vindicate their rights is a substantially greater wrong than permitting

---

217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at 211.
223. *Id.* at 210.

judges to hear cases in which they are interested. Because the rule of necessity operates in narrow circumstances, however, it poses no threat to judicial impartiality in general.