Chapter 20

Motions for a Change of Venue; Motions for Recusal of the Judge

Part A. Motions for a Change of Venue

§ 20.01 STATUTORY AND CONSTITUTIONAL RULES GOVERNING VENUE IN A DELINQUENCY CASE

§ 20.01(a) The Statutory Provisions

In most jurisdictions the juvenile statutes specify the venue of delinquency cases. Some States follow the typical adult criminal court rule that offenses are triable only in the county (or circuit, or other judicial unit) comprising the place in which the offense was committed. *See, e.g.,* COLO. REV. STAT. ANN. § 19-2.5-104 (2022); ME. REV. STAT. ANN. tit. 4, § 155(1) (2022); N.Y. FAM. CT. ACT § 302.3(1) (2022).

Other States broaden the traditional criminal rule, granting discretion to the juvenile court to set venue either in the county in which the offense was committed or in the county in which the child resides. *See, e.g.,* CONN. GEN. STAT. ANN. § 46b-142(a) (2022); OR. REV. STAT. § 419C.013(1) (2022) (except cases that are subject to a waiver hearing); WASH. REV. CODE ANN. § 13.40.060(1) (2022) (for "cases in which diversion is provided by statute").

Still other States give the judge discretion to choose among the location of the crime, the county in which the child resides, and the locale in which the child was apprehended. *See, e.g.,* CAL. WELF. & INST. CODE § 651 (2022).

Finally, in some States, if the trial is held in the county in which the crime was committed, the case can thereafter be transferred for disposition to the child's county of residence. *See, e.g.,* COLO. REV. STAT. ANN. § 19-2.5-104(1)(a) (2022); N.Y. FAM. CT. ACT § 302.3(4) (2022); WASH. REV. CODE ANN. § 13.40.060(2)(b) (2022). The theory underlying such postconviction changes of venue is that the issues to be decided at disposition – the respondent's need for treatment or confinement; the types of community-based services available in the child's community – are likely to depend upon witnesses and evidence located in the child's home county.

§ 20.01(b) The Constitutional Provisions

At least arguably, the state legislature's power to regulate venue in delinquency cases is constricted by the guarantees of the Sixth Amendment, as applied to the States through incorporation in the Fourteenth Amendment (*see Duncan v. Louisiana,* 391 U.S. 145 (1968)). The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district *wherein the crime shall have been*

committed, which district shall have been previously ascertained by law . . . .” U.S. CONST. amend. VI (emphasis added). Although its terms refer to “criminal prosecutions,” and delinquency proceedings are not technically “criminal,” “[l]ittle . . . is to be gained by any attempt simplistically to call the juvenile court proceeding either ‘civil’ or ‘criminal.’” *McKeiver v. Pennsylvania,* 403 U.S. 528, 541 (1971) (plurality opinion). As a matter of due process, an alleged delinquent is entitled to whatever Sixth Amendment protections are “necessary component[s] of accurate factfinding.” *Id.* at 543. *Cf. In re Gault,* 387 U.S. 1, 49-50 (1967) (despite the explicit language of the Fifth Amendment Self-Incrimination Clause referring to “criminal case[s],” the Court holds the Privilege applicable to juvenile delinquency proceedings: “[t]o hold otherwise would be to disregard substance because of the feeble enticement of the ‘civil’ label-of-convenience which has been attached to juvenile proceedings”).

Although the Court concluded in *McKeiver* that the right to jury trial embodied in the Sixth Amendment is not essential to accurate factfinding, *see* 403 U.S. at 543, 547 (plurality opinion); *id.* at 554-55 (concurring and dissenting opinion of Justice Brennan), the venue requirement of the Sixth Amendment is an entirely different matter. By demanding that a trial be held within “the State and district wherein the crime shall have been committed,” the Amendment ensures that the accused will have access to the witnesses and evidence essential to “accurate factfinding.” *See, e.g., United States v. Johnson,* 323 U.S. 273, 278 (1944) (recognizing that the “large policy back of the constitutional safeguards” established in the venue clause is to protect the accused from “the serious hardship of defending prosecutions in places . . . [whose “remote[ness]” would cause] difficulties, financial and otherwise, . . . of marshalling . . . witnesses”); *see also Platt v. Minnesota Mining & Mfg. Co.,* 376 U.S. 240, 245-46 (1964). This is true whether the State is one that affords jury trials or only bench trials in juvenile cases, since the venue clause of the Sixth Amendment “strengthen[s] . . . the factfinding function” (*McKeiver v. Pennsylvania,* 403 U.S. at 547) – regardless of the nature of the finder of fact – by enabling the accused to gather the evidence to be presented to the factfinder.

§ 20.02 MOTIONS CHALLENGING THE CHARGING PAPER ON VENUE GROUNDS

The initial venue selected by the prosecutor must comply with the statutory and constitutional requirements described in § 20.01 *supra.* A Petition filed in the wrong venue is generally subject to a motion to quash or to dismiss, but in some jurisdictions the respondent’s remedy may be merely a motion for transfer to the court of proper venue.

As explained in § 17.05 *supra,* a Petition also may be subject to dismissal for the technical defect of failing to allege facts establishing venue in the court in which it is filed.

§ 20.03 DEFENSE MOTIONS FOR A CHANGE OF VENUE

When the applicable venue doctrine would allow prosecution of a particular offense in more than one court (as, for example, in States in which the statute permits prosecution either in the county where the crime was committed or in the county where the respondent resides (see

§ 20.01(a) *supra*)), the prosecutor has the initial choice of venue. After the filing of the Petition, however, the defense can move for a change of venue. Unlike the motions described in § 20.02 *supra,* which attack the Petition on the ground that venue has been improperly selected or pleaded, motions for a change of venue assume the technical propriety of venue in the court in which the Petition has been filed and request that the case be transferred to some other court for trial or plea, on the ground that the initial venue is prejudicial to the respondent. The forms of prejudice ordinarily recognized by local statutes and caselaw as justifying a change of venue are: (a) inconvenience to the respondent, defense witnesses, or both; and (b) inability to obtain a fair trial in the court in which the charge is pending. A motion for a change of venue on these grounds may also be predicated on state and federal constitutional guarantees under some circumstances.

§ 20.03(a) Motions for a Change of Venue in Order To Secure Defense Access to Witnesses

As explained in § 20.01(b) *supra,* a respondent who is being prosecuted in a county other than the one in which the crime was committed has an arguable claim of right, under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, to change the venue of the trial to the "district wherein the crime shall have been committed," U.S. CONST. amend. VI, in order to protect the respondent's ability to seek out and produce defense witnesses at trial. However, because this constitutional theory is not yet established in the caselaw, counsel when invoking it should make a strong factual showing by affidavits or testimony that the defense is seriously handicapped in investigating and preparing for trial as a result of the venue chosen by the prosecutor. Counsel should also rest his or her request for a change of venue on the alternative non-constitutional basis described in the following paragraph.

In most jurisdictions, statutes, court rules, or common-law doctrines allow the respondent to request a discretionary transfer of venue in the interests of justice, on the ground that the respondent or his or her witnesses are inconvenienced by the prosecution's selection of venue. *See, e.g.,* N.Y. FAM. CT. ACT § 302.3(2) & Commentary (2022). Changes of venue on this ground are most commonly made for the purpose of moving a trial to the locale of the crime, to secure the respondent's access to witnesses. The defense can also invoke the doctrine in seeking to change venue to the child's county of residence, in order to prevent hardship to the respondent in attending court proceedings or to arrange "the presence of character witnesses [who are likely to reside] . . . in the district of [the respondent's] . . . residence." *United States v. Johnson,* 323 U.S. 273, 279 (1944) (Murphy, J., concurring).

§ 20.03(b) Motions for a Change of Venue on the Ground That a Fair Trial Cannot Be Had in the Court in Which the Charge Is Pending

This section discusses the right to a venue change in order to escape trial in a locality in which it will be impossible to empanel a fair and impartial jury by reason of community attitudes, inflammatory publicity, and so forth. It is pertinent only to jurisdictions that provide for

jury trials in delinquency cases. Motions for recusal or disqualification of a judge on grounds of bias, denominated "motions for a change of venue" in some jurisdictions, are discussed in §§ 20.04-20.07 *infra.* These may be made in connection with either bench trials or jury trials.

If the jurisdiction is one that affords jury trials in juvenile cases, the defense can invoke the extensive caselaw guaranteeing an accused's right to a fair trial by an impartial jury. *See, e.g.*, *Sheppard v. Maxwell,* 384 U.S. 333 (1966); *Irvin v. Dowd,* 366 U.S. 717 (1961); *Murphy v. Florida,* 421 U.S. 794 (1975); *Patton v. Yount,* 467 U.S. 1025 (1984); *Coleman v. Kemp,* 778 F.2d 1487 (11th Cir. 1985), *rehearing en banc denied*, 782 F.2d 896 (11th Cir. 1986). The constitutional due process right to a fair trial does not guarantee a venue change as its inevitable safeguard; but a venue change is one of the primary means for assuring a fair trial, *see Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 563-64 (1976) and may be required if other methods are insufficient, *Groppi v. Wisconsin,* 400 U.S. 505 (1971); *Ruiz v. State*, 265 Ark. 875, 582 S.W.2d 915 (1979); *People v. Boss*, 261 A.D.2d 1, 701 N.Y.S.2d 342 (N.Y. App. Div., 1st Dep't 1999) (per curiam)*; cf. Skilling v. United States*, 561 U.S. 358, 377-85 (2010). Under the federal due process cases, the defense can seek a change of venue on the basis of public hostility against the respondent, public belief that the respondent is guilty, public outrage over the offense, or prejudicial news reporting or editorializing that vilifies the respondent or discloses inadmissible evidence against the respondent. *See Gannett Co. v. DePasquale*, 433 U.S. 368, 378 (1979) ("This Court has long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial . . . . To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity."); *Chandler v. Florida*, 449 U.S. 560, 574 (1981) (dictum) ("Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law."). A motion seeking a change of venue on these grounds is ordinarily required to be supported by affidavits, and the defense is given an evidentiary hearing if the motion and affidavits are facially sufficient. Evidentiary support for the proposition that a fair trial cannot be held in the locality may be found in: newspaper clippings, videotapes, audiotapes, and TV or radio scripts; testimony of persons knowledgeable about public opinion; opinion polls; evidence of petitions, resolutions, speeches, and so forth; and evidence of news conferences, press releases, and media interviews by the police and the prosecutor. In some jurisdictions a motion for venue change from a court in which the respondent asserts that s/he cannot be fairly tried must await the conclusion of *voir dire* examination of prospective jurors (see §§ 28.03-28.05 *infra*); only after an attempt to empanel a fair jury has been made and, in the opinion of the presiding judge, has failed, may venue be shifted. In other jurisdictions a motion for change of venue may be made prior to trial.

Courts commonly hold that a showing of prejudicial publicity or community hostility is not sufficient to require a change of venue on constitutional grounds unless the accused also demonstrates that as a consequence of these biasing factors it is likely to be impracticable to empanel an impartial jury. *See*, *e.g.*, *State v. Komisarjevsky*, 338 Conn. 526, 258 A.3d 1166 (2021); *Commonwealth v. Briggs*, 608 Pa. 430, 12 A.3d 291 (2011); *State v. Fowler*, 266 S.C. 203, 222 S.E.2d 497 (1976). The latter demonstration is particularly difficult to make. If the

publicity is highly inflammatory or the hostility particularly intense, a doctrine of "presumed prejudice" that finds support in *Sheppard*, *supra,* may render evidentiary proof of impracticality unnecessary. *See Rideau v. Louisiana*, 373 U.S. 723 (1963); *Estes v. Texas*, 381 U.S. 532 (1965); *compare Skilling v. United States*, *supra*. But "[f]or prejudice to be presumed under this standard, the defendant must show: 1) that the pretrial publicity was prejudicial and inflammatory and 2) that the prejudicial pretrial publicity saturated the community where the trial was held. *See Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985). Under this standard, a defendant carries an extremely heavy burden of proof. ¶ . . . The presumptive prejudice standard is 'rarely' applicable, and is reserved for only 'extreme situations'." *Brown v. State*, 74 So.3d 984, 1031-32 (Ala. App. 2010), *aff'd,* 74 So.3d 1039 (Ala. 2011). *See also*, *e.g.*, *Gonzalez v. State*, 222 S.W.3d 446 (Tex. Crim. App. 2007); *Commonwealth v. Casper*, 481 Pa. 143, 151, 392 A.2d 287, 291 (1978) ("[i]t is trite but true to note that a presumption of prejudice pursuant to this exception requires the presence of exceptional circumstances."). Ordinarily, counsel who is seeking a change of venue will want to proceed on alternative theories of actual prejudice and presumed prejudice. *See Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005) ("To support a change of venue motion, Daniels must demonstrate either actual or presumed prejudice. . . . To demonstrate actual prejudice, Daniels must show that 'the jurors demonstrated actual partiality or hostility that could not be laid aside.' . . . Prejudice is presumed only in extreme instances 'when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime.' . . . ¶ Three factors should be considered in determining presumed prejudice: (1) whether there was a 'barrage of inflammatory publicity immediately prior to trial, amounting to a huge . . . wave of public passion'; (2) whether the news accounts were primarily factual because such accounts tend to be less inflammatory than editorials or cartoons; and (3) whether the media accounts contained inflammatory or prejudicial material not admissible at trial. . . . ¶ Applied here, these factors compel a finding 'that the venue [wa]s saturated with prejudicial and inflammatory media publicity about the crime' sufficient for a presumption of prejudice."). But in some cases in which counsel anticipates that s/he will fail to persuade the court of either actual or presumed prejudice, s/he may nevertheless be well advised to file a change-of-venue motion. A trial judge who is convinced that the local atmosphere is tainted by the accused's notoriety or damaging portrayal in widespread media may grant the motion as a matter of discretion without insisting on the showing of impracticality that the constitutional caselaw demands. *See*, *e.g.*, *United States v. Cortez*, 251 F.R.D. 237 (E.D. Tex. 2007); *and see Meadows v. Mutter*, 243 W. Va. 211, 228, 842 S.E.2d 764, 781 (2020). High-publicity cases are labor-intensive and costly to the court and prosecution; savvy trial judges understand that by denying a change-of-venue motion they will risk appellate reversal of a conviction obtained after a laborious trial; they may choose to avoid that risk or simply to escape the burden of trying a troublesome case.

Before seeking a change of venue on the grounds sketched in the preceding paragraphs, counsel should ascertain from knowledgeable local attorneys or court personnel *where,* in granting such motions, the court (or the judge presiding over the case) has been sending cases. Unlike the motions described in § 20.03(a) *supra,* which seek transfer of the case to a particular locale, a motion requesting a venue change on the ground of local juror bias cannot control what

county the case will be sent to. After investigating the localities to which the case is likely to be sent in the event that a defense motion for a change of venue is granted, counsel should thoroughly review the risks and costs of being transferred to those locales and weigh them against the liabilities of remaining in the current forum.

Part B. Motions for Recusal or Disqualification of the Judge

§ 20.04 THE RIGHT TO AN IMPARTIAL JUDGE

In some jurisdictions the juvenile code explicitly provides for defense motions for recusal or disqualification of a judge who is biased or prejudiced. *See, e.g.,* N.Y. FAM. CT. ACT § 340.2(3)(b) (2022); WASH. REV. CODE ANN. § 13.40.060(2)(a) (2022). Recusal may be automatic upon defense request in certain circumstances. *See, e.g.,* D.C. CODE §§ 16-2307(g), 16-2312(j) (2022) (upon defense request, judge who presided over detention hearing or transfer hearing must disqualify himself or herself from serving as the factfinder in a bench trial).

Even in jurisdictions whose codes do not explicitly provide for defense motions for recusal, the courts have consistently recognized a juvenile respondent's right to seek recusal, reaching this result either through the application of statutes or rules governing recusal in civil cases, *see, e.g., Anonymous v. Superior Court in and for the County of Pima,* 14 Ariz. App. 502, 484 P.2d 655 (1971); *State ex rel. R.L.W. v. Billings,* 451 S.W.2d 125 (Mo. 1970), or through the enforcement of the inherent common-law right to an impartial judge, *see, e.g., In the Matter of G.K.,* 497 P.2d 914, 915 (Alaska 1972) ("fundamental tenet of our system of justice that every litigant shall have his rights adjudicated by a judge who is disinterested, impartial, and unbiased").

In addition to statutory and common-law doctrines, the Due Process Clause of the Fourteenth Amendment and equivalent state constitutional provisions guarantee a right to an impartial judge. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883-84 (2009); *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997); *In re Murchison,* 349 U.S. 133, 136 (1955); *Williams v. Pennsylvania*, 579 U.S. 1 (2016). *See, e.g., Hurles v. Ryan*, 752 F.3d 768 (9th Cir. 2014); *In re Ruth H.,* 26 Cal. App. 3d 77, 84-86, 102 Cal. Rptr. 534, 538-39 (1972); *State v. Sawyer*, 297 Kan. 902, 906-07, 909-12, 305 P.3d 608, 611-12, 613-15 (2013); *People v. Stevens*, 498 Mich. 162, 164, 869 N.W.2d 233, 238-39 (2015); *State ex rel. Mitchell v. Bowman,* 54 Wis. 2d 5, 194 N.W.2d 297 (1972); *see also Tumey v. Ohio,* 273 U.S. 510 (1927); *Ward v. Village of Monroeville,* 409 U.S. 57 (1972); *Cain v. White*, 937 F.3d 446 (5th Cir. 2019); *Caliste v. Cantrell*, 937 F.3d 525 (5th Cir. 2019); *Harper v. Professional Probation Services, Inc.*, 976 F.3d 1236 (11th Cir. 2020) (extending the rule to a private contract probation agency) (distinguished in *Brucker v. City of Doraville*, 2022 WL 2277661 (11th Cir. June 24, 2022)); *Butler v. United States*, 414 A.2d 844, 852-53 (D.C. 1980) (en banc) ("[t]he essence of the judicial role is neutrality"); *cf. Mayberry v. Pennsylvania,* 400 U.S. 455 (1971); *Johnson v. Mississippi,* 403 U.S. 212 (1971); *Taylor v. Hayes,* 418 U.S. 488 (1974); *Connally v. Georgia,* 429 U.S. 245, 247-50 (1977) (per curiam); *Withrow v. Larkin,* 421 U.S. 35, 47 (1975) (dictum);

Marshall v. Jerrico, Inc., 446 U.S. 238, 242-43 (1980) (dictum); *and see* Ronald Rotunda, *Judicial Disqualification in the Aftermath of* Caperton v. A.T. Massey Coal Co., 60 SYRACUSE L. REV. 247 (2010). Federal constitutional due process requires recusal in any case in which "actual," subjective bias is demonstrated and also "when, objectively speaking, 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable'" (*Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (per curiam)). "The test does not require a showing of actual judicial bias, 'though actual bias, if disclosed, no doubt would be grounds for appropriate relief.' . . . Rather, the test requires only a showing of an undue risk of bias, based on the psychological temptations affecting an 'average judge.'" *Echavarria v. Filson*, 896 F.3d 1118, 1128-29 (9th Cir. 2018).

In *Williams v. Pennsylvania*, *supra*, the Supreme Court sketched the contours of the federal constitutional command of recusal of a judge for bias. "Due process guarantees 'an absence of actual bias' on the part of a judge. . . . Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, 'the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias."' . . . Of particular relevance, the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case" (579 U.S. at 8). Refining this standard for application to the sub-set of cases in which a judge has played a role as a prosecuting attorney in the defendant's case before being appointed or elected to the bench, the Court held that "under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case" (*id*.). Hence, *Williams* found that Due Process obliged a state supreme court chief justice to recuse himself in a postconviction proceeding brought by a death-sentenced inmate when that justice had been the district attorney at the time of the inmate's prosecution and had personally approved the decision of his subordinates to seek the death sentence in the case. And this result was required even though the D.A.'s position was as the head of an office employing more than two hundred assistants, where the practice was that the initial decision to paper a case as capital was made by a line prosecutor and passed up the chain of command for the D.A.'s final review, and where the D.A. acted to approve dozens of capital prosecutions a year. "A prosecutor may bear responsibility for any number of critical decisions, including what charges to bring, whether to extend a plea bargain, and which witnesses to call. Even if decades intervene before the former prosecutor revisits the matter as a jurist, the case may implicate the effects and continuing force of his or her original decision. In these circumstances, there remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process." *Id*. at 10-11. *See also Reed v. State*, 259 So.3d 718 (Fla. 2018).

§ 20.05 GROUNDS FOR RECUSAL OR DISQUALIFICATION OF THE JUDGE

In some jurisdictions the mere filing of a motion for recusal bars the judge from presiding and requires transfer of the matter to another judge. *See, e.g., Anonymous v. Superior Court in and for the County of Pima,* 14 Ariz. App. 502, 484 P.2d 655 (1971); *Daniel V. v. Superior Court*, 139 Cal. App. 4th 28, 39-40, 49, 42 Cal. Rptr. 3d 471, 477-78, 485 (2006); FLA. RULE JUD. ADMIN. 2.330(f) (2022); *State v. Espinoza*, 112 Wash. 2d 819, 823, 774 P.2d 1177, 1179 (1989); *State ex rel. Mateo D.O. v. Circuit Court for Winnebago County*, 280 Wis. 2d 575, 584, 696 N.W.2d 275, 280 (Wis. App. 2005). The brake against improvident use of these "judicial peremptory strike" procedures is that the lawyer who resorts to them too frequently ends up in serious disfavor with the entire local judiciary – not only the judges s/he strikes but those s/he seeks to draw.

In most jurisdictions, the defense must demonstrate specific grounds for recusal. Recusal statutes and caselaw uniformly require that a judge recuse himself or herself when s/he has a personal interest in the outcome of the case, a relationship to a party, or some actual bias or prejudice. *See*, *e.g.*, *Liteky v. United States*, 510 U.S. 540 (1994), surveying the basic federal statutory provisions. The AMERICAN BAR ASSOCIATION MODEL CODE OF JUDICIAL CONDUCT (2007), which has been adopted verbatim in almost all jurisdictions, provides that "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to . . . [certain specified] circumstances" (MODEL CODE, Rule 2.11(A)). *See, e.g.*, *United States v. Orr*, 969 F.3d 732, 738 (7th Cir. 2020). The specified circumstances address situations in which the judge or a family member has personal connections with the litigants or personal interests in a case, and also call for disqualification a/k/a recusal in three situations of particular significance in criminal matters: where (1) "The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding" (MODEL CODE, Rule 2.11(A)(1)); (2) "The judge, while a judge or a judicial candidate, 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 or rule in a particular way in the proceeding or controversy" (MODEL CODE, Rule 2.11(A)(5)); and (3) "The judge: (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association; (b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy; (c) was a material witness concerning the matter; or (d) previously presided as a judge over the matter in another court." (MODEL CODE, Rule 2.11(A)(6)).

The recusal issue that arises most frequently in delinquency cases is whether a judge must recuse himself or herself as the trier of fact in a bench trial when s/he has learned information about the respondent or the case prior to trial. Several courts have held that prior knowledge of the case or the respondent does not necessarily bar a judge from serving as the factfinder in a bench trial, since judges are presumed to be capable of ignoring inadmissible information and reaching a verdict solely on the facts elicited at trial. *See, e.g., In re Kean,* 520 A.2d 1271, 1277 (R.I. 1987); *In the Matter of Michael W.,* 122 Misc. 2d 243, 470 N.Y.S.2d 319 (N.Y. Fam. Ct.

1983). However, recusal is required if the information known to the judge is highly prejudicial, such as:

1. When the information known to the judge strongly suggests that the respondent is guilty of the charges, *see, e.g., Butler v. United States,* 414 A.2d 844 (D.C. 1980) (en banc) (the adult criminal defendant deprived of due process when judge presided over bench trial after having been informed by defense counsel that the prosecution could prove its case beyond a reasonable doubt and that the defendant intended to commit perjury); *In re George G.,* 64 Md. App. 70, 494 A.2d 247 (1985) (the judge should have recused himself as trier of fact in delinquency bench trial because he had previously convicted three co-perpetrators of the same crime, rejecting the same defense that the respondent intended to offer); *Brent v. State,* 63 Md. App. 197, 492 A.2d 637 (1985) (the judge should have recused himself from presiding over adult criminal defendant's bench trial after learning of defendant's willingness to plead guilty and after having presided over the guilty plea proceedings of the co-defendants, at which statements were made implicating the defendant); *People v. Zappacosta,* 77 A.D.2d 928, 431 N.Y.S.2d 96 (N.Y. App. Div., 2d Dep't 1980) (the judge should have recused himself from presiding over the bench trial of adult criminal defendant because the judge had presided over the guilty plea proceeding of defendant's wife, who was his co-perpetrator, and judge thereby heard statements incriminating the defendant). *Cf. Watson v. State*, 934 A.2d 901, 906-08 (Del. 2007) (the Family Court judge who had convicted the juvenile in a bench trial based in part on the judge's rejection of the credibility of the juvenile's testimony, should have recused herself from a trial of the same juvenile immediately thereafter on an unrelated charge in which the juvenile's credibility would again be at issue).

2. When the judge is aware of inadmissible evidence about the respondent's other criminal activity, prior record, or prejudicial aspects of the respondent's character or history, *see, e.g., Commonwealth v. Goodman,* 454 Pa. 358, 362 & n.4, 311 A.2d 652, 654 & n.4 (1973) (the judge who presided over suppression hearing should have recused himself from bench trial in marijuana possession case because, at the suppression hearing, "an impression was left from hearsay testimony as to probable cause that the appellants were trafficking in narcotics," and this evidence was both "highly inflammatory" and "inadmissible during the trial of the cause"); *In the Matter of James H.,* 41 A.D.2d 667, 341 N.Y.S.2d 92 (N.Y. App. Div., 2d Dep't 1973), *appeal withheld and case remanded on an unrelated point*, 34 N.Y.2d 814, 316 N.E.2d 334, 359 N.Y.S.2d 48 (1974), *appeal dism'd,* 36 N.Y.2d 794, 330 N.E.2d 649, 369 N.Y.S.2d 701 (1975) (when probation officer stated during delinquency trial that case was "a 'Training School' case," judge should have granted defense motion for disqualification to avoid appearance of prejudice); *cf. In re Gladys R.,* 1 Cal. 3d 855, 861-62, 464 P.2d 127, 132, 83 Cal. Rptr. 671, 676 (1970) (judge in delinquency trial

committed reversible error by reviewing social study with "negative indications about [the child's] . . . home environment").

Even when the judge does not view himself or herself as actually biased, s/he must consent to recusal whenever his or her knowledge of prejudicial information would cause the proceedings to have an "appearance of partiality." *See*, *e.g.*, *Perotti v. State*, 806 P.2d 325 (Alaska App. 1991) (the "appearance of partiality . . . [arising] 'in light of the objective facts'" (*id*. at 328) required that the trial judge recuse himself from serving as the sentencing judge in an adult criminal case in which he had presided over the proceeding to transfer the case from juvenile to adult court and had made a finding of non-amenability to rehabilitative treatment based on improperly-obtained psychiatric evidence); *In re Ruth H.,* 26 Cal. App. 3d 77, 86, 102 Cal. Rptr. 534, 539 (1972) ("persons appearing before the referee should have no basis to suspect him of partiality; appearances are important"); *People v. Zappacosta,* 77 A.D.2d at 930, 431 N.Y.S.2d at 99 (courts must be "[s]ensitive to the imperative that we avoid any situation which allows even a suspicion of partiality"); *In the Matter of James H.,* 41 A.D.2d at 667, 341 N.Y.S.2d at 93 ("[e]ven though the court may not be in fact influenced by what it hears, it is the appearance of prejudice against which the policy is directed"); *Commonwealth v. Goodman,* 454 Pa. at 361, 311 A.2d at 654 ("[w]e have every confidence that the trial judges of this Commonwealth are sincere in their efforts to avoid consideration of incompetent inflammatory evidence in reaching these judgments but we also are acutely aware that the appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of either of these elements"). *See also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 888 (2009) ("[T]he States have implemented . . . ["judicial reforms"] to eliminate even the appearance of partiality. Almost every State . . . has adopted the American Bar Association's objective standard: 'A judge shall avoid impropriety and the appearance of impropriety.' ABA Annotated Model Code of Judicial Conduct, Canon 2 (2004) . . . . The ABA Model Code's test for appearance of impropriety is 'whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.' Canon 2A, Commentary"); *Williams v. Pennsylvania*, 579 U.S. 1, 12-14 (2016); AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE MONITORS AND MONITORING, SPECIAL FUNCTIONS OF THE TRIAL JUDGE (4th ed. 2017), Standard 6-1.9, *Obligation to perform and circumstances requiring recusal* ("[t]he trial judge should recuse himself or herself whenever the judge has any doubt as to his or her ability to preside impartially or whenever his or her impartiality reasonably might be questioned"); *Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (per curiam) (summarily vacating the Nevada Supreme Court's denial of relief on a judicial bias claim and remanding the case for further proceedings because the lower court focused exclusively on the existence of actual bias rather than "ask[ing] the question our precedents require: whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable"; "Under our precedents, the Due Process Clause may sometimes demand recusal even when a judge '"ha[s] no actual bias."' . . . Recusal is required when, objectively speaking, 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'"); *accord*, *Gacho v. Wills*, 986 F.3d 1067, 1068 (7th Cir. 2021) (vacating a conviction returned in a jury trial in which the presiding

judge was corrupt, without requiring a showing that the judge was actually biased against this defendant in particular: "Evidence that the presiding judge was actually biased is sufficient to establish a due-process violation but it's not necessary. Constitutional claims of judicial bias also have an objective component: the reviewing court must determine whether the judge's conflict of interest created a constitutionally unacceptable likelihood of bias for an average person sitting as judge."); *State v. Daigle*, 2018-0634 (La. 4/30/18), 241 So.3d 999, 1000 (La. 2018) (requiring recusal where "[t]he record . . . demonstrates that the trial judge had a longtime working relationship with Mrs. Vincent, the victim's widow and a court employee; has a social media relationship with Mrs. Vincent that he initially denied in a formal opinion, but later admitted under oath; and has taken steps barred by the Code of Criminal Procedure which, if not corrected by the appellate court, would have thwarted another judge from considering his recusal. Mrs. Vincent is not only the victim's widow, she is designated as a penalty phase witness in this capital case."); *People v. Towns*, 33 N.Y.3d 326, 328, 125 N.E.3d 816, 817, 102 N.Y.S.3d 151, 152 (2019) ("On this appeal, we are asked to decide whether defendant was denied the right to a fair trial when the trial court negotiated and entered into a cooperation agreement with a codefendant requiring that individual to testify against defendant in exchange for a more favorable sentence. We hold that the trial court abandoned the role of a neutral arbiter and assumed the function of an interested party, thereby creating a specter of bias that requires reversal."); *cf. Matter of Dependency of A.N.G.,*12 Wash. App. 2d 789, 459 P.3d 1099 (2020) (in a proceeding seeking the termination of a mother's parental rights, the judge should have recused himself because he had served as the state's attorney who previously sought and obtained termination orders regarding the mother's two older children; the Court of Appeals relies, *inter alia*, on *Williams v. Pennsylvania*, *supra*, which sets the due process standard for recusal in cases in which a judge has formerly acted as a prosecuting attorney). And the recognition by the Supreme Court of the United States in *Breed v. Jones,* 421 U.S. 519, 536-37 (1975), that when a juvenile judge has presided over a pretrial transfer hearing, "the nature of the evidence considered at [that] . . . hearing may in some States require that, if transfer is rejected, a different judge preside at the [trial]" (see § 13.17 *supra*) can be cited as reflecting an assumption by the Court that propriety – if not constitutional due process – would be offended if a judge who has once been exposed to the prosecutor's adversary presentation of incriminating evidence against a respondent on a specific charge were to sit as factfinder on the trial of that very charge.

Recusal is also required when a judge manifests bias against a class with which s/he identifies the respondent by, for example, treating the respondent's characteristics as stereotypical of the class. *See State v. Smith,* 308 Kan. 778, 423 P.3d 530 (2018) (ordering a new hearing before a different judge because the judge who made credibility findings against the defendant in a postconviction proceeding displayed unwarranted attention to the defendant's tattoos and supposed taste for rap music; "Granted, our record does not conclusively show that the district court actually relied on the irrelevant tattoo and brand information it retrieved independently – and may not have effectively shared with counsel and the parties before denying Smith's motion to file a late appeal. Nor does it conclusively show the court in fact relied on its irrelevant 'assumption' about the music Smith listened to. But a judge must avoid even 'conduct that may reasonably be perceived as prejudiced or biased.' Supreme Court Rule 601B, Canon 2,

Rule 2.3, Comment [2] (2018 Kan. S. Ct. R. 436). And this information (particularly the assumption) was obviously at least considered by the court."

Moreover, even if recusal is not *required,* counsel can urge the judge to exercise his or her discretion in favor of recusal as a prophylactic measure to guard against any possible unconscious influences of the judge's prior knowledge on his or her factfinding function, or any possible appearance of impropriety. Counsel can point to decisions recognizing that even when the judge intends to faithfully ignore inadmissible information, it may still have an effect upon his or her mind. *See, e.g., United States v. Walker,* 473 F.2d 136, 138 (D.C. Cir. 1972) (although a "[j]udge is presumed to have a trained and disciplined judicial intellect, . . . [this] disciplined judicial mind should not be subjected to any unnecessary strain; even the most austere intellect has a subconscious"); *People v. Zappacosta,* 77 A.D.2d at 930, 431 N.Y.S.2d at 99 ("[e]ven the most learned [j]udge would have difficulty in excluding such information from his subconscious deliberations"); *In re George G.,* 64 Md. App. 70, 80, 494 A.2d 247, 252 (1985) (although "the sincerity [and] . . . the integrity of the trial judge" could not be doubted, "[s]ubconsciously, . . . [the impermissible information] apparently lingered on in the deep recesses of his mind"). *See also People v. Kagan*, 204 A.D.3d 695, 696, 163 N.Y.S.3d 867, 867-68 (Mem) (N.Y. App. Div., 2d Dept. 2022) (reversing a bench trial conviction because, after the trial, the judge reviewed the "transcript of the trial," "reflect[ed] on the case," and then forthrightly admitted that "his experiences as a civil rights activist 'influenced [his] analysis'" of a cross-racial homicide, causing him to "'incorrectly frame[ ] the issue as being whether the defendant was motivated in his actions by racism rather than whether or not his criminal intent was established beyond a reasonable doubt,'" and thereby preventing the judge from being "fair and impartial"; a different judge who thereafter presided over the defendant's postconviction motion to vacate the conviction was wrong to dismiss the trial judge's admissions of "'bias and prejudice . . . [as] mere afterthoughts or second guesses'"). Counsel then can suggest that, at least when recusal and substitution of another judge will impose no significant burden or inconvenience upon the judiciary, they are appropriate to avoid even the possibility of unconscious influences upon the judge. *See, e.g., United States v. Walker,* 473 F.2d at 138-39 (rejecting the argument that a judge *must* recuse himself or herself after learning that one of the defendants had offered a guilty plea, but observing that "it would be better if [the judge] . . . exercised his prerogative to recuse himself [in such a situation since this rule] . . . should be easy to observe and put no burden on the administration of justice"); *People v. Smith,* 264 Cal. App. 2d 718, 722, 70 Cal. Rptr. 591, 594 (1968) (indicating that "where a motion is properly made before trial, a pretrial [suppression] hearing before another judge is . . . preferable to a determination by the trial judge"); *Banks v. United States*, 516 A.2d 524, 529 (D.C. 1986) (although the trial judge did not commit an abuse of discretion by conducting a bench trial of a defendant whose guilty plea broke down because the defendant asserted his innocence and the prosecution refused to offer an *Alford* plea, "the preferable procedure would have been for the trial judge to certify the case to another judge for trial after he rejected the plea"). The same reasoning, calling for recusal when it is not burdensome to the judicial system, would also apply to cases in which there is a potential for the appearance of impropriety. *See, e.g., State v. Lawrence,* 344 N.W.2d 227, 231 (Iowa 1984), *partially overruled on an unrelated point, State v. Liddell*, 672 N.W.2d 805 (Iowa 2003)

(upholding trial judge's exercise of discretion in favor of recusal because judge "felt his trial rulings might be questioned in the mistaken belief that he was reacting in some way to the fact that he had been asked to step aside").

In addition to these situations in which information known to the judge may render it difficult for the judge to be an objective finder of fact at a bench trial – or would give rise to an unacceptable appearance of impropriety – the manner in which a judge conducts a bench trial may manifest such an apparent bias in favor of the prosecution that recusal is required or at least highly desirable to avoid an appearance of impropriety. *See, e.g.*, *In the Matter of Jacqulin M.*, 83 A.D.3d 844, 845, 922 N.Y.S.2d 111, 112-13 (N.Y. App. Div., 2d Dep't 2011) (the "Family Court Judge [in a juvenile delinquency bench trial] took on the function and appearance of an advocate by extensively participating in both the direct and cross-examination of the two . . . [prosecution] witnesses and eliciting testimony which strengthened the . . . [prosecution's] case" and by summoning the accused's probation officer to court to refute the accused's direct examination testimony that she gave "a certain document which would support her defense" to the probation officer, and by informing defense counsel that "unless he agreed to stipulate as to what . . . [the] Probation Department records would reflect, those records would be admitted into evidence through the Probation Officer's testimony"); *People v. Arnold*, 98 N.Y.2d 63, 64, 67-68, 772 N.E.2d 1140, 1142, 1144-45, 745 N.Y.S.2d 782, 784, 786-87 (2002) (the trial court abused its discretion in a bench trial by calling a police officer as a court witness to clarify an ambiguity in the prosecution's case after both sides had rested; "Although the law will allow a certain degree of judicial intervention in the presentation of evidence, the line is crossed when the judge takes on either the function or appearance of an advocate at trial"; the judge in this case "assumed the parties' traditional role of deciding what evidence to present, and introduced evidence that had the effect of corroborating the prosecution's witnesses and discrediting defendant on a key issue"); *People v. Zamorano*, 301 A.D.2d 544, 546-47, 754 N.Y.S.2d 645, 648 (N.Y. App. Div., 2d Dep't 2003) (the trial court in a bench trial abused its discretion in various ways, including taking "on the function and appearance of an advocate when, after the People's cross-examination, [the judge] asked the defendant numerous questions about the attack and tried to point out the inconsistencies and unbelievablity of his theory of defense").

In jurisdictions that afford jury trials in juvenile delinquency cases, a judge's lack of objectivity – or even just an appearance of partisanship – can be problematic in a jury trial as well. "Although the judge in a criminal jury trial does not find facts, he or she still must make many rulings that affect the defendant's ability to obtain a fair trial. Some of these rulings rise and fall on the judge's discretion alone, and they can have dramatic impact on the evidence the jury hears as well as both parties' ability to present their arguments. . . . It nearly goes without saying that a criminal trial judge also is inevitably vested with considerable discretion at sentencing." *State v. Sawyer*, 297 Kan. 902, 911, 305 P.3d 608, 614 (2013) (rejecting the trial judge's and lower appellate court's reasoning that recusal was not necessary because "this case was tried to a jury rather than to the bench"). *See also People v. Towns*, *supra; Gacho v. Wills*, 986 F.3d at 1076 ("It is irrelevant that Gacho was convicted by a jury rather than . . . [by the biased judge] himself."). Accordingly, in jury trials just as in bench trials, counsel should

consider seeking recusal or disqualification if a judge has made statements evidencing a bias against the respondent or in favor of the prosecution or has manifested such a bias in the way that s/he conducted pretrial proceedings or is conducting the trial. *See Sawyer*, 297 Kan. at 908, 911-12, 305 P.3d at 613, 614-15 (although defense counsel's motion for recusal did not specify bias sufficient to require recusal under the applicable state statute, the Due Process Clause required recusal because "Judge McNally had previously chosen to recuse in Sawyer's assault and battery bench trial; the judge's intemperate demeanor in Sawyer's intervening jury trial for lewd and lascivious behavior drew a stern admonition from the Court of Appeals; and Judge McNally's mere observation that this case involved a jury trial rather than a bench trial did nothing to ameliorate any earlier need for recusal"). *See also, e.g.*, *People v. Lawhorn*, 178 A.D.3d 1466, 1467, 112 N.Y.S.3d 631, 632 (N.Y. App. Div. 4th Dep't 2019) ("the [trial] court committed reversible error when it 'negotiated and entered into a [plea] agreement with a codefendant[,] requiring that individual to testify against defendant in exchange for a more favorable sentence' . . . . Here, 'by assuming the function of an interested party and deviating from its own role as a neutral arbiter, the trial court denied defendant his due process right to "[a] fair trial in a fair tribunal"' . . . . We therefore reverse the judgment and grant a new trial before a different justice")*; State v. Malone*, 963 N.W.2d 453, 457, 466, 469 (Minn. 2021) (the judge's conduct during a pretrial proceeding on the defendant's motion to dismiss the charging paper for lack of probable cause – which included the judge's "investigat[ing] a fact not introduced into evidence, announc[ing] the findings from that investigation to the parties, rel[ying] on those findings in rejecting Malone's motion to dismiss, [and] suggest[ing] that the State might want to consider calling a second witness to testify against Malone" – "reasonably caused the judge's impartiality to be questioned" and therefore required disqualification under MINN. R. CRIM. P. 26.03 subd. 14(3) even though "Malone failed to show actual bias"; this error could not be deemed harmless on the ground that "the judge did not sit as the factfinder at Malone's [jury] trial"); *People v. Stevens*, 498 Mich. 162, 869 N.W.2d 233 (2015) ("Judicial misconduct may come in myriad forms, including belittling of counsel, inappropriate questioning of witnesses, providing improper strategic advice to a particular side, biased commentary in front of the jury, or a variety of other inappropriate actions." *Id*. at 172-73, 869 N.W.2d at 243. "A trial judge's conduct deprives a party of a fair trial if the conduct pierces the veil of judicial impartiality. A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party. . . . When the issue is preserved and a reviewing court determines that the trial judge's conduct pierced the veil of judicial impartiality, the court may not apply harmless-error review. Rather, the judgment must be reversed and the case remanded for a new trial." *Id*. at 164, 869 N.W.2d at 238-39.); *People v. Estevez*, 155 A.D.3d 650, 651, 64 N.Y.S.3d 236, 237 (N.Y. App. Div., 2d Dep't 2017) (reversing a conviction due to the trial judge's excessive intervention in witness examinations, even though defense counsel did not preserve the claim by "object[ing] to the court's questioning of the witnesses"; the judge "effectively took over the direct examination of one of the complaining witnesses at key moments in her testimony where she was describing how the defendant shot the victim . . . . Moreover, in its extensive questioning of the defendant, the court repeatedly highlighted apparent inconsistencies in the defendant's testimony."); *People v.*

Aponte, 204 A.D.3d 1031, 1034-35, 1036, 167 N.Y.S.3d 154, 158, 159 (N.Y. App. Div., 2d Dept. 2022) (reversing a conviction because the trial judge "improperly impeded the defendant's defense of third-party culpability by limiting the defendant's cross-examination of the police witness regarding the lineup procedures, curtailing defense counsel's summation, and, sua sponte, improperly and erroneously instructing the jury and defense counsel in the presence of the jury that counsel could not argue that the lineup was unfair or suggestive, as the court had already found it fair and not suggestive"; "although the defendant's contention that he was deprived of a fair trial is unpreserved for appellate review, we reach it in the exercise of our interest of justice jurisdiction . . . and find that the cumulative effect of these errors, particularly the . . . [trial court's] intrusion into defense counsel's summation as an advocate for the People and its erroneous instructions on the law regarding the lineup, deprived the defendant of a fair trial"); *People v. Kocsis*, 137 A.D.3d 1476, 1481-82, 28 N.Y.S.3d 466, 471-72 (N.Y. App. Div. 3d Dep't 2016) (the judge in a jury trial "deprived [the defendant] of a fair trial" by providing "guidance and instructions" to the prosecutor regarding "the rules of evidence": "During the course of the trial, the ADA [Assistant District Attorney] in question demonstrated difficulty in laying the proper foundation for the admission into evidence of certain photographs and bank records and in utilizing a particular document to refresh a witness's recollection. In response, County Court conducted various sidebars, during the course of which the court, among other things, explained the nature of defense counsel's objections, outlined the questions that the ADA needed to ask of the testifying witnesses, referred the ADA to a certain evidentiary treatise and afforded him a recess in order to consult and review the appropriate section thereof."; the "County Court's assistance in this regard – although well-intentioned – arguably created the perception that the People were receiving an unfair tactical advantage"); *People v. Retamozzo*, 25 A.D.3d 73, 74, 86-87, 802 N.Y.S.2d 426, 427, 434-35 (N.Y. App. Div., 1st Dep't 2005) (the trial judge in a jury trial "deprived defendant of his constitutional right to a fair trial by excessive interference in the examination of witnesses," including asking questions and making comments during counsel's cross-examinations of prosecution witnesses that undermined the cross-examinations, and asking questions during the defendant's testimony that conveyed "considerable skepticism"; the record does not contain "a single instance of a question asked by the trial judge that plausibly could be viewed as helpful to the defense"); *People v. Chatman*, 14 A.D.3d 620, 620-21, 789 N.Y.S.2d 208, 210 (N.Y. App. Div., 2d Dep't 2005) (the trial judge in a jury trial "assumed the appearance of an advocate at the trial" by "improperly elicit[ing] from the investigating detective testimony that the defendant did not mention his alleged alibi at the time of his arrest, and refused to answer any questions" and by "extensive[ly] questioning . . . the defendant's alibi witness"); *People v. Raosto*, 50 A.D.3d 508, 509, 856 N.Y.S.2d 86, 88 (N.Y. App. Div., 1st Dept. 2008) (the trial judge in a jury trial "'unduly injected himself into the proceeding to such an extent as to deny defendant a fair and impartial trial'" by "conduct[ing] lengthy and inappropriate cross-examinations of defendant and defense witnesses, which were neither neutral nor aimed at clarification, but disrupted the flow of testimony and plainly conveyed to the jury the court's disbelief of these witnesses").

§ 20.06 PROCEDURES FOR SEEKING RECUSAL OR DISQUALIFICATION

Local practice must be consulted with regard to the appropriate form of challenge to a judge (motion for recusal or disqualification or substitution; affidavit of bias; whatever) and the time when it must be made.

As noted in § 20.05 *supra,* in some jurisdictions, the filing of a facially sufficient affidavit or motion requires that the judge recuse himself or herself, without inquiry into the truth of the matters of fact averred. Under other procedures the underlying factual questions are heard before the judge who is challenged or another judge.

The defense is entitled to put allegations of bias into the record in any manner necessary to present them to the court and save them for review. *See Holt v. Virginia,* 381 U.S. 131 (1965); *In re Little,* 404 U.S. 553 (1972). Ordinarily, a written motion with supporting affidavits is desirable to protect the record.

Procedures and preparations for dealing with a predictably hostile judge are discussed in Michael D. Cicchini, *Combating Judicial Misconduct: A Stoic Approach*, 67 BUFFALO L. REV. 1259 (2019).

In some jurisdictions there is a procedure – sometimes called a motion for change of venue, sometimes called an affidavit of bias – that is actually used (by law or custom) as a form of peremptory challenge to the judge. It may not require any assertion of bias, or it may require simply an allegation of bias in conclusory form that the judges do not take seriously or resent. Ordinarily, motions or affidavits for removal of a judge under these peremptory-challenge procedures are timely only if filed before the judge has taken any action in the case; sometimes they are required to be filed within a specific time after the assignment of the case to the judge.

§ 20.07 TACTICAL CONSIDERATIONS IN DECIDING WHETHER TO SEEK RECUSAL AND IN FRAMING THE RECUSAL REQUEST

In deciding whether to seek recusal or disqualification of the judge, counsel must balance the liabilities of keeping the present judge (that is, the likely effects of biasing factors upon the judge's verdict and sentence) against the risk of incurring judicial wrath. If the motion is denied and the judge retains the case, whatever latent biasing factors originally existed may well be exacerbated by the judge's anger over being accused of bias. A sufficiently irascible judge may also invoke sanctions against counsel. *See Dean v. Philadelphia Gas Works*, 2020 WL 7695751 (E.D. Pa. 2020). And even if the motion is granted, there may be repercussions: The judge to whom the case is transferred may resent counsel and the client for what the judge perceives as an attack upon a colleague or the judiciary in general.

In deciding whether to seek recusal, counsel also will need to compare the present judge with the other judges to whom the case might be assigned if the recusal motion is granted. Even if the current judge knows prejudicial information about the respondent or the case, s/he still might be a fairer factfinder than the other judges who could receive the case. And even if the

present judge is so biased that s/he is likely to convict, it still might be preferable to keep the judge if the respondent's chances of winning at trial are slim no matter who the judge is and if the present judge is a relatively lenient sentencer.

Counsel can both maximize the chances of gaining recusal and minimize the risks of incurring judicial wrath by the way in which the recusal request is framed. Recusal motions should not ordinarily state or even imply that the judge is incapable of keeping an open mind. When the impact of prior exposures upon the judge must be identified, it should be described in terms of the potential unconscious effects of these exposures upon any human being in the judge's situation. See § 20.05 fourth paragraph *supra.* Alternatively, when possible, counsel should rely upon the "appearance of impropriety" as the primary basis for recusal. See *id.*

Depending upon the temperament of the judge and counsel's relationship with the judge, counsel may want to consider making an informal recusal request before filing a motion or invoking statutory recusal procedures. The initial soft-sell approach permits a graceful way out that will be accepted by some judges who would feel obliged to resist a formal motion making specific allegations of bias against them. However, some judges may resent such informal requests, viewing them as an attempt to use a back-door approach to obtain recusal for reasons that are so insubstantial that the attorney is not even willing to put them on the record.

In making the difficult decisions whether to seek recusal and how to frame recusal requests, counsel should always investigate both the general local attitudes toward these procedures and the known past reactions of the individual judge in question. In some jurisdictions, and with some judges, recusal motions are accepted as a routine forum-shopping device, which may ordinarily be safely used, without incurring judicial ire. Conversely, what is accepted as stock pleading in one locality – or to one judge – may be taken as a deadly insult in another locality or by another judge in the same locality.