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Judicial Disqualification—Confusion, Clarification and Continued Considerations: A Closer Look at Arkansas's Judicial Disqualification Rules in Light of *Ferguson v. State*

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JUDICIAL DISQUALIFICATION—CONFUSION, CLARIFICATION AND CONTINUED CONSIDERATIONS: A CLOSER LOOK AT ARKANSAS’S JUDICIAL DISQUALIFICATION RULES IN LIGHT OF *FERGUSON V. STATE*.

I. INTRODUCTION

For our legal system to achieve the justice it so demands, the public must have trust and confidence in our judicial system.¹ And because the judiciary is central to the preservation of principles of justice, the responsibility of maintaining the confidence of the general public is placed upon our judges.² Judges are therefore expected to adhere to scrupulous rules governing their conduct, both professionally and personally, to further promote public confidence.³ An additional safeguard for preserving public confidence is effectuated by and through the requirement of judges to perform their judicial duties both fairly and impartially.⁴ This commitment to fairness and impartiality is so vital to our judicial system that, when a judge’s impartiality has been reasonably called into question, the Arkansas Code of Judicial Conduct (“Code”) mandates that the judge must disqualify himself or herself from the proceeding.⁵

As the rule for disqualification implies, it is not enough for justice to be done, but rather “justice must [also] satisfy the appearance of justice.”⁶ And while courts are generally the most trusted of the three branches of government, the concern for potential judicial bias remains a direct threat to public confidence.⁷ Since judicial disqualification is mandatory under certain circumstances, the Code purports to provide a process for alleviating those

1. *Public Trust and Confidence: Resource Guide*, NAT’L CTR. FOR ST. CTS., <http://www.ncsc.org/Topics/Court-Community/Public-Trust-and-Confidence/Resource-Guide.aspx> (last visited June 20, 2018).

2. ARK. CODE JUD. CONDUCT Preamble ¶ 1 (amended 2016).

3. *Id.* ¶ 2 (“Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.”).

4. *Id.* R. 2.2.

5. *Id.* R. 2.11.

6. *Offutt v. United States*, 348 U.S. 11, 14 (1954).

7. Gerstein Bocian Agne Strategies, *Analysis of National Survey of Registered Voters*, NAT’L CTR. FOR ST. CTS., (Nov. 17, 2015), http://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC_2015_Survey%20Analysis.ashx.

lingering concerns.⁸ Unfortunately, the Code has not always been an effective remedy for achieving that goal.⁹

The problem plaguing Arkansas's rule regarding judicial recusal¹⁰ is that, although the Code mandates disqualification when the judge's impartiality has been reasonably questioned,¹¹ Arkansas's appellate courts seemingly disregarded that mandate and instead granted judges "substantive discretion"¹² in deciding their own disqualification fate.¹³ Perhaps some level of judicial discretion must be applied when determining whether or not recusal is mandated because the judge must first determine whether the movant has reasonably questioned the judge's impartiality before the Code's mandate to disqualify becomes operative.¹⁴ However, once a determination is made that the request for disqualification is reasonable, the decision to recuse is no longer discretionary; the judge *must* then recuse.¹⁵ The conflict between the mandate of the code and the absolute substantive discretion afforded to judges by Arkansas's appellate courts had created such a perplexing conflict in Arkansas law that appellate review of a judge's refusal to recuse was rendered impractical for decades. However, in the 2016 case of *Ferguson v. State*, the Supreme Court of Arkansas took great strides to correct these inconsistencies and breathe new life into the rules for judicial disqualification.¹⁶

In *Ferguson*, the Arkansas Supreme Court explicitly recognized the imperatives of the Code and delivered a decision with the force necessary to implicitly overrule decades of conflicting precedent that had plagued this

8. ARK. CODE JUD. CONDUCT R. 1.2 cmt. n.3.

9. See *Walls v. State*, 341 Ark. 787, 792, 20 S.W.3d 322, 325 (2000) (affirming a trial judge's decision not to recuse despite the fact the judge made "inappropriate and ethically suspect" comments); *Trimble v. State*, 316 Ark. 161, 170–72, 871 S.W.2d 562, 566–67 (1994) (affirming a trial judge's decision not to recuse despite the fact the judge's son worked in the prosecuting attorney's office which created an appearance of bias).

10. ARK. CODE JUD. CONDUCT R. 2.11 cmt. n.1. The terms "recusal" and "disqualification" are used interchangeably. *Id.*

11. *Id.* R. 2.11.

12. The phrase "substantive discretion" is used in this note to refer to a judge's discretion in deciding the substance of a recusal motion, *i.e.* choosing whether or not to recuse. Substantive discretion should not be confused with the abuse-of-discretion standard of review which will be discussed later in this note. See *infra* Part III.C.2.

13. See *Walls*, 341 Ark. at 792, 20 S.W.3d at 325 ("[T]he decision to recuse lies within the discretion of the judge."); *Irvin v. State*, 345 Ark. 541, 549–50, 49 S.W.3d 635, 640 (2001) ("Whether a judge has become biased to the point that he should disqualify himself is a matter to be confined to the conscience of the judge."); *Noland v. Noland*, 326 Ark. 617, 620, 932 S.W.2d 341, 343 (1996) ("[B]ias is a subjective matter peculiarly within the knowledge of the trial judge.").

14. ARK. CODE JUD. CONDUCT R. 2.11.

15. *Id.*

16. *Ferguson v. State*, 2016 Ark. 319, at 6–8, 498 S.W.3d 733, 737–38.

area of law.¹⁷ Not only did the Arkansas Supreme Court recognize the mandatory requirements the Code outlines for disqualification, but it also provided fundamental guidance that had been noticeably absent in years past.¹⁸ Also valuable to the clarification of this area of law is the concurring opinion, written by former Chief Justice Brill, which defined a term found in the rules where no express definition had previously existed.¹⁹ For these combined reasons, *Ferguson* is one of the most important disqualification cases to be decided in Arkansas since the inception of the Code.

Part II of this note focuses on the delineation of the Code, and it exposes the complexity of the inconsistency between the Code and pre-*Ferguson* case law.²⁰ Part III provides a detailed discussion of the decision delivered in *Ferguson* and its impact on the application of the Code's rules on disqualification post-*Ferguson*.²¹ This point also argues that weaknesses remaining in the procedural application of the Code deserve further inquiry and modification in light of the *Ferguson* decision.²² Part IV summarizes and concludes this note.²³

II. BACKGROUND

Judicial disqualification is a process guaranteed by the Arkansas Constitution.²⁴ Arkansas statutes also authorize disqualification of judges under certain circumstances.²⁵ However, the Code provides the broadest method through which a litigant can seek judicial disqualification.²⁶

A. Disqualification Under the First Code

In November 1973, the Arkansas Supreme Court adopted the American Bar Association's Model Code of Judicial Conduct ("Model Code") as the "proper standards for the Judiciary of this State."²⁷ Although the Model

17. *Id.* at 6–8, 498 S.W.3d at 737–38.

18. *Id.* at 6–7, 498 S.W.3d at 737.

19. *Id.* at 9–10, 498 S.W.3d at 738–39 (Brill, C.J., concurring).

20. *See infra* Part II.

21. *See infra* Part III.

22. *See infra* Part III.

23. *See infra* Part IV.

24. ARK. CONST. amend. 80, § 12 ("No Justice or Judge shall preside or participate in any case in which he or she might be interested in the outcome, in which any party is related to him or her by consanguinity or affinity within such degree as prescribed by law, or in which he or she may have been counsel or have presided in any inferior court.").

25. *E.g.*, ARK. CODE ANN. § 16-11-108 (disqualification of state supreme court justices); *Id.* § 16-13-214 (disqualification of circuit court judges); *Id.* § 16-15-111 (disqualification of county court judges).

26. ARK. CODE JUD. CONDUCT R. 2.11 (amended 2016).

27. *In re* Uniform Docketing Rule, 255 Ark. 1073 (December 24, 1973) (per curiam).

Code had been adopted and had been given force of law by the Arkansas Supreme Court, the Model Code was not formally published until 1988 as the “Arkansas Code of Judicial Conduct” (“First Code”).²⁸

Canon 3(C)(1) of the First Code, titled “Disqualification,” merely suggested that a judge “*should* disqualify himself in a proceeding in which his impartiality might reasonably be questioned”²⁹ Given the permissive nature of the rule, the First Code left the test for determining whether there was an appearance of impropriety to the individual judge’s own conscience.³⁰

1. *Cases Decided Under the “Should Disqualify” Language of the First Code*

The First Code’s use of the permissive term “should”³¹ combined with its subjective test for determining whether the appearance of impartiality was reasonably questioned³² resulted in the impartation of broad discretionary authority upon judges when deciding disqualification issues.³³

Trimble v. State is illustrative of the forgiving nature of this broad discretionary standard.³⁴ In *Trimble*, when a trial judge presided over a criminal matter where the judge’s son was employed at the prosecuting attorney’s office, the trial judge’s refusal to recuse was affirmed even though the appellate court agreed that “the appearance generated by the employment of a judge’s son at the prosecutor’s office is none too good.”³⁵ But, as the *Trimble* court indicated, the trial judge’s conduct had not violated the First Code because it merely suggested that the judge disqualify himself only after the judge subjectively determined that he had become biased and was unable to continue presiding over the trial.³⁶ Since the judge in *Trimble* did not agree

28. *In re* Arkansas Code of Judicial Conduct, 295 Ark. 707 (June 6, 1988) (per curiam).

29. ARK. CODE JUD. CONDUCT Canon 3(C)(1) (1988) (current version at R. 2.11 (amended 2016)) (emphasis added).

30. *Id.* Canon 2(A) cmt. ¶ 2 (current version at R. 1.2 (amended 2016)).

31. *Id.* Canon 3(C)(1) (current version at R. 2.11 (amended 2016)).

32. *Id.* Canon 2(A) cmt. ¶ 2 (current version at R. 1.2 (amended 2016)).

33. *E.g.*, *Roe v. Dietrick*, 310 Ark. 54, 59, 835 S.W.2d 289, 292 (1992) (“The decision to disqualify from a case is, again, discretionary with the trial court.”); *Sheridan v. State*, 313 Ark. 23, 48, 852 S.W.2d 772, 785 (1993) (“The decision to disqualify . . . is discretionary with a judge.”); *Matthews v. State*, 313 Ark. 327, 330, 854 S.W.2d 339, 341 (1993) (“The matter of whether to disqualify is to be determined in the sound discretion of the judge in question”); *Korolko v. Korolko*, 33 Ark. App. 194, 197, 803 S.W.2d 948, 950 (1991) (“[D]isqualification of a judge is discretionary with the judge himself”); *Duty v. State*, 45 Ark. App. 1, 6, 871 S.W.2d 400, 403 (1994) (“[W]hether recusal is required lies within the judge’s conscience.”).

34. *Trimble v. State*, 316 Ark. 161, 871 S.W.2d 562 (1994).

35. *Id.* at 171-72, 871 S.W.2d at 567.

36. *Id.*

that his son's employment at the prosecuting attorney's office affected his ability to preside impartially over the criminal prosecution, his refusal to recuse was not a violation of the First Code.³⁷

This analysis demonstrates just how ambivalently the rules of disqualification were applied under the First Code. Naturally, under such lax rules, matters of disqualification were left exclusively to the trial judge's discretion, leading to years of precedent supporting a broad substantive discretionary authority vested in judges.³⁸

B. Disqualification Under the Second Code

A revised Arkansas Code of Judicial Conduct ("Second Code") was adopted in 1993.³⁹ Both the First Code and the Second Code had similar formatting, wherein the admonishments were labeled "Canons," and each Canon adopted the American Bar Association's explanatory "Commentary" section.⁴⁰ However, a significant change was made from the First Code to the Second Code with respect to the rules for disqualification.⁴¹ Canon 3(E)(1) of the Second Code, still titled "Disqualification," mandated that a judge "*shall* disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."⁴² Also significant was the change made to the test for determining the appearance of impropriety, which was amended to incorporate an objective "reasonable minds" test instead of allowing the decision to lie within the conscience of the judges themselves.⁴³

The differences between the First and Second Codes were profound, changing the entire application of the rule. The purpose of these significant changes was to nullify the discretionary notion of recusal that the First Code had created by replacing the permissive term "should" with the mandatory directive "shall."⁴⁴ This purpose was made clear in the Preamble to the Second Code:

37. *Id.* at 165, 171–72, 871 S.W.2d at 564, 567.

38. *See supra* note 33.

39. *In re* Arkansas Code of Judicial Conduct, 313 Ark. Appx. 737 (July 5, 1993) (per curiam).

40. Howard W. Brill, *The Arkansas Code of Judicial Conduct of 2009*, 2009 Ark. L. Notes 1, 2 (2009).

41. *Compare* ARK. CODE JUD. CONDUCT Canon 3(C)(1) (1988) (suggesting that a judge *should* disqualify), *with* ARK. CODE JUD. CONDUCT Canon 3(E)(1) (1993) (mandating that a judge *shall* disqualify).

42. ARK. CODE JUD. CONDUCT Canon 3(E)(1) (1993) (current version at R. 2.11 (amended 2016)) (emphasis added).

43. *Id.* Canon 2(A) cmt. ¶ 2 (current version at R. 1.2 (amended 2016)).

44. *Id.* Preamble ¶ 2 (1993) (current version at Scope ¶ 2 (amended 2016)).

The text of the [Code] . . . is authoritative When the text uses “shall” or “shall not,” it is intended to impose binding obligations the violation of which can result in disciplinary action. When “should” or “should not” is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as binding rule under which a judge may be disciplined. When “may” is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.⁴⁵

Additionally, the commentary found under the “shall” disqualify rule of the Second Code stated “[u]nder this rule, a judge *is* disqualified whenever the judge’s impartiality might reasonably be questioned, regardless of whether any of the specific rules in [the section] apply.”⁴⁶

1. Cases Decided Under the “Shall Disqualify” Language of the Second Code

For all intents and purposes, the changes incorporated into the Second Code should have rendered the prior “discretionary” case law decided under the First Code inapplicable to judicial recusal decisions being decided under the modified rules for disqualification. Unfortunately, as issues regarding recusal were appealed under the Second Code, the Arkansas appellate courts continued applying the legal analysis derived from the provisions of the First Code.⁴⁷

One of the first cases addressing the issue of judicial disqualification under the Second Code was *Reel v. State*.⁴⁸ In *Reel*, the defendant moved to disqualify the presiding judge because the judge had been the victim of a similar crime for which the defendant was being charged.⁴⁹ In affirming the trial judge’s refusal to recuse, the Arkansas Supreme Court acknowledged the “shall disqualify” language of the Second Code by and through the amended language comprising the then-Canon 3(E)(1).⁵⁰ However, it appears as though the court simply copied and pasted a legal analysis of the rule from an opinion decided under the First Code.⁵¹ This “copy-and-paste” legal analysis was evidenced by the court’s errant identification of the former disqualification rule wherein the court stated, “*Canon 3(C)* provide[s]

45. *Id.*

46. *Id.* Canon 3(E)(1) cmt. 1 (1993) (current version at R. 2.11 cmt. 1 (amended 2016)) (emphasis added).

47. *See infra* note 68 and accompanying text.

48. *Reel v. State*, 318 Ark. 565, 886 S.W.2d 615 (1994).

49. *Id.* at 569, 886 S.W.2d at 617.

50. *Id.*, 886 S.W.2d at 617.

51. *Id.*, 886 S.W.2d at 617.

that . . . ”⁵² Canon 3(C), of course, is the disqualification provision found in the First Code,⁵³ and it was no longer the rule in effect at the time *Reel* was decided.⁵⁴ The court in *Reel* had already acknowledged that Canon 3(E)(1) of the Second Code was the rule for disqualification in effect at the time *Reel* was decided.⁵⁵ Yet, instead of conducting a new legal analysis for the newly amended rules, the court simply pasted into its opinion the inapplicable legal analysis derived from the First Code’s rules.⁵⁶ Thereafter, to support its proposition that disqualification was discretionary, the court cited two cases that were decided under the First Code as the legal authority for its holding.⁵⁷

Compounding the already errant legal analysis, the *Reel* court then applied the First Code’s test for determining whether there was an appearance of impropriety when holding that the judge was “in the better position to determine if his recent experience would compromise his impartiality.”⁵⁸ The appropriate and modified test of the Second Code should have been applied by the court to impose an objective “reasonable minds” standard to the facts rather than allowing the presiding judge’s own conscience to prevail in the determination of recusal.⁵⁹ By failing to appreciate the substantial changes that had been made between the First and Second Codes, the decision in *Reel* critically undercut the purpose of the changes made by and through the Second Code.⁶⁰

The Arkansas Supreme Court’s flawed legal analysis of the Second Code was also evident in *Walls v. State*, where the court actually acknowledged the mandatory language of the Second Code, stating that the rule “does provide that a judge *shall* disqualify,”⁶¹ but then stated, “however, we have held that recusal is a matter that is discretionary with the trial judge.”⁶² Based on its application of prior precedent inapposite to the mandate of the Second Code, the court in *Walls* affirmed the trial judge’s decision not to

52. *Id.*, 886 S.W.2d at 617 (emphasis added).

53. ARK. CODE JUD. CONDUCT Canon 3(C)(1) (1988).

54. *Reel*, 318 Ark. at 569, 886 S.W.2d at 617.

55. *Id.*, 318 Ark. at 569, 886 S.W.2d at 617.

56. *Id.* at 569, 886 S.W.2d at 617.

57. *Id.* at 569, 886 S.W.2d at 617 (citing to *Matthews v. State*, 313 Ark. 327, 854 S.W.2d 339 (1993), which discussed disqualification pursuant to Canon 3(C) of the First Code, and *Trimble v. State*, 316 Ark. 161, 871 S.W.2d 562 (1994), which also discussed disqualification under Canon 3(C) of the First Code).

58. *Reel*, 318 Ark. at 570, 886 S.W.2d at 618.

59. Compare ARK. CODE JUD. CONDUCT Canon 2(A) cmt. ¶ 2 (1993) (current version at R. 1.2 cmt. n.5 (amended 2016)), with ARK. CODE JUD. CONDUCT Canon 2(A) cmt. ¶ 2 (1988) (current version at R. 1.2 cmt. n.5 (amended 2016)).

60. See *supra* notes 44–46 and accompanying text.

61. *Walls v. State*, 341 Ark. 787, 792, 20 S.W.3d 322, 325 (2000).

62. *Id.* at 792, 20 S.W.3d at 325.

recuse despite the fact the court believed the judge made “inappropriate and ethically suspect” comments to the defendant during the course of his case.⁶³ This holding wholly defeated the purpose of the Second Code.⁶⁴

The misapplication of old case law to the amended rules of the Second Code continued for decades, entrenching in Arkansas law an errant holding that trial judges still had substantive discretion in deciding matters of recusal in spite of the language found in the Second Code.⁶⁵ Nothing in the language of the Second Code either stated or implied that a trial judge had any discretion whatsoever in deciding whether to recuse once the judge’s impartiality had reasonably been questioned.⁶⁶ Regardless of the absence of any such authority in the Second Code, Arkansas appellate courts continued to grant judges precisely that vast and uninhibited substantive discretion, leaving the judge’s decision on matters of recusal virtually untouched on appellate review.⁶⁷ Because of the resultant competing standards, a judge’s decision to recuse was mandatory under the Second Code yet discretionary under the case law.⁶⁸ The two were irreconcilable.

C. Disqualification Under the Current Code

The Code was amended a third time in 2009, but the provisions regarding disqualification were not substantively changed.⁶⁹ However, the original “Canon” was replaced with the enumerated “Rule 1.2” heading.⁷⁰ Portions of the Code were amended a fourth time in 2016, specifically the provisions regarding disqualification.⁷¹ However, since the Second Code was made

63. *Id.*, 20 S.W.3d at 325.

64. *See supra* notes 44–46 and accompanying text.

65. *See Porter v. Ark. Dept. of Health & Human Serv.*, 374 Ark. 177, 191, 286 S.W.3d 686, 697 (2008) (“The question of bias is generally confined to the conscience of the judge.”); *Searcy v. Davenport*, 352 Ark. 307, 313, 100 S.W.3d 711, 715 (2003) (“Whether a judge has become biased to the point that he should disqualify himself is a matter to be confined to the conscience of the judge.”); *Gates v. State*, 338 Ark. 530, 544, 2 S.W.3d 40, 48 (1999) (“The decision to recuse is within the trial court’s discretion . . .”).

66. *See* ARK. CODE JUD. CONDUCT Canon 3(E)(1) (1993) (current version at R. 2.11 (amended 2016)).

67. *See supra* note 65.

68. *Compare* ARK. CODE JUD. CONDUCT Canon 3(E)(1) (1993) (current version at R. 2.11 (amended 2016)), *with Porter*, 374 Ark. at 191, 286 S.W.3d at 697 (“The question of bias is generally confined to the conscience of the judge.”); *Searcy*, 352 Ark. at 313, 100 S.W.3d at 715 (“Whether a judge has become biased to the point that he should disqualify himself from a matter to be confined to the conscience of the judge.”); *Gates*, 338 Ark. at 544, 2 S.W.3d at 48 (“The decision to recuse is within the trial court’s discretion.”).

69. *Compare* ARK. CODE JUD. CONDUCT R. 2.11 (2009) (amended 2016), *with* ARK. CODE JUD. CONDUCT Canon 3(E)(1) (1993) (current version at R. 2.11 (amended 2016)).

70. *Id.*

71. *In Re* Arkansas Code of Judicial Conduct, 2016 Ark. 470, 4 (Dec. 15, 2016).

effective in 1993, the rules regarding disqualification have remained substantively unchanged.⁷² The current rule, Rule 2.11, still requires that a judge “*shall* disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.”⁷³ Moreover, the reasonable person standard still applies when determining what conduct constitutes a violation of the Code.⁷⁴

1. *Disqualification Cases Decided Under the Current Code: Prior to Ferguson*

The cases decided under the current version of the Code have been decided with the same inherent quandaries as those that had been decided under the Second Code.⁷⁵ These inconsistencies and conflicts rendered appellate review impractical and fruitless.⁷⁶ Unfortunately, the Code was never applied with the force of law it was intended to create, and throughout the Code’s existence, only the most egregious judicial conduct resulted in reversal on appeal.⁷⁷

72. Compare ARK. CODE JUD. CONDUCT Canon 3(E)(1) (1993), with ARK. CODE JUD. CONDUCT R. 2.11 (amended 2016).

73. ARK. CODE JUD. CONDUCT R. 2.11 (amended 2016).

74. *Id.* R. 1.2 cmt. n.5.

75. See *Ahmad v. Horizon Pain, Inc.*, 2014 Ark. App. 531, 5, 444 S.W.3d 412, 416 (holding that a trial judge is presumed to be impartial and the burden is on the party seeking disqualification to prove a showing of bias or prejudice before a reversal can be achieved); *Smith v. Hudgins*, 2014 Ark. App. 150, 7, 433 S.W.3d 265, 269 (holding that the decision to recuse is within the discretion of the judge and that in order to reverse that decision, the moving party must show bias or prejudice on the part of the judge).

76. See *supra* note 75.

77. See *Patterson v. R.T.*, 301 Ark. 400, 406–7, 784 S.W.2d 777, 781 (1990) (reversing a judge’s decision not to recuse because the decision was tainted by the appearance of pre-judgment after the trial judge seemed to announce the outcome of the case before it was tried); *Farley v. Jester*, 257 Ark. 686, 693, 520 S.W.2d 200, 204 (1975) (reversing a judge’s decision not to recuse where the judge made statements that reasonably could have been understood by the movant as an implication that the testimony of an opposing witness would receive more consideration than the testimony of other witnesses); *Riverside Marine Mfrs., Inc. v. Booth*, 93 Ark. App. 48, 51–2, 216 S.W.3d 611, 613–14 (2005) (reversing a judge’s decision not to recuse where the judge had given the “appearance of having a mindset that could not be reconciled with the proposition that he was committed to hear all relevant, credible evidence, weighing it and arriving at a judicious result” but still applying the erroneous standard that “the decision to recuse is within the trial court’s discretion. . .”).

III. ARGUMENT

A. The *Ferguson* Decision

1. *Relevant Facts and Procedural History*

Ferguson was accused of physically abusing one of her adopted children.⁷⁸ A juvenile dependency-neglect action was commenced, which was assigned to the Honorable Circuit Judge Barbara Elmore.⁷⁹ Thereafter, the state of Arkansas charged Ferguson with second-degree domestic battery, alleging that Ferguson “unlawfully, feloniously with the purpose of causing physical injury to a family or household member he or she knows to be twelve (12) years of age or younger” injured one of her adopted children.⁸⁰ Judge Elmore was assigned to preside over the criminal proceeding as well.⁸¹

During the course of the juvenile proceeding and approximately two weeks after Ferguson was criminally charged, an adjudication hearing was held before Judge Elmore wherein she stated from the bench:

I find that there’s dependent neglect. I do find that the allegations have been substantiated by proof beyond a preponderance of the evidence. The child is dependent neglect. *There was physical abuse of the child younger than six years of age. I don’t see how you can find anything else.*⁸²

Because of those definitive statements rendered at the close of the juvenile adjudication hearing, Ferguson requested that Judge Elmore recuse from the criminal proceeding in accordance with the Code’s rules governing disqualification.⁸³ Ferguson maintained that Judge Elmore’s statements, specifically that “[t]here was physical abuse of the child younger than six years of age” and that Judge Elmore “[couldn’t] see how you can find anything else,” were evidence of pre-judgment and bias, or at a minimum gave the appearance of a bias.⁸⁴ Ferguson also argued that, in addition to the current Code mandating recusal for an appearance of bias, two of the enumerat-

78. *Ferguson v. State*, 2016 Ark. 319, 1–2, 498 S.W.3d 733, 735.

79. *Id.* at 2, 498 S.W.3d at 735.

80. *Id.*, 498 S.W.3d at 735.

81. *Id.*, 498 S.W.3d at 735.

82. *Id.*, 498 S.W.3d at 735 (emphasis added).

83. *Id.* at 2–3, 498 S.W.3d at 735; ARK. CODE JUD. CONDUCT R. 2.11(A)(1) (2009) (amended 2016).

84. *Ferguson*, 2016 Ark. at 2, 5, 498 S.W.3d at 735–36.

ed subsections found in the rule for disqualification were also applicable, specifically subsections (1) and (6).⁸⁵

Ferguson argued that under Rule 2.11(A)(6)(d),⁸⁶ Judge Elmore was required to recuse because she “previously presided as the judge over the matter in another court.”⁸⁷ She contended that because the juvenile dependency-neglect and the criminal proceedings consisted of the same allegations, involved the same key witnesses who would provide the same testimony, and because the purpose of both cases was identical (“to prove that [Ferguson] caused physical injury to a child in her household that was younger than six years of age”), both proceedings were the same “matter” as contemplated by Rule 2.11(A)(6)(d).⁸⁸ Ferguson also argued that Rule 2.11(A)(1)⁸⁹ required Judge Elmore to recuse because she had developed a personal bias or prejudice against Ferguson.⁹⁰ In addition to filing her motion for recusal, Ferguson also attempted to waive her right to a jury trial.⁹¹

Judge Elmore denied both the recusal motion and the jury-trial waiver.⁹² In her written opinion, Judge Elmore acknowledged that “some of the same testimony and evidence” would be heard in the criminal proceeding that had already been heard in the juvenile proceeding, but Judge Elmore held that the repetition of evidence was irrelevant because both cases had different burdens of proof.⁹³ Thereafter, at the criminal jury trial, the same key witnesses from the juvenile proceeding testified again, and Ferguson was convicted of the charges against her.⁹⁴

2. *The Arkansas Court of Appeals*

a. The Majority Opinion

Ferguson appealed the denial of her recusal motion to the Arkansas Court of Appeals.⁹⁵ In construing the application of the Code to the facts in Ferguson’s appeal, the court of appeals repeated the outdated rule that “a judge’s recusal is discretionary” and that a “substantial burden” is on the

85. *Id.* at 4–5, 498 S.W.3d at 736.

86. ARK. CODE JUD. CONDUCT R. 2.11(A)(6)(d) (amended 2016).

87. *Ferguson*, 2016 Ark. at 4, 498 S.W.3d at 736.

88. *Id.* at 3–4, 498 S.W.3d at 735–36.

89. ARK. CODE JUD. CONDUCT R. 2.11(A)(1) (amended 2016).

90. *Ferguson*, 2016 Ark. at 4–6, 498 S.W.3d at 736–37.

91. *Id.* at 3, 498 S.W.3d at 735.

92. *Id.* at 3, 498 S.W.3d at 735.

93. *Id.* at 3–4, 498 S.W.3d at 735–36.

94. *Id.* at 4, 498 S.W.3d at 736.

95. *Ferguson v. State*, 2015 Ark. App. 722, 479 S.W.3d 25, *rev’d* 2016 Ark. 319, 498 S.W.3d 733.

movant to prove the judge was not impartial.⁹⁶ In a 4-3 decision, the court affirmed Judge Elmore's denial, finding specifically that the juvenile dependency-neglect and criminal proceedings were not the same "matter" and that the specific subdivisions contained within the Code's disqualification provision did not require Judge Elmore to recuse.⁹⁷ However, the court failed to address Ferguson's underlying argument that a reasonable person would question Judge Elmore's impartiality under those circumstances and that, pursuant to the Code, Judge Elmore was required to recuse.⁹⁸

b. The Dissenting Opinion

The dissenting justices pointed out that whether the cases were in fact the same "matter" was an issue of first impression that required clarification.⁹⁹ The dissent also highlighted the conflict between the case law cited by the majority as authority for affirming the trial court's denial of the recusal motion and the plain language of the Code that mandated recusal.¹⁰⁰ The dissent posited this precise issue, "How do we square the *mandatory* language in Rule 2.11 with the '[a] judge's recusal is discretionary' caselaw on which the majority relies?"¹⁰¹

Ultimately, the dissenting justices opined that the mandatory language of the Code "tips the scales in favor of recusal."¹⁰² This was especially so given that the juvenile dependency-neglect proceeding was the "mirror-image" of the criminal proceeding, and Ferguson justifiably questioned Judge Elmore's impartiality under the Code's reasonable person standard, which should have required Judge Elmore to recuse.¹⁰³ Utilizing the dissenting opinion as the basis for her request, Ferguson filed a Petition for Review in the Arkansas Supreme Court, which was subsequently granted.¹⁰⁴

96. *Id.* at 4, 479 S.W.3d at 27.

97. *Id.* at 6, 479 S.W.3d at 28.

98. *Id.* at 13, 479 S.W.3d at 32 (Harrison, J., dissenting).

99. *Id.*, 479 S.W.3d at 32.

100. *Id.* at 12-13, 479 S.W.3d at 31-2.

101. *Ferguson*, 2015 Ark. App. at 15, 479 S.W.3d at 33 (Harrison, J., dissenting).

102. *Id.* at 11, 479 S.W.3d at 31.

103. *Id.* at 14, 479 S.W.3d at 32.

104. *Ferguson v. State*, 2016 Ark. 319, at 1, 498 S.W.3d 733, 734.

3. *The Arkansas Supreme Court's Review*

a. The Majority Opinion

In a 4-3 decision, the Arkansas Supreme Court reversed the court of appeals opinion affirming Judge Elmore's decision and remanded the case for a new trial before a different judge.¹⁰⁵ In reaching its determination, the majority focused on the plain wording of Rule 2.11(A) and provided an analysis of the application of that rule when a judge's impartiality has been reasonably called into question.¹⁰⁶ The court ruled that, when determining the reasonableness of a litigant's questioning of the judge's impartiality, the judge is required to "be mindful of the perception of bias from the litigant's perspective."¹⁰⁷ The court also explained that the six enumerated sections found under Rule 2.11(A) were not an exhaustive list of the only ways in which a judge's impartiality might be called into question.¹⁰⁸ As long as the judge's impartiality has been reasonably called into question, Rule 2.11(A) mandates disqualification.¹⁰⁹

Additionally, the court did not require Ferguson to make a showing of actual bias to achieve recusal.¹¹⁰ The court found relevant the comments Judge Elmore made from the bench while denying Ferguson's jury-trial waiver wherein Judge Elmore stated, "If you don't think that I can be impartial in a bench trial, then I'll deny your bench trial. So we'll have a jury trial."¹¹¹ This statement was sufficient proof that Ferguson had reasonably questioned Judge Elmore's impartiality to such an extent that the judge did not believe she could serve as the fact-finder during Ferguson's trial.¹¹² Yet instead of recusing, Judge Elmore simply denied the jury-trial waiver and forced the case to proceed before a jury.¹¹³ For these reasons, the court reversed Ferguson's conviction and found that Rule 2.11 required Judge Elmore to recuse.¹¹⁴

105. *Id.* at 8, 498 S.W.3d at 738.

106. *Id.* at 6-7, 498 S.W.3d at 737. The court explained that the word "shall" found in Rule 2.11(A) had mandatory rather than discretionary implications and once a judge's impartiality had been reasonably questioned, "the mandatory portion of Rule 2.11(A) is invoked and the judge is required to disqualify." *Id.* at 7, 498 S.W.3d at 737.

107. *Id.* at 7, 498 S.W.3d at 737.

108. *Id.*, 498 S.W.3d at 737.

109. *Id.*, 498 S.W.3d at 737.

110. *Ferguson*, 2016 Ark. at 7, 498 S.W.3d at 737.

111. *Id.*, 498 S.W.3d at 737.

112. *Id.*, 498 S.W.3d at 737.

113. *Id.* at 3, 498 S.W.3d at 735.

114. *Id.* at 8, 498 S.W.3d at 738.

b. The Concurring Opinion

In his concurring opinion, former Chief Justice Howard Brill seized the opportunity to expound the language in Rule 2.11 and defined what would constitute the same “matter” to invoke mandatory recusal under Rule 2.11(A)(6)(d).¹¹⁵ Because the term “matter” was not specifically defined in the Code, and since that particular issue had not been addressed by the Arkansas appellate courts, Chief Justice Brill wrote his concurrence to fill this void in the Code.¹¹⁶ By reviewing the definitions of “matter” found in the Arkansas Rules of Professional Conduct,¹¹⁷ by also reviewing the comments to the Rules of Professional Conduct¹¹⁸, and by looking to the Black’s Law Dictionary definition of “matter,”¹¹⁹ Chief Justice Brill compiled a list of four factors which he believed were instructive in determining whether two “matters” are in fact the same: (1) whether they focus on the same basic facts; (2) whether the specific parties are the same; (3) if the time between the two proceedings is brief; (4) and other similar factors between the two proceedings.¹²⁰ In applying those factors to the facts presented in *Ferguson*, Chief Justice Brill determined that the criminal and juvenile dependency-neglect proceedings were indeed the same “matter,” and therefore, recusal was mandatory.¹²¹

c. The Dissenting Opinion

Justice Paul Danielson, Justice Rhonda Wood, and Justice Courtney Goodson took the same approach as the Arkansas Court of Appeals and clung to past precedent as proof that Judge Elmore was not required to recu-

115. *Id.* at 8–10, 498 S.W.3d at 738–39. (Brill, C.J., concurring).

116. *Ferguson*, 2016 Ark. at 9, 498 S.W.3d at 738 (Brill, C.J., concurring).

117. *Id.*, 498 S.W.3d at 738 (“[T]he Arkansas Rules of Professional Conduct . . . defines a ‘matter’ as ‘any judicial or other proceeding, allegation, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties.’” (citing ARK. RULES PROF’L CONDUCT 1.11(e)(1)).

118. *Id.*, 498 S.W.3d at 738 (“[I]n determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.” (citing ARK. RULES PROF’L CONDUCT 1.11 cmt. n.10)); *Id.*, 498 S.W.3d at 738 (“[T]he scope of a ‘matter’ . . . depends on the facts of a particular situation or transaction.” (citing ARK. RULES PROF’L CONDUCT 1.9 cmt. n.2)).

119. *Id.*, 498 S.W.3d at 738 (“Black’s Law Dictionary defines ‘matter’ in pertinent part as ‘[a] subject under consideration, especially involving a dispute or litigation . . . Something that is to be tried or proven; an allegation forming the basis of a claim or defense.’” (citing *Matter*, BLACK’S LAW DICTIONARY (10th ed. 2014)).

120. *Id.* at 9–10, 498 S.W.3d at 738–39.

121. *Id.* at 10–11, 498 S.W.3d at 739

se.¹²² Citing *Owens v. State*, the dissent quoted the long-held propositions that recusal decisions are discretionary and that the burden is on the moving party to prove actual bias before appellate courts are allowed to reverse those discretionary decisions.¹²³ The dissenting justices also rejected the definition of “matter” found in the concurrence, instead concluding that “matter” was synonymous with “case.”¹²⁴ In support of its interpretation, the dissent pointed to the explanation contained in the Model Code, which discussed judges being disqualified from “cases over which they preside in a different court.”¹²⁵ The dissent also held that even if recusal was required in situations where a judge “presided over a different matter involving similar facts,” proof of an actual bias or prejudice must still be exhibited in accordance with prior Arkansas precedent.¹²⁶ Under these requirements, the dissenting justices believed that Ferguson failed to provide sufficient evidence to demonstrate an actual bias and, therefore, recusal was not warranted.¹²⁷

B. The Effect of *Ferguson*

By no means did the Arkansas Supreme Court highlight the fact that it had revived the legal concept of judicial disqualification when it issued the *Ferguson* opinion; nevertheless, that is precisely what it did by overruling decades of conflicting precedent by implication.¹²⁸ The decision in *Ferguson* is contrary to most, if not all, of the case law that had developed over the preceding years.¹²⁹ Specifically, *Ferguson* overruled the precedent that the appellate courts had continued to rely on as authority for the proposition that recusal was a wholly discretionary decision left to the presiding judge.¹³⁰

122. *Ferguson*, 2016 Ark. at 11, 498 S.W.3d at 739 (Danielson, J., dissenting).

123. *Id.*, 498 S.W.3d at 739 (“The trial judge’s decision to not recuse from a case is a discretionary one and will not be reversed on appeal absent an abuse of that discretion.” (citing *Owens v. State*, 354 Ark. 644, 655, 128 S.W.3d 445, 451 (2003) (“[A]n abuse-of-discretion can be shown by proving bias or prejudice on the part of the trial judge.”))).

124. *Id.* at 12, 498 S.W.3d at 740 (“Rule 2.11(A)(6)(d) would require recusal only when the judge previously presided over the same case in another court. The most obvious example of this would be an appellate court judge who previously presided over the case as a trial judge.” (emphasis added)).

125. *Id.* at 12, 498 S.W.3d at 740 (emphasis in original).

126. *Id.* at 13, 498 S.W.3d at 740.

127. *Id.* at 14, 498 S.W.3d at 741.

128. A prior decision is overruled by implication when a subsequent decision is delivered that is contrary to the holding of a prior decision. See *Nooner v. State*, 2014 Ark. 296, 16–17, 438 S.W.3d 233, 243–44; see also *Oldner v. Villines*, 328 Ark. 296, 303–04, 943 S.W.2d 574, 578 (1997).

129. Compare *Ferguson*, 2016 Ark. 319, 498 S.W.3d 733, with *supra* notes 33, 65, and 75, and accompanying text.

130. See *Chancellor v. State*, 14 Ark. App. 64, 66, 684 S.W.2d 831, 833 (1985) (“Disqualification of a judge is discretionary with the judge himself.”); *Woods v. State*, 278 Ark.

Ferguson held instead that “[o]bviously, if a judge’s impartiality may ‘reasonably’ be questioned, the mandatory portion of [the disqualification rule] is invoked and the judge is required to disqualify.”¹³¹ Although the *Ferguson* court found that mandatory recusal was obvious, with no deference given to the discretion of the trial judge, that mandate was anything but obvious during the decades prior to *Ferguson*.¹³²

The *Ferguson* holding also revived the objective test for determining a judge’s impartiality, which turns on the perception of reasonable minds rather than the judge’s own conscience.¹³³ For example, the holding in *Ferguson* that “circuit court[s] are] to be mindful of the perception of bias from the litigant’s perspective”¹³⁴ impliedly overrules cases such as *Reel v. State*, which held that judges were in better positions to determine whether their impartiality had been compromised.¹³⁵ In the wake of *Ferguson*, cases such as *Lofton v. State*, wherein the court affirmed a judge’s refusal to recuse finding that the movant’s allegations of an appearance of bias were “subjective” to the movant, are now impliedly overruled because the court must now review the allegations from the litigant’s perspective.¹³⁶ Now, under the *Ferguson* analysis, the opinion and conscience of the judge are irrelevant; it is the objective standard of a reasonable person that is determinative on this issue.¹³⁷

Also beneficial to the disqualification doctrine is former Chief Justice Brill’s definition of “matter” found in his concurring opinion.¹³⁸ Although the Arkansas Supreme Court did not formally adopt Chief Justice Brill’s definition of “matter,” his interpretation is nevertheless instructive in determining the circumstances under which recusal could be required. Prior to Chief Justice Brill’s definition, no express definition had been provided for the legal term “matter” and the guidance that now exists in the concurring opinion will be instrumental for litigants seeking recusal under that precise provision of the disqualification Code.¹³⁹ The dissenting justices disagreed with Chief Justice Brill’s definition and instead relied on the explanation

271, 273, 644 S.W.2d 937, 939 (1983) (“Disqualification is discretionary with the judge himself.”).

131. *Ferguson*, 2016 Ark. at 7, 498 S.W.3d at 737.

132. *Id.* at 7, 498 S.W.3d at 737; *see also supra* notes 33, 65, and 75, and accompanying text.

133. ARK. CODE JUD. CONDUCT R.1.2 cmt.5 (amended 2016).

134. *Ferguson*, 2016 Ark. at 7, 498 S.W.3d at 737.

135. *Reel v. State*, 318 Ark. 565, 570, 886 S.W.2d 615, 618 (1994).

136. *Lofton v. State*, 57 Ark. App. 226, 234, 944 S.W.2d 131, 135 (1997).

137. *Ferguson*, 2016 Ark. at 7, 498 S.W.3d at 737.

138. *See id.* at 10, 498 S.W.3d at 738–39 (Brill, C.J., concurring).

139. *Id.* at 9–10, 498 S.W.3d at 738–39.

section contained in the Model Code, which discussed judges being disqualified from “cases over which they preside in a different court.”¹⁴⁰

However, the dissent’s interpretation is far too narrow. If the dissenting justices’ definition of “matter” were accurate, then the only time this provision of the Code would apply would be in a circumstance just like the example provided by the dissent: where a judge presides over the exact same case during appellate review.¹⁴¹ Such a narrow interpretation excludes other instances in which a judge may have presided over the matter in another court: instances just like the one presented in *Ferguson*.¹⁴² Merely because the Model Code commented on one instance wherein the Code would prohibit a judge from presiding over the matter in another court does not mean that the single example is the only prohibition this provision of the Code meant to provide.¹⁴³ Chief Justice Brill’s definition of “matter” is more inclusive and more in line with the spirit of the Code.¹⁴⁴ Moreover, Chief Justice Brill’s definition follows in line with the definition of “matter” found in rules proscribed for the conduct of attorneys.¹⁴⁵ If the expectations of a judge are supposed to be higher than the expectations placed upon attorneys, it seems only natural that the definition of “matter” would be equivalent, if not more stringent for judges than the definition of a “matter” that applies to conduct for attorneys.¹⁴⁶ Until a formal definition is adopted, the definition laid out in the concurring opinion creates meaningful guidance to litigants seeking recusal in similar situations.

140. *Id.* at 12–13, 498 S.W.3d at 740 (Danielson, J., dissenting) (quoting Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics—The Lawyer’s Deskbook on Professional Responsibility* § 10.2-2.11(l) (2016) (emphasis added)) (“The ‘Explanation of Black Letter’ following the rule and its comments [found in the American Bar Association 2007 Model Code of Judicial Conduct] describes subsection (A)(6)(d) as a ‘[n]ew paragraph on judges sitting on cases they previously heard.’”).

141. *Id.* at 13, 498 S.W.3d at 740.

142. *Id.* at 4, 498 S.W.3d at 736.

143. *See supra* note 140 and accompanying text.

144. *See Ferguson*, 2016 Ark. at 10, 498 S.W.3d at 738–39 (Brill, C.J., concurring); *see also supra* notes 44–46 and accompanying text.

145. *Ferguson*, 2016 Ark. at 9, 498 S.W.3d at 738 (“[T]he Arkansas Rules of Professional Conduct . . . defines ‘matter’ as ‘any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties.’”) (citing ARK. RULES PROF’L CONDUCT 1.11(e)(1)).

146. *Id.* at 10, 498 S.W.3d at 739; ARK. CODE JUD. CONDUCT R. 1.2 cmt.2 (2009).

C. Proposing Additional Improvements

Reform of the rules regarding judicial disqualification is not a new concept.¹⁴⁷ As the Code has continued to change, so have its procedural complications, hence the continued need for reform.¹⁴⁸ The proposed changes discussed herein are meant to address some of the most basic procedural mechanisms that, if left unchanged, would be inconsistent with the application of law as set forth in the *Ferguson* opinion. This is not an exhaustive consideration of the issues. Instead, it is merely meant to lead to open discussion and consideration of the work that remains to be done in this area of law.

1. *Requiring Independent Review of Recusal Motions*

Even assuming *arguendo* that the procedural evolution of the disqualification doctrine was not laden with conflicts and misapplications of law, it is still challenging to obtain a judge's recusal because Arkansas still allows the challenged judge to decide the recusal motion instead of having an independent judge provide an unbiased consideration of the issue.¹⁴⁹ This proverbial fox guarding the henhouse does little good to promote public confidence in the judiciary, which was the public policy reason behind having rules that mandate disqualification in the first place.¹⁵⁰ Moreover, it is a blatant contradiction to the oft-quoted maxim *nemo iudex in sua causa*—no man should be judge in his own case.¹⁵¹ In allowing the challenged judge to rule on the motion for disqualification, Arkansas has created a significant obstacle to the preservation of fairness and confidence in the judiciary.¹⁵² If recusal is meant to be a mechanism for maintaining and enhancing public

147. Brennan Ctr. for Justice, *Reforming Judicial Recusal Rules*, N.Y. UNIV. SCH. OF LAW (Nov. 25, 2014), <http://www.brennancenter.org/analysis/judicial-recusal> (providing a listing of various reports and publications advocating for recusal reform).

148. *Id.*

149. Compare ARK. CODE JUD. CONDUCT R. 2.11 (amended 2016), with Ill. Comp. Stat. 725 § 5/114-5 (1987) (requiring a judge not named in the motion to conduct the hearing and decide the motion).

150. See ARK. CODE JUD. CONDUCT Preamble ¶ 1 (amended 2016) (“Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.”).

151. Adrian Vermeule, Essay, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384, 386–87 (2012).

152. MATTHEW MENENDEZ & DOROTHY SAMUELS, JUDICIAL RECUSAL REFORM: TOWARD INDEPENDENT CONSIDERATION OF DISQUALIFICATION, 4 (2016) https://www.brennancenter.org/sites/default/files/publications/Judicial_Recusal_Reform.pdf (discussing study findings that judges are prone to see themselves in the best light, view themselves as fair, and have difficulty recognizing their own bias).

confidence in the judiciary,¹⁵³ it is imperative that additional changes be made in this area of law to further that purpose.

The simplest and perhaps most effective change would be to require a neutral judge to consider recusal motions instead of allowing the challenged judge to make that determination.¹⁵⁴ This could be achieved by mandating that recusal motions be transferred to a county's administrative judge or a special judge who would then conduct an independent review of the motion with no further action being taken by the challenged judge until a decision is rendered.¹⁵⁵ By enacting a procedural rule such as this, litigants would have an assurance that the challenged judge's own subjective opinion about himself or herself will have no impact on the ultimate recusal decision.¹⁵⁶

An assurance that the movant will receive a fair and independent review of the motion for disqualification could have an immediate and positive effect on the disqualification procedures in Arkansas. Moreover, such a requirement would ensure that the challenged judge's susceptibility towards self-preservation would not impact the requirement that the recusal motion be viewed from the perception of the litigant.¹⁵⁷ Alternatively, if no changes are made to the procedural mechanisms of the disqualification rules, the appellate courts could be confronted with great difficulty in policing judges' decisions not to recuse. This is especially so in attempting to determine whether the trial court's subjective opinions played any role in the outcome. For these reasons, a bright-line procedural rule that mandates independent review of recusal motions should be implemented in Arkansas.

2. *Changing the Standard of Review on Appeal*

Appellate review of trial court decisions are traditionally divided into three basic categories: (1) "*de novo*" review of questions of law; (2) "clear error" review of questions of fact; and (3) "abuse-of-discretion" review of matters within the trial judge's discretion.¹⁵⁸ *De novo* review is an expansive form of review where the appellate court gives no deference to the lower court's decisions and, instead, considers the case as if it had been brought

153. ARK. CODE JUD. CONDUCT Preamble ¶ 1 (2009)

154. See MENENDEZ & SAMUELS, *supra* note 152, at 6–17 (discussing the procedural safeguards that would be afforded to recusal decisions if recusal motions were subject to independent review).

155. This suggestion is based in part on the requirements for disqualification in Utah. See Utah R. Civ. P. 63(c).

156. *Id.*; MENENDEZ & SAMUELS, *supra* note 152, at 8.

157. See Utah R. Civ. P. 63(c); see also *Ferguson v. State*, 2016 Ark. 319, 7, 498 S.W.3d 733, 737.

158. *Highmark Inc. v. Allcare Health Mgmt. Sys. Inc.*, 134 S.Ct. 1744, 1748 (2014).

before the appellate court for the first time.¹⁵⁹ Because cases reviewed under this standard involve the application of law to facts, courts are primarily concerned with determining how the law applies to the case.¹⁶⁰

A “clear error” or “clearly erroneous” review deals largely with questions of fact.¹⁶¹ Because the trial judge had the opportunity to hear the testimony and consider the evidence, trial judges are given deference regarding those factual findings.¹⁶² The clear error standard requires the appellate court to have a “definite and firm conviction that a mistake has been committed” by the trial court before reversing the trial court’s deferential decision regarding these factual findings.¹⁶³

The most deferential standard, however, is the abuse-of-discretion standard, which is a “high threshold” that requires the trial court to act “imprudently, thoughtlessly, or without due consideration” before a trial judge’s decision will be reversed.¹⁶⁴ Decisions that are subject to the abuse-of-discretion standard usually involve “judgement calls” that are difficult for appellate courts to re-evaluate on appeal.¹⁶⁵

Judicial disqualification decisions have historically been reviewed under the highly deferential abuse-of-discretion standard.¹⁶⁶ Consequently, not only is the procedural system set up to fail by allowing the challenged judge to determine the seriousness of his or her own bias, but once the procedural process does fail, and a denial is raised on appeal, the standard of review on appeal presents an even higher hurdle for litigants to overcome.

The abuse-of-discretion standard is incongruent with the post-*Ferguson* disqualification analysis, and it should be abandoned in favor of the more appropriate *de novo* standard of review. Because of the decision handed down in *Ferguson*, the judge no longer has subjective discretion in deciding his or her own recusal motions, and the appellate court is not required to give the judge any deference when reviewing recusal decisions.¹⁶⁷ It would serve a grave injustice to the disqualification doctrine if Arkansas’s appellate courts continued to review disqualification decisions under the abuse-of-discretion standard post-*Ferguson*. If a judge refuses to recuse, an appeal of that denial should be reviewed objectively to ensure the mandatory call of

159. Daniel Solomon, *Identifying and Understanding Standards of Review*, GEO. U. L. CTR.: The Writing Ctr 1–2 (2013).

160. *Id.* at 2.

161. *Id.*

162. *Id.*

163. *Accord* Concrete Pipe and Prod. of Cal. Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 623 (1993).

164. *Accord* Lone v. Koch, 2015 Ark. App. 373, 4, 467 S.W.3d 152, 155 (quoting Gullely v. State, 2012 Ark. 368, at 10, 423 S.W.3d 569, 576).

165. Solomon, *supra* note 159, at 3.

166. *See* Matthews v. State, 313 Ark. 327, 330, 854 S.W.2d 339, 341 (1993).

167. *See supra* notes 107–109.

the Code was appropriately applied. Logically, this type of review should require the courts to abandon the abuse-of-discretion standard.

The issue presented in the appeal of a recusal motion, however, involves both a question of fact and a question of law because the court must determine if the judge's impartiality has been reasonably questioned, and it also must determine if the mandate of the Code applies.¹⁶⁸ It can be difficult to determine the appropriate standard of review for mixed questions of law and fact.¹⁶⁹ The Ninth Circuit established a functional test that is helpful in making this determination.¹⁷⁰ If applying the rule of law to the facts of the case requires an "essentially factual" inquiry, then the clearly erroneous standard applies.¹⁷¹ If the issue requires consideration of legal concepts and the "values that animate legal principles," then the *de novo* standard applies.¹⁷²

The review of a disqualification decision is not so much factually based as it is based in the application of law to the facts. Therefore, the more appropriate standard of review appears to be the *de novo* review standard.

D. Attempts at Clarification Post *Ferguson*

Since *Ferguson*, further attempts at clarification have been made.¹⁷³ The arguments addressed in this note¹⁷⁴ were raised before the Arkansas Court of Appeals in the case of *In re Estate of Edens*.¹⁷⁵ In that case, the conflict between the Code and the case law espousing the review and application of the Code's rules were placed squarely before the court for review and clarification.¹⁷⁶ After citing *Ferguson* as support of his position, the appellant argued that the Code's use of the term "shall" created mandatory obligations on the trial judge, that it disposed of the requirement to prove actual bias, and that an objective reasonable person standard should determine whether recusal was required.¹⁷⁷ The overarching concern, as ex-

168. ARK. CODE JUD. CONDUCT R. 2.11. (amended 2016).

169. Solomon, *supra* note 159, at 4.

170. *Id.* (analyzing the case of *United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984)).

171. *Id.*

172. *Id.*

173. After substantially completing this note, I was given the opportunity to work on an appeal regarding judicial disqualification as a Rule XV certified student attorney alongside Jonathan R. Streit of Searcy, Arkansas, the attorney that wrote the *Ferguson* brief and argued the *Ferguson* case before the Arkansas Supreme Court. As a result of our efforts, we were able to present the arguments made in this note to the Arkansas Court of Appeals in an attempt to achieve the much-needed clarification argued for in this note.

174. See *supra* Parts II.B and III.C.2

175. *In re Estate of Edens*, 2018 Ark. App. 226, 1–2, 2018 WL 1615195, at * 1–2.

176. *Id.* at 1–2, 11.

177. *Id.* at 2.

plained in this note,¹⁷⁸ was that the decision in *Ferguson* did not expressly overrule prior conflicting case law and, as a result, created misunderstanding and misapplication of the appropriate standard for judicial recusal which is what happened in the lower court proceeding.¹⁷⁹

Unfortunately, the Arkansas Court of Appeals opted not to address those arguments.¹⁸⁰ The court ruled that the trial judge should have recused because his “impartiality was reasonably brought into question”¹⁸¹ and “Rule 2.11 required the trial court to recuse according to *Ferguson*.”¹⁸² Since the appellant was able to secure a reversal of the trial judge’s decision not to recuse under the even more deferential “abuse of discretion” standard, the appellate court did not address the remaining points relating to the conflict or modification of the standard of review on appeal.¹⁸³ Although the court did not reach those arguments, it did acknowledge “these arguments are interesting and may even have merit.”¹⁸⁴ That was not the clarification that the writers of the appeal brief hoped to secure, but the court’s statement nonetheless proves that, with the right set of facts on review, changes to this area of law can still be achieved.

IV. CONCLUSION

After decades of navigating a legal realm of superficial existence, *Ferguson* has finally made judicial disqualification an attainable solution for attorneys and their clients. And while there is significant work that remains to be done to improve the procedural aspects of the disqualification process, *Ferguson* nonetheless takes judicial disqualification a substantial leap in the right direction by ending the conflict between the Code and Arkansas precedent. If the momentum of *Ferguson* is continued, judicial disqualification

178. See *supra* Part III.B.

179. *In re Estate of Edens*, 2018 Ark. App. at 11, 2018 WL 1615195, at * 11.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

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can be at the forefront of maintaining and promoting the public's trust and confidence in the fairness of the judiciary.

*Elizabeth James**