CHAPTER 14
JUDICIAL MISCONDUCT AND ERRORS / RECUSAL
Table of Contents

CHAPTER 14
JUDICIAL MISCONDUCT AND ERRORS / RECUSAL

I. DEALING WITH A JUDGE WHO IS BIASED AGAINST YOU OR YOUR CLIENT

A. RIGHT TO IMPARTIAL JUDGE

A trial before an impartial judge is an essential element of due process, especially because of respect the jury accords a judge and the added importance a jury might give to any showing of partiality of a judge. Cook v. State, 734 N.E.2d 563 (Ind. 2000). To rebut presumption that judge is not biased or prejudiced, a defendant must establish from judge's conduct actual bias or prejudice that places defendant in jeopardy. Smith v. State, 770 N.E.2d 818 (Ind. 2002).

Everling v. State, 929 N.E.2d 1281 (Ind. 2010) (Court reversed defendant's three Class A felony convictions for child molesting and two class B felony sexual misconduct with minor convictions because trial court denied defendant's right to an impartial judge. Taken together, evidentiary rulings, uneven tolerance for late filings, and court's comments to defense counsel showed actual bias and prejudice).

B. MAKE A RECORD

Dealing with a judge biased against you or your client may interfere with your client's rights to be treated fairly. It is important to make a record of the misconduct and request that the judge recuse herself. (See III.A. below).

Make certain to record facial expressions, body movements, and actions or behaviors that you believe are prejudicial. A judge's facial expressions and body movements may communicate with the jury as dramatically as words.

1. Judge attacks you or your presentation

This may affect jury's receptivity to any evidence you present. Protect record with objection: "Objection, Your Honor. With all due respect, Your Honor's comments in the presence of the jury are affecting their opinion of my integrity and credibility and are denying my client a fair trial."

2. "Baited" into arguments

Respectfully refuse to engage in argument. In a fight with the judge, the lawyer (and the client) nearly always lose. Simply say:

"Your Honor, I have made my motion, stated my grounds; that is sufficient for the record."

Or,

"Your Honor, the record reflects my position adequately to protect my client; I have nothing further to say on the issue."

Practice Pointer: Always address the Court as "Judge" or "Your Honor." It will eventually become a habit and, if you should find yourself in an argument that results in a contempt citation, the record will reflect your respectful address to the Court.

3. Judge remarks on belief in credibility of witnesses or evidence

Jury likely to give undue weight to judge's comments on evidence despite instruction that they should not. It is important to object when court exceeds its limits of commentary.

(1) Object in most respectful tone possible; (avoid words like "improper" or "prejudicial," which jury or judge may perceive as insulting)

(2) Request a sidebar; or

(3) Make motion for recusal when jury is out of the room.

4. Judge asks questions impacting credibility

Judge should only question a witness to help clarify a point. It's improper for judge to ask questions that determine credibility of witness. See II.A.10(a), below.

If judge exceeds proper bounds - or if the judge has called a witness such as an expert during a competency exam - consider making an objection to the questions. Objection will draw jury's attention to judge's question, may antagonize judge, and may make jury feel you are blocking judge's attempt to speed up trial. It is necessary to make an objection to preserve the record and insure your client a full and fair review of the proceedings. If you object, state reason concisely and respectfully at bench conference. See II.C.2., below.

If the court has asked improper questions of a witness, counsel should ask for a curative instruction such as the following:

> "You [must] not take anything I may have said or done as indicating how I think you should decide this case. If you believe that I have expressed or indicated any opinion as to the facts, you should ignore it. It is your sole and exclusive duty to decide the verdict in this case." See Hollander and Bergman, *Everyday Criminal Defense Resource Book*, § 65:3 (Thomson Reuters 2013-14).

II. JUDICIAL MISCONDUCT AND ERRORS – D.14

A. TYPES OF MISCONDUCT AND ERRORS

1. Exclusion of general public from proceeding

"No court may order the exclusion of the general public from any criminal proceeding, or part of a criminal proceeding, unless it first affords the parties and the general public a meaningful opportunity to be heard on the issue of any proposed exclusion." Ind. Code § 5-14-2-3. See Chapter 1, I.B., Public Trial.

(a) Hearing required

See Ind. Code § 5-14-2-4 through 6 for notice of hearing and hearing procedures.

(b) Bring original action to contest exclusion

Any party or member of general public has standing to bring original action. Ind. Code § 5-14-2-8.

(c) May exclude based on inherent power

Ind. Code § 5-14-2-7 provides: "This chapter does not affect the inherent power of a court to make limited exclusions of witnesses, to relieve overcrowding, to protect the order and decorum of the courtroom, or to exclude those individuals whose presence constitutes a direct threat to the safety of the spectators, parties, or witnesses."

2. Pressuring defendant to forego his rights

Indiana Code of Judicial Conduct, Canon 2, Rule 2.6(B) permits a judge to "encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement." However, where the court applies pressure, the defendant is helpless to counteract the actions of the court as whatever is said or done in his behalf further antagonizes the court. Ford v. State, 248 Ind. 438, 229 N.E.2d 634, 638-39 (1967) HN 8; Winston v. State, 165 Ind. App. 369, 374, 332 N.E.2d 229, 232 (1975).

(a) Right to jury trial

Judge violates Judicial Conduct Rules 1.2, 2.2, 2.6(B) and 2.8(B) when he or she dissuades a litigant from contesting criminal charges or infractions in court. Thus, reversal may be required where a judge makes comments to the litigant directly or implying that the defendant would receive better treatment if he forgoes his jury trial right. Ford v. State, 229 N.E.2d 634, 638-39 (Ind. 1967).

Further, a judge may not increase penalties for defendants who chose to try their cases before a jury so as to penalize a defendant for exercising his rights and discouraging others from doing so as well. In re Young, 943 N.E.2d 1276 (Ind. 2011); In re Harkin, 958 N.E.2d 788 (Ind. 2011).

> In re Young, 943 N.E.2d 1276 (Ind. 2011) (imposing discipline where judge threatened to, and did, impose increased penalties for traffic infraction litigants who exercised their right to trial instead of pleading guilty, so as to penalize them for doing so and to discourage others from doing so).

(b) Right to avoid self-incrimination

While judge may advise witness of his right to avoid self-incrimination, he may not do so in threatening or browbeating manner. Diggs v. State, 531 N.E.2d 461, 464 (Ind. 1988) (*citing* Webb v. Texas, 409 U.S. 95 (1972)).

It is reversible error for a judge to permit a co-defendant or accomplice to take the stand and refuse to testify in front of the jury; it raises the inference in the jury's mind that the withheld testimony would be damaging, not only to the witness, but also to the defendant. Tucker v. State, 534 N.E.2d 1110 (Ind. 1989); Borders v. State, 688 N.E.2d 874, 879 (Ind. 1997).

However, it may not be reversible error where it is not clear that the parties or the court knew that the co-defendant or accomplice would refuse to testify.

> Brown v. State, 671 N.E.2d 401, 404-05 (Ind. 1996) (co-defendant's testimony from prior trial was available and used, and defense counsel did not object to him being brought before jury).

3. Placement of persons

Placement of persons is matter within discretion of trial court. Whitehead v. State, 511 N.E.2d 284 (Ind. 1987); Pitman v. State, 436 N.E.2d 74 (Ind. 1982).

> Chapman v. State, 556 N.E.2d 927, 933 (Ind. Ct. App. 1990) (nothing in record indicates judge abused discretion in permitting reporters to sit at table in front of bar opposite jury; nothing in record indicates any undue disturbance caused by any reporter).

4. *Ex parte* communications

Indiana Code of Judicial Conduct, Canon 2.9(A)) specifically prohibits trial judge from engaging in *ex parte* communications. Bell v. State, 655 N.E.2d 129, 131 (Ind. Ct. App. 1995).

In re Jacobi, 715 N.E.2d 873 (Ind. 1999) (judge violated prohibition against *ex parte* communications by granting TRO petition from one party without written indication of service of notice to opposing parties and without attempting to independently contact the other party; judge received three-day suspension without pay).

Bell v. State, 655 N.E.2d 129 (Ind. Ct. App. 1995) (judge's failure to recuse himself from defendant's case, and his failure to fully disclose extent of his conversation with co-conspirator created appearance of impropriety and negatively impacted on public's confidence in integrity of judicial system).

(a) Disqualify self if reasonable person would doubt impartiality

Judicial Canon 2.11 requires judge to disqualify self if impartiality might reasonably be questioned. Standard is not personal belief on impartiality, but whether reasonable person aware of all circumstances would question judge's impartiality. In re Edwards, 694 N.E.2d 701, 710 (Ind. 1998).

In re Morton, 770 N.E.2d 827 (Ind. 2002) (judge violated Canon 3(B)(8) by engaging in *ex parte* conversation with two attorneys when they presented him with a motion, where attorneys told judge the motion would be "very interesting reading" and "lay down" a case of forgery by opposing party's therapist, and expressed interest in judge inducing criminal investigation; and by failing to promptly report *ex parte* communication; judge should have disqualified self because reasonable person would doubt impartiality).

Saylor v. State, 765 N.E.2d 535, 566 (Ind. 2002) (several days after conclusion of hearing on post-conviction relief petition, prosecutor in original trial was present at courthouse and engaged in "small talk" with special judge who heard petition for three to five minutes; judge's brief comments about difficulty in deciding cases where you decide if someone lives or dies did not provide reason to doubt impartiality of judge).

(b) Exceptions for scheduling, administrative, or emergency purposes

However, certain *ex parte* communications approved for scheduling, administrative or emergency purposes: (1) that do not deal with substantive matters or issues on the merits; (2) so long as judge reasonably believes no party will gain procedural, substantive or tactical advantage; (3) judge promptly notifies all parties of substance of the *ex parte* communication; and (4) allows them opportunity to respond. *Indiana Code of Judicial Conduct*, Canon 2.9(A)(1).

Mahrdt v. State, 629 N.E.2d 244 (Ind. Ct. App. 1994) (no appearance of impropriety where judge's *ex parte* communication with sheriff's office concerned scheduling of inspection of BAC machine in sheriff's custody).

(c) Exceptions for judge to consult with disinterested expert, court personnel, parties, or others as authorized by law

(1) Disinterested expert

Judge may obtain advice of disinterested expert on law applicable to proceeding before judge if judge gives notice to parties of person consulted and substance of

advice and affords parties reasonable opportunity to object and respond to the notice and to the advice received. *Indiana Code of Judicial Conduct*, Canon 2.9(A)(2).

Matter of Guardianship of Garrard, 624 N.E.2d 68 (Ind. Ct. App. 1993) (new trial where judge initiated *ex parte* communication with expert who had prepared report in connection with guardianship proceeding, even later testimony of expert could not cure appearance of impropriety created by *ex parte* contact.).

To obtain advice of disinterested expert on legal issues, judge should invite expert to file a brief *amicus curiae*.

(2) Court personnel

Judge may consult with court personnel and others whose function is to aid judge, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter. *Indiana Code of Judicial Conduct*, Canon 2.9(A)(3).

Cannon v. State, 866 N.E.2d 770 (Ind. 2007) (judges may seek each other's advice and counsel in performance of their judicial duties, and thus may confer about specific cases in furtherance of their adjudicative responsibilities without violating the rule against *ex parte* communications; here, judge's reference to hand-written notes made by another judge in another case was not an improper ex parte communication).

(3) Parties

Judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before judge. *Indiana Code of Judicial Conduct*, Canon 2.9(A)(4).

(4) Others as authorized by law

Judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so. *Indiana Code of Judicial Conduct*, Canon 2.9(A)(5).

(d) Communications regarding pending proceedings

Judge may be suspended from practice of law for engaging in private conversations with individuals concerning disposition of pending cases. Matter of Lewis, 535 N.E.2d 127, 129 (Ind. 1989).

Attorney must object when the *ex parte* communications are discovered, or the right to appeal may be waived. Hobson v. State, 471 N.E.2d 281, 287 (Ind. 1984) (defendant did not object or move for change of judge after learning judge discussed case with prosecutor and told prosecutor the best approach was to present case to jury and let it decide outcome, and therefore error not preserved).

(e) Extrajudicial comment about case

Indiana Code of Judicial Conduct, Canon 2.10(A) prohibits judge from making any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

While it is improper for a judge to comment about a case to the media, it may not be grounds for reversal without evidence that the judges' comments were such as to create bias or otherwise affect the outcome or impair the fairness of the matter before the court.

Dickens v. State, 260 Ind. 284, 295 N.E.2d 613, 617 (1973); see also Barger v. State, 466 N.E.2d 725, 727 (Ind. 1984).

Thakkar v. State, 644 N.E.2d 609 (Ind. Ct. App. 1994) (trial judge should have recused himself based on comments to press during defendant's appeal, but prior to sentencing, that defendant "had received a fair trial, that the evidence was devastating," and that "it was common for lawyers to blame the misfortunes of their clients upon the trial judge;" though not directly related to sentencing, comments strayed from objectivity and impartiality court is expected to display).

Noble v. State, 725 N.E.2d 842, 848 (Ind. 2000) (juror's comment to press that, after trial but before sentencing, "[the judge] told us [the defendant] is going to wish he'd never done this" might be seen as judge declaring himself for lengthy sentence but may also be declaring straightforward truth, and court could not find comment to be clearly erroneous).

(f) Practice pointers

(1) Request recusal to preserve error

Complaining party must request judge recuse himself. Matter of Adoption of Johnson, 612 N.E.2d 569, 572 (Ind. Ct. App. 1993).

(2) Must show prejudice for reversible error

Defendant must show prejudice resulted from communication. Focus on impact communication had upon impartiality of trial judge. Unless evidence suggests otherwise, appellate court assumes judge would have disqualified himself had his impartiality reasonably been called into question.

Judge v. State, 659 N.E.2d 608 (Ind. Ct. App. 1995) (defendants failed to show how they were prejudiced by judge's communication with Planned Parenthood where court acknowledged conversation in open court during sentencing and explained its discussion dealt with lecture format and objections to defendants' presence in clinic).

5. Leaving court while trial in progress

Error for judge to depart from courtroom while trial proceeding. "Where the trial judge is present and presiding, we have every confidence in the regularity of the proceedings. If he absents himself, there is no basis for such a presumption." Hall v. State, 497 N.E.2d 916, 918 (Ind. 1986).

Hall v. State, 497 N.E.2d 916, 918 (Ind. 1986) (reversible error where judge left courtroom during voir dire to act on emergency petition and allowed prosecutor to continue questioning prospective jurors in his absence, no court reporter, bailiff or other court personnel present).

However, judge's absence may be harmless when judge remained in effective control.

McBrady v. State, 459 N.E.2d 719 (Ind. 1984) (defendant did not show harm by judge's absence and any error waived by failure to object, during absences prosecutor and defense counsel agreed "nothing out of the ordinary" occurred).

6. Failure to sequester jury

In non-capital case, sequestration of jury matter within discretion of trial court. To show abuse of discretion defendant must show: (1) jurors exposed to trial publicity; or (2) they

violated admonition to refrain from viewing media coverage. Schweitzer v. State, 531 N.E.2d 1386, 1389 (Ind. 1989).

7. Sarcasm, quips, and ridicule

Sarcasm and ridicule in criminal trial are destructive weaponry. They contaminate trial and have incalculable adverse effect on administration of justice. Dixon v. State, 145 Ind.App. 603, 290 N.E.2d 731, 740 (1972).

Brown v. State, 421 N.E.2d 431 (Ind. Ct. App. 1981) (although Court affirmed conviction, it disapproved of the judge's sarcastic and confrontational treatment of witness in post-conviction hearing).

Hollinsworth v. State, 928 N.E.2d 201 (Ind. 2010) (reversed defendant's conviction where during the court's review of the defendant's criminal history, the court noted some charges and the defendant's attorney brought it to the court's attention that those were only alleged charges, the court replied "sure they are").

Tharpe v. State, 955 N.E.2d 836 (Ind. Ct. App. 2011) (trial judge's comments during voir dire, adverse rulings, a single incidence of sarcasm, and inappropriate facial gestures insufficient to establish bias of trial judge).

In re J.K., 30 N.E.3d 695 (Ind. 2015) (judge's derogatory remarks at CHINS hearing, including calling parties' dispute "ridiculous and retarded," faulting parties for "stupidity," telling father he would "find (his) butt finding a new job" if he wanted to "play that game," and expressing frustration at the time of day, established bias in violation of due process).

Harris v. Lafayette LIHTC, LP, 85 N.E.3d 871 (Ind. Ct. App. 2017) (trial court failed to remain impartial when it made comments belittling defendant for living in subsidized housing during landlord-tenant proceedings).

See also *Indiana Code of Judicial Conduct:*

Canon 2.8(B): "A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, . . .";

Canon 2.3(A) & (B): "A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so."

Note: Commentary to Canon 2.3 provides "[F]acial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased. "

Practice Pointer: You and/or your client are likely to lose personal exchanges with the judge. Where judge attacks you, or your presentation, she diminishes your credibility with jury. This may affect jury's receptivity to any evidence you present. Protect record with objection, e.g., "Objection, Your Honor. With all due respect, Your Honor's comments in the presence of the jury are affecting their opinion of my integrity and credibility and are denying my client a fair trial." See Dombroff, *Trial Objections*, page 5-18, 3d edition (James Publishing 2011).

(a) During bench trial

In bench trial, fact that judge is discourteous to counsel and unduly critical of their conduct of case does not render proceeding void. Must show how you were prejudiced.

Hollinsworth v. State, 928 N.E.2d 201 (Ind. 2010) (judge's comments during bench trial did not meet standards of impartiality, and his failure to disqualify himself thus required reversal for new trial); Gray v. State, 256 Ind. 342, 268 N.E.2d 745 (1971) (no basis for reversal where defendant failed to demonstrate how judge's extremely critical comments prejudiced his case);

Owens v. State, 255 Ind. 693, 266 N.E.2d 612 (1971) (improper for judge to assist prosecutor in getting value of sweater into evidence and to direct comments and criticism and sarcasm to prosecutor; conviction affirmed because evidence conclusive of defendant's guilt);

Dixon v. State, 145 Ind. App. 603, 290 N.E.2d 731, 740 (1972) (misconduct in bench trial where judge engaged in running commentary, quips, sarcasm, judicial intrusions, and ridicule directed at prosecution witnesses; not reversible error because defendant did not show how or exactly in what manner he was prejudiced).

(b) Judge's intrusion of self into bench trial proceeding

Defendant may be deprived of fair and impartial non-jury trial if effect of judge's intrusion creates atmosphere that actually prevents orderly presentation of the cause or ascertainment of the truth. IND. CONST. art. I, § 12.

Judge may create atmosphere as to effectively deny defendant due process of law. If adverse effects can be demonstrated error created will be reversible error for denial of due process of law.

Dixon v. State, 145 Ind. App. 603, 290 N.E.2d 731, 741 (1972) (atmosphere may be created by commentary from bench, and by judge's facial expressions and gestures);

State v. Lawrence, 162 Ohio St. 412, 123 N.E.2d 271 (1954) (reversible error in bench trial where judge so dominated proceedings by interrupting defense's case with threats and intimidation of defense witnesses).

8. Courtroom demonstrations

Admissible subject to court's discretion. Peck v. State, 563 N.E.2d 554 (Ind. 1990) and Lambert v. State, 643 N.E.2d 349, 353 (Ind. 1994). Court should consider degree of accuracy of recreation, complexity and duration of procedure, other available means of proving same facts, and risk of unfairness to defendant. Lambert v. State, 643 N.E.2d 349, 353 (Ind. 1994).

Yamobi v. State, 672 N.E.2d 1344, 1347-48 (Ind. 1996) (demonstration of shooting within trial court's discretion where it comported with mechanics of confrontation, enabled witness to show jury exactly how gun was pointed at him, and trial court ensured accuracy by repositioning prosecutor and witness to resemble seating arrangement in car).

9. Calling witnesses

Indiana Rules of Evidence, Rule 614(a) provides: "The court may not call a witness except in extraordinary circumstances or as provided for court- appointed experts. All parties are entitled to cross-examine any witness called by the court."

Indiana Rules of Evidence, Rule 614(c) provides that objections to the calling of witnesses by the court may be made at the time or at the next opportunity when the jury is not present. Ruggieri v. State, 804 N.E.2d 859, 863 (Ind. Ct. App. 2004).

10. Interrogating witnesses in a way that improperly influences jury

Trial court may, within reasonable limits, interrogate witness if done in a manner that will not improperly influence jury. Taylor v. State, 602 N.E.2d 1056, 1059 (Ind. Ct. App. 1992). See also Ind. Evid. R. 614(b) and II.A.15, below: Assuming Role of Advocate.

Stellwag v. State, 854 N.E.2d 64 (Ind. Ct. App. 2006) (fundamental error where judge interrupted defendant's testimony and a defense witness' testimony to tell them not to argue with prosecutor but answer the question, after the defendant and witness had both already answered the question).

Wilson v. State, 222 Ind. 63, 51 N.E.2d 848, 856 (1943*)* (judge examined and cross-examined witnesses beyond reasonable bounds and improperly influenced jury by indicating defendant's defense was without merit and his testimony false);

McDonald v. State, 164 Ind. App. 285, 328 N.E.2d 436 (1975) (as defendant was testifying on his own behalf, judge asked about his willingness to submit to a polygraph examination; judge's inquiry violated defendant's privilege against compulsory self-incrimination).

Note: See 25 A.L.R.2d 1407, §§2 (1952) (requiring submission to physical examination or test as violation of constitutional rights).

Rosendaul v. State, 864 N.E.2d 1110 (Ind. Ct. App. 2007) (judge's interrogation of defendant related to his use of "military style" dating did not reveal any bias on part of trial court, but rather aided trial court in its fact-finding responsibilities and was done in an impartial manner).

United States v. Barnhart, 599 F.3d 737, 745 (7th Cir. 2010) (judge's questioning of witnesses went far beyond mere clarification and instead gave the impression that the judge disbelieved Barnhart's defense; trial judges need not be silent spectators, but they are neutral arbiters).

United States v. Saenz, 134 F.3d 697 (5th Cir. 1998) (trial court's extensive interrogation of defendant "may have conveyed an impression of the court as prosecutorial rather than impartial" and constituted plain error).

Practice Pointer: Weigh risks before objecting to judge's line of questioning. Objection will draw jury's attention to judge's question, may antagonize judge, and may make jury feel you're blocking judge's attempt to speed up trial. If you object, state reason concisely and respectfully at bench conference.

(a) Jury admonishment is advisable

If the judge questions witnesses in a jury trial, it is advisable to instruct the jurors to draw no inference that the court has any opinion as to the facts of the case. United States v. Wilson, 135 F.3d 291, 307 (4th Cir. 1998).

Sample admonishment: "You [must] not take anything I may have said or done as indicating how I think you should decide this case. If you believe that I have expressed or indicated any opinion as to the facts, you should ignore it. It is your sole and exclusive duty to decide the verdict in this case." See Hollander and Bergman, *Everyday Criminal Defense Resource Book*, § 65:3 (Thomson Reuters 2013-2014).

(b) Cannot ask questions calculated to impeach or discredit

Improper for judge to ask questions calculated to impeach or discredit witness. In bench trial, trial judge has discretion to question witnesses in order to aid fact-finding process as long as it is done in impartial manner and defendant is not prejudiced. Isaac v. State, 605 N.E.2d 144 (Ind. 1992) and Taylor v. State, 530 N.E.2d 1185 (Ind. 1988).

Abernathy v. State, 524 N.E.2d 12, 13 (Ind. 1988) (violation of defendant's right to fair trial where judge's questions and comments impeached or discredited defendant's wife and suggested he disbelieved her testimony).

11. Interrogating witness during bench trial

In bench trial, judge may ask questions of witness to aid in fact-finding process as long as it is done in an impartial manner and defendant not prejudiced. Taylor v. State, 530 N.E.2d 1185 (Ind. 1988).

Even without presence of jury to be influenced, court has duty to conduct proceedings in impartial, decorous manner so as not to intimidate either party in presenting matters to court or to demean public image of judicial integrity. Bruce v. State, 268 Ind. 180, 375 N.E.2d 1042, 1056 (1978).

"Admittedly, the best course for a judge to take in a bench trial is to refrain from expressing doubts as to a particular defense strategy and to limit his questioning of the witnesses."

Ware v. State, 560 N.E.2d 536 (Ind. Ct. App. 1990) (discretion to question witnesses greater in bench trials than trials before juries).

12. Commenting on evidence, credibility, guilt, or facts

Judge must refrain from comments tending to indicate his opinion as to weight or sufficiency of evidence, credibility of witnesses, guilt of accused or any fact in controversy. Wallace v. State, 553 N.E.2d 456, 467 (Ind. 1990).

United States v. Van Dyke, 14 F.3d 415 (8th Cir. 1994) (trial court erred by making one-sided and distractive comments throughout the trial; further, court erred by repeatedly interrupting the defendant's testimony, "often taking on an impeaching air and/or bolstering the prosecution's case." Trial judge further prejudiced defendant's case when he responded to an objection by saying, 'I sort of drifted away. What was the question?' Such a statement could have given the jury an early impression (even if incorrect) that the trial judge was not interested in what defendant had to say).

Jurors' customary respect for judge "can lead them to accord great and perhaps decisive significance to the judge's every word and intimation. It is therefore essential that the judge refrain from any actions indicating any position other than strict impartiality." Abernathy v. State, 524 N.E.2d 12, 13 (Ind. 1988), *citing* Kennedy v. State, 258 Ind. 211, 226, 280 N.E.2d 611, 620-21 (1972).

Practice Pointer: Jury likely to give undue weight to judge's comments on evidence despite instruction that they should not. Important to object when court begins to exceed its limits of commentary. Object in most respectful tone possible. Avoid words like "improper" or "prejudicial" which jury or judge may perceive as insulting.

Example: "Objection, Your Honor. While Your Honor certainly has the discretion to comment upon the evidence, I respectfully submit that:

- Your remarks are argumentative.
- You are expressing an opinion on contested facts.
- You are expressing an opinion on the weight or sufficiency of evidence.
- [Or as appropriate]. See Dunn, *Trial Objections*, page 5-16, 3d edition (James Publishing 2011).

(a) Cannot appraise credibility of witnesses

Wholly function of jury to appraise weight and value of testimony. Jury must be allowed to form its own opinion on credibility of witnesses free of any influence by judge's beliefs or opinions. Brannum v. State, 267 Ind. 51, 366 N.E.2d 1180 (1970).

Wilson v. State, 222 Ind. 63, 51 N.E.2d 848 (1943) (judge improperly influenced jury by indicating defendant's defense was without merit and his testimony false; statements invaded province of the jury).

Abernathy v. State, 524 N.E.2d 12 (Ind. 1988) (judge's questions did not clarify facts for jury, but indicated judge's opinion of witness's credibility, requiring reversal of conviction).

(b) Neither lay nor expert witnesses may testify as to the truthfulness of another witness

The jury decides credibility. It is highly improper and invades the jury's province in determining the weight of a witness's testimony to allow a witness to testify as to whether another witness is telling the truth. Shepard v. State, 538 N.E.2d 242, 243 (Ind. 1989) and Head v. State, 519 N.E.2d 151, 152 (Ind. 1988).

13. Comments to jury during recess

Judge's reaction overly dramatic and exceeded bounds of judicial discretion where judge told jury they would be rewarded because of their unusual service to the State and be taken to nice restaurant in police cars through stop lights with red lights and sirens on; judge's conduct not to be emulated, but not reversible error. Samaniego v. State, 553 N.E.2d 120, 125 (Ind. 1990).

Blaize v. State, 51 N.E.3d 97 (Ind. 2016) (in excusing jury for lunch, trial court commented on cell phone sectors in apparent reference to testimony of cell tower expert who had just testified in support of State's theory of events placing defendant at or near victim's residence when he was killed; comment did not vouch for accuracy of expert's testimony but was an acknowledgement of complexity of cellphone tower evidence).

14. Admonishing defendant in front of jury

A trial judge must be given latitude to run the courtroom and maintain discipline and control of the trial. However, if the trial judge's action and demeanor crosses the barrier of impartiality and prejudices the defendant's case, reversal is required.

Stellwag v. State, 854 N.E.2d 64 (Ind. Ct. App. 2006) (fundamental error where, in front

of jury, judge called defendant before him and admonished defendant that he would go to jail if he did not stop whispering to his attorney and making gestures; admonishment in front of jury was not a function necessary to controlling the courtroom);

Woods v. State, 98 N.E.3d 656 (Ind. Ct. App. 2018) (implicit threat to hold defendant in contempt in jury's presence did not show bias where defendant's testimony had attacked other witnesses and discussed hearsay after repeated warnings and admonition outside presence of jury did not change her behavior).

Rochefort v. State, 177 N.E.3d 113 (Ind. Ct. App. 2021) (no bias shown where trial court admonished defendant in front of jury only after defendant had repeatedly contravened trial court's authority).

15. Assuming role of advocate

Judge may not assume adversarial role. Fox v. State, 497 N.E.2d 221 (Ind. 1986). See also II.A.10, above, interrogating witnesses in a way that improperly influences jury.

Miller v. State, 789 N.E.2d 32, 40, n.8 (Ind. Ct. App. 2003) (trial court erred in objecting to defendant's questioning of witness "on behalf of the State"; court's behavior was overly partial, crossed line between ensuring that case proceeded expeditiously and treating one side favorably, could be intimidating to pro se litigant, and could sway jury due to their respect for judge's perceived position).

Brannum v. State, 267 Ind. 51, 366 N.E.2d 1180, 1183 (1977) (reversible error where judge assumed role of advocate by (1) giving appraisal of a witness's testimony and indicating value to be given to it, and (2) giving special instruction in middle of jury deliberations that commented on final argument of defense counsel).

Kennedy v. State, 258 Ind. 211, 280 N.E.2d 611 (Ind. 1972) (conduct highly prejudicial where judge extensively and critically interrogated two witnesses who sought to give evidence favorable to accused, judge lost appearance of impartiality and indicated to jury doubt in witnesses' credibility).

United States v. Filani, 74 F.3d 378 (2d Cir. 1996) (plain error where jury given powerful impression court believed defendant was guilty - judge's numerous questions of defendant and prosecution's witnesses: (1) targeted defendant's credibility and challenged his story more in manner of prosecutor than impartial judge; (2) were argumentative; and (3) betrayed tone of incredulity, even though defendant failed to object to judge's questioning during trial).

A.N. v. K.G., 3 N.E.3d 989 (Ind. Ct. App. 2014) (judge making sua sponte objections on behalf of pro se litigant was arguably improper but defendant could not show it interfered with right to fair trial during bench trial).

(a) Violation of separation of powers or functions

Violation of separation of powers or functions for judge to assume role of fact-presenter rather than factfinder. See IND. CONST. art. III, § 1.

Isaac v. State, 605 N.E.2d 144, 148 (Ind. 1992) (reversible error in probation revocation proceeding for judge to call probation officer as witness and conduct examination; defense counsel objected to judge's questions and judge ruled upon objections to his own questions).

Ratliff v. State, 546 N.E.2d 309 (Ind. Ct. App. 1990) (reversal in revocation proceeding where only evidence pertinent to culpability was obtained by court interrogating defendant).

A.N. v. K.G., 3 N.E.3d 989 (Ind. Ct. App. 2013) (trial court did not act as advocate by asking K.G. foundational questions regarding trial court, has burden of proof).

(b) Technical assistance by court permitted

Court's "technical assistance" to prosecutor within his discretion to guide trial to preserve its fairness and integrity. Musick v. State, 352 N.E.2d 717, 719-20 (Ind. 1976) (photograph and trial court's questions were neutral, served to clarify K.G.'s testimony, and did not discredit A.N. or her defense). See also Trotter v. State, 733 N.E.2d 527 (Ind. Ct. App. 2000).

(c) Possible prejudice cured by cautionary instruction?

Compare

United States v. Martin, 189 F.3d 547, 555 (7th Cir. 1999) (cautionary instruction may cure or diminish any prejudice that could have resulted from trial judge's comments or questions that implied disbelief in defendant's testimony).

and

United States v. Matt, 116 F.3d 971, 974 (2d Cir. 1997) (presumption that once judge's actions create an impression of partisanship, curative instructions will generally not save the day).

16. Prejudging case

Defendant denied fair trial if judge, before hearing all evidence, makes it clear he will find defendant guilty. Ware v. State, 560 N.E.2d 536, 544 (Ind. Ct. App. 1990).

Defendant has right to be tried in impartial atmosphere in which both judge and jury presume his innocence until deliberations begin. Fair trial before an impartial judge is essential element of due process. Harrington v. State, 584 N.E.2d 558, 561 (Ind. 1992).

Everling v. State, 929 N.E.2d 1281 (Ind. 2010) (evidentiary rulings, uneven tolerance for late filings, and court's comments to defense counsel showed actual bias and prejudice requiring reversal of convictions).

17. Broadcasting, televising, recording, or taking of photographs

Except with prior approval of the Indiana Supreme Court, *Code of Judicial Conduct,* Canon 2.17 prohibits, with a few exceptions, broadcasting, televising, recording, or taking of photographs in courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions.

Samaniego v. State, 553 N.E.2d 120, 124 (Ind. 1990) (record shows purpose of photographs of some of proceedings was for jury reunion book; absent specific showing court presumes judge did not violate Judicial Canon, no evidence photographs were embarrassing or received undue publication).

(a) Exceptions

Pursuant to *Code of Judicial Conduct,* Canon 2.17, a judge may authorize:

(a) use of electronic or photographic means for presentation of evidence, for perpetuation of record, or for other purposes of judicial administration;

(b) broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

(c) photographic or electronic recording and reproduction of appropriate court proceedings under following conditions:

(i) means of recording will not distract participants or impair dignity of proceedings;

(ii) parties have consented, and consent to being depicted or recorded has been obtained from each witness appearing in recording and reproduction;

(iii) reproduction will not be exhibited until after proceeding has been concluded and all direct appeals have been exhausted; and

(iv) reproduction will be exhibited only for instructional purposes in educational institutions.

18. Judicial comments on perjury

(a) Warning witness against committing

Once witness swears to give truthful answers, court should not: (1) warn him not to commit perjury, and (2) direct him to tell the truth.

It would render sanctity of oath quite meaningless to require admonition to adhere to it. United States v. Winter, 348 F.2d 204, 210 (2d Cir. 1965).

Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972) (denial of defendant's due process rights where unnecessarily strong terms used by judge could have exerted duress on defendant's sole witness not to testify; fact witness was willing to come to court to testify, refusing to do so only after judge's lengthy and intimidating warning, suggest judge's comments caused witness's refusal to testify).

United States v. George, 363 F.3d 666, 670-71 (7th Cir. 2004) (judge confirming attorney's concern that, by testifying, witness would place self in jeopardy of perjury charge was merely appropriate warning of right to assert Fifth Amendment privilege, not intimidation tactic to interfere with defendant's right to call witness).

(b) Threatening with charges of perjury

Indiana Supreme Court strongly recommends against practice of threatening witness with perjury charges during trial, even in bench trials. Practice poses unnecessary dangers to integrity of trial and to public respect for courts. Lee v. State, 419 N.E.2d 825, 829 (Ind. Ct. App. 1981).

Myers v. State, 266 Ind. 513, 364 N.E.2d 760, 763 (1977) (improper for court to warn witness against committing perjury and twice request prosecutor examine witness's testimony and determine if charge of perjury should be brought; defendant not denied fair trial because threats made after conclusion of witness's testimony).

Decker v. State, 515 N.E.2d 1129, 1132 (Ind. Ct. App. 1987). (Reversible error, right to fair trial impaired where judge interrupted witness and commented that if witness testified to "two different things under oath there is a presumption that you are guilty of perjury." Defendant's attorney tried to object several times but was told to be quiet).

19. Testifying at trial in which judge presides

Ind. Evid. R. 605 provides: "The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue."

Ferguson v. State, 40 N.E.3d 954 (Ind. Ct. App. 2015) (trial judge did not impermissibly testify when she, while admonishing jury to disregard police officers' statements about alleged victim's veracity, characterized the officers' views as "heartfelt").

United States v. Lewis, 833 F.2d 1380 (9th Cir. 1987) (district court erred in relying on personal experience of the effects of anesthesia in determining the voluntariness of a confession).

United States v. Blanchard, 542 F.3d 1133 (7th Cir. 2008) (reversible error for prosecutor to read into trial record some comments trial court made during a pretrial suppression hearing regarding the credibility of a government witness; Rule 605 would serve little purpose if it were violated only where a judge observes all the formalities of an ordinary witness).

20. Testifying voluntarily as character witness

"A judge shall not testify as a character witness…or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned." *Indiana Code of Judicial Conduct,* Canon 3.3.

21. Commenting on defendant's decision not to testify

(a) Federal law

Fifth Amendment privilege to remain silent can be seriously undermined when judge comments in any way on accused's decision not to testify. Griffin v. California, 380 U.S. 60, 985 S.Ct. 1229, 14 L.Ed.2d 106 (1965) (Fifth Amendment forbids instructions by court that defendant's silence is evidence of guilt).

Giving cautionary instruction over defendant's objection does not violate 5th and 14th Amendment privilege against compulsory self-incrimination.

Lakeside v. Oregon, 435 U.S. 333, 340-41, 98 S.Ct. 1091, 1095, 55 L.Ed.2d 319, 326 (1978) (each State free to forbid its trial judges from doing so as matter of state law; wise for judge not to give such a remark over objection).

(b) Indiana law

Necessary to closely regulate all judicial statements regarding accused's silence. Essential no aspersions be cast upon accused for failure to testify. Gross v. State, 261 Ind. 489, 306 N.E.2d 371, 372 (1974).

(1) Defendant must request "no adverse inference" instruction

Error for court to instruct jury concerning, Fifth Amendment privilege against self-incrimination, absent consent of defendant and his counsel. Accused must request instructions requiring jury not to draw negative inferences from silence, or consent to giving of instruction. Conn v. State, 535 N.E.2d 1176, 1182-83 (Ind. 1989) and Bush v. State, 775 N.E.2d 309 (Ind. 2002).

Gross v. State, 261 Ind. 489, 306 N.E.2d 371, 372 (1974) (invasion of Fifth Amendment rights and judicial error if judge states intention to submit instruction, defense objects, and State gives instruction anyway).

(2) Inferring guilt based on refusal to testify in civil cases

The privilege against self-incrimination does not prohibit the trier of fact in a civil case from drawing adverse inferences from a witness' refusal to testify. Gash v. Kohm, 476 N.E.2d 910, 913 (Ind. Ct. App. 1985).

M.K. v. Ind. Dep't of Child Servs. (In re A.G.), 6 N.E.3d 952 (Ind. Ct. App. 2014) (respondent waived argument that rule in Gash (above) does not apply in CHINS proceedings given her constitutional right to raise her children; trial court did not err by inferring respondent's guilt based on her refusal to testify).

(c) Object, if judge offers *sua sponte* instruction

If judge *sua sponte* offers to give instruction, and defense fails to object, defense will be deemed to have consented to its submission. Gross v. State, 306 N.E.2d 371 (Ind. 1974); Bush v. State, 775 N.E.2d 309 (Ind. 2002).

22. Discussion with jury during deliberations & emphasizing particular jury instruction

A trial court is not allowed to engage in dialogue with jury explaining instructions outside the presence of the parties.

Cameron v. State, 383 N.E.2d 1039 (1979) (reversible error where court sent final instructions to jury room during deliberations, but never read them to jury; after retiring, jurors reported problems understanding court's instruction which defined insanity relative to defendant's insanity defense, and court began lengthy dialogue with jury, attempting to answer questions that they asked him).

23. Telling jury about sentence

It is error for a trial court to tell the jury that if the defendant is convicted, the defendant's sentence would be suspended or substantially diminished. Bryant v. State, 205 Ind. 372, 186 N.E. 322 (1933); Deming v. State, 133 N.E.2d 51 (Ind. 1956).

24. Commending or criticizing jurors for verdict

"A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding." Indiana Code of Judicial Conduct, Canon 2.8(C).

25. Interfering with attorney-client consultation

A judge has a duty to respect the attorney-client relationship. Judicial interference with counsel's ability to consult with his client may run afoul of this precept and violate the Sixth Amendment right to assistance of counsel. But when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying.

Perry v. Leeke, 488 U.S. 272 (1989) (no Sixth Amendment violation where defendant is prohibited from consulting with counsel during a fifteen-minute recess between his direct and cross-examination).

United States v. Santos, 201 F.3d 953 (7th Cir. 2000) (order barring discussion of defendant's testimony during overnight recess improperly prevented legitimate areas of consultation and violated defendant's Sixth Amendment right to counsel).

26. Using example during voir dire that is similar to D's case

A trial court is precluded from using examples during voir dire that are substantially similar to the defendant's case.

Merritt v. State, 822 N.E.2d 642 (Ind. Ct. App. 2005) (fundamental error where trial court during voir dire used an example of constructive possession that was strikingly similar to facts of defendant's case; although trial court has broad discretionary power to regulate the form and substance of voir dire, it also has a concurrent duty to remain impartial and to refrain from making unnecessary comments or remarks).

27. Inattentiveness; sleeping during trial

Lampitok v. State, 817 N.E.2d 630 (Ind. Ct. App. 2004) (Court rejected defendant's argument that he was deprived of a fair trial where judge allegedly slept during closing argument, where: (1) there was no direct evidence in record that judge was, in fact, asleep; (2) if judge was asleep, there was no evidence that jurors knew or even noticed this fact; and (3) defendant waived issue by failing to object, request a recess or ask for mistrial).

28. Letter to Supreme Court justice to state agreement with opinion

Inappropriate and violation of canon of judicial conduct where judge wrote letter to supreme court justice indicating he favored justice's dissenting opinion in case reversing defendant's conviction; held, however, letter did not indicate judge harbored prejudice against defendant, but antipathy toward being reversed on appeal. Harrington v. State, 584 N.E.2d 558 (Ind. 1992).

29. Operating illegal traffic school deferral program

In re Harkin, 958 N.E.2d 788 (Ind. 2011) (by referring traffic infraction litigants to Traffic School and then dismissing their cases upon their completion of the program without any dismissal request from prosecutor, Respondent abused his judicial authority, committed conduct prejudicial to the administration of justice, and violated Code of Judicial Conduct's provisions that required him: to "comply with the law," Ind. Judicial Conduct Rule 1.1; to "act at all times in a manner that promotes public confidence in the integrity, independence and impartiality of the judiciary, Jud. Cond.R. 1.2; to "uphold and apply the law," Jud. Cond.R. 2.2; and to "perform judicial and administrative duties competently," Jud. Cond.R. 2.5).

B. IMPROPER JUDICIAL INTERVENTION

Fundamental error doctrine applies to claims of improper judicial intervention. Record must reveal: (1) blatant violations of basic and elementary principles; and (2) harm or potential for harm could not be denied. Decker v. State, 515 N.E.2d 1129, 1132 (Ind. Ct. App. 1987).

1. Intervention or abandonment of impartiality

New trial required where: (1) issue is close; (2) judge's personal intervention in favor of State is pervasive throughout entire trial; or (3) is reasonably calculated to impeach or discredit a witness or his testimony. Spaulding v. State, 533 N.E.2d 597, 603 (Ind. Ct. App. 1989).

Decker v. State, 515 N.E.2d 1129, 1132 (Ind. Ct. App. 1987) (judge interrupted witness and commented that if witness testified to "two different things under oath there is a presumption that you are guilty of perjury." Defendant's attorney tried to object several times but was told to be quiet. Right to fair trial required reversal).

Stellwag v. State, 854 N.E.2d 64 (Ind. Ct. App. 2006) (trial court's intervention into a jury trial illustrated his partiality and was fundamental error).

C. SPECIFIC OBJECTION TO PROTECT RECORD

1. Reluctance to object

Objecting to judge's behavior may antagonize court and the jury. May cause judge to wield her tremendous discretion against you.

However, failure to object during trial may result in waiver; comments will lead to reversal only if reflect such lack of impartiality as to constitute fundamental error. Mitchell v. State, 726 N.E.2d 1228 (Ind. 2000).

Spaulding v. State, 533 N.E.2d 597, 603 (Ind. Ct. App. 1989) (waiver where isolated exchanges or innocuous remarks unaccompanied by specific and contemporaneous objection, request for admonishment and motion for mistrial).

2. Object outside presence of jury

"We recognize that an attorney may be reluctant to object to the judge's actions in the presence of the jury, fearing that an apparent conflict with the judge would cause more damage. In such a case, we have treated the alleged error on the merits." Abernathy v. State, 524 N.E.2d 12,15 (Ind. 1988).

SUGGESTIONS:

(1) make contemporaneous objection to judge's actions.

(2) request bench conference to give your specific reasons.

(3) explain objection concisely and courteously at sidebar, out of hearing of jury.

Practice Pointer: Keep your tone of voice moderate and respectful. Phrase objection in way that gives judge benefit of doubt and a way to correct misconduct.

D. DELAY ENTERING JUDGMENT – D.8.C.

1. Promptly prepare and sign judgment or be compelled by mandate – C.R. 15.1

Indiana Criminal Rule 15.1 requires judge to promptly prepare and sign judgment, and clerk to enter judgment in Record of Judgments and Orders and note entry in Chronological Case Summary. Judge failing to promptly cause judgment to be prepared may be compelled by mandate.

Note: Provisions of *Trial Rule* 58(B) relating to content of judgment shall not apply in criminal proceedings. See *Criminal Rule* 15.1.

2. Lazy judge rule – Trial Rule 53.2

Trial Rule 53.2(A) provides that if trial court fails to issue judgment within 90 days after it has taken matter under advisement, case may be withdrawn from trial court and transferred to Supreme Court for appointment of a special judge.

Trial Rule 53.2 applies in criminal proceedings in accordance with Ind. Rules of Procedure. Ind. Crim. R. 15.

3. Undue delay in carrying out sentence

Trial court loses jurisdiction if it does not act to initiate commencement of sentence within reasonable time after certification of affirmance of conviction. Woods v. State, 583 N.E.2d 1211 (Ind. 1992).

Unusual delay must be for some recognized legal purpose; termination of delay must be fixed.

Hull v. State, 799 N.E.2d 1178 (Ind. Ct. App. 2003) (improper for trial court to enhance sentence by ordering sentence concurrent except that ten years of sentence for Count II would be served consecutively to Count I, in effect delaying commencement of sentence on Count II for ten years; ten-year delay of sentence is improper absent specific statutory authorization).

Taylor v. State, 233 Ind. 398, 402, 120 N.E.2d 165 (1954) (delay deprived court of jurisdiction and required reversal of judgment where defendant found guilty in July 1952

and matter held in abeyance until April 1953, at which time defendant sentenced to 10-20 year term; American citizens are entitled to live without a Damocles sword dangling over his head).

(a) Delay following appeal

Court should have reasonable time to issue *writ of mittimus*.

Woods v. State, 583 N.E.2d 1211 (Ind. 1992) (5½ year delay by State in commencing sentence was inequitable application of law).

Layne v. State, 172 Ind.App. 570, 361 N.E.2d 170 (1977) (delay of six months from final appeal until order for execution of sentence was not reversible error; however, this case follows Smith v. Howard, 206 Ind. 496, 190 N.E. 169 (1934), which was modified by Woods).

(b) Delay in correcting judgment; mistaken release

Beliles v. State, 663 N.E.2d 1168 (Ind. Ct. App. 1996) (delay in correcting judgment to reflect actual agreed upon sentence which was longer than sentence in incorrect judgment was not reversible error where defendant was not prejudiced beyond frustrated expectation of being released from prison; defendant was in prison properly serving sentence, although he had made plans to be released).

Vance v. State, 949 N.E.2d 1269 (Ind. Ct. App. 2011) (trial court had jurisdiction to enter order recommitting defendant to the DOC after he was released prematurely on parole in 2007; his case differs from Woods in that he committed other crimes after he was mistakenly released from the DOC).

III. RECUSAL

A. MUST RECUSE WHEN ACTUAL PREJUDICE OR WHEN IMPARTIALITY MIGHT REASONABLY BE QUESTIONED

Where judge has actual prejudice in case, due process requires that judge disqualify himself. Smith v. State, 535 N.E.2d 1155 (Ind. 1989).

Absent circumstances supporting contrary conclusion, assumed judge would have complied with obligation to disqualify herself had there been any reasonable question concerning her impartiality. Austin v. State, 528 N.E.2d 792 (Ind. Ct. App. 1988).

1. Indiana leans towards recusal if in doubt

Indiana practice has always leaned towards recusal where reasonable questions about impartiality exist. Saylor v. State, 765 N.E.2d 535, 566 (Ind. 2002) (*citing* Tyson v. State, 622 N.E.2d 457, 460 (Ind. 1993).

2. *Cite* both due process and Judicial Canon 2, Rule 2.11

When a judge is actually biased, the due process clause requires disqualification as a matter of federal constitutional law. Where a party can demonstrate the appearance of bias but cannot prove actual bias, disqualification is still required by Indiana Code of Judicial Conduct, Canon 2, Rule 2.11 (discussed below). Authorities are split on whether federal due process requires disqualification for the appearance of bias without proof of actual bias. Flamm, *Judicial Disqualification*, §2.3.3 (Banks & Jordan Co. 2007). For this reason, always *cite* both federal due process and Canon 2, Rule 2.11 in motions to disqualify the judge.

The Court of Appeals has recently held that the Code of Judicial Conduct does not create a freestanding mechanism for relief, independent of a properly brought Criminal Rule 12

motion. See Mathews v. State, 64 N.E.3d 1250 (Ind. Ct. App. 2016); Abney v. State, 79 N.E.3d 942 (Ind. Ct. App. 2017).

B. TEST FOR ACTUAL PREJUDICE

Whether: (1) objective person; (2) knowledgeable of all circumstances; (3) would have reasonable basis for doubting judge's impartiality. Tyson v. State, 622 N.E.2d 457, 459 (Ind. 1993). See also *Indiana Code of Judicial Conduct,* Canon 2.11(A).

Tyson v. State, 622 N.E.2d 457, 459-60 (Ind. 1993) (reasonable basis to doubt impartiality where judge's wife advised an attorney on how to obtain a better result for his client appearing before the judge).

Bell v. State, 655 N.E.2d 129, 132 (Ind. Ct. App. 1995) (abuse of discretion to deny motion for change of judge where judge had *ex parte* meeting with defendant's co-conspirator, shortly after the meeting co-conspirator given immunity for testimony against defendant and judge recused himself from co-conspirator's case; reasonable for defendant to believe judge's impartiality in question and judge made no effort to explain nature of meeting or to assure defendant it did not impact his case).

In re Guardianship of Garrard, 624 N.E.2d 68, 70 (Ind. Ct. App. 1993) (reasonable basis where court met *ex parte* with an expert witness in an attempt to settle the matter more quickly).

Stevens v. State, 770 N.E.2d 739, 763 (Ind. 2002) (denial of opportunity to interview judge as potential witness, where same judge sat at trial and post-conviction relief, is not evidence of partiality or proper reason for recusal where judge found that his testimony would merely be cumulative).

Miller v. State, 106 N.E.3d 1067 (Ind. Ct. App. 2019) (no support for claim of appearance of bias or prejudice based on trial court's premature findings on remand after it had applied incorrect "knowingly" mens rea in bench trial for attempt murder).

1. Establishing actual bias

Defendant must establish from judge's conduct actual bias or prejudice that places defendant in jeopardy. Bias or prejudice exists only where: (1) there is undisputed claim; or (2) judge has expressed opinion on merits of pending controversy. Cook v. State, 612 N.E.2d 1085 (Ind. Ct. App. 1993).

Although many Indiana cases have stated that a conviction will not be reversed except upon a showing of "actual bias" or "undisputed evidence of actual bias," see, e.g., Cook, *supra*; Smith v. State, 535 N.E.2d 1155 (Ind. 1989), the 7th Circuit case Harrison v. McBride, 428 F.3d 652 (7th Cir. 2005) calls all of these Indiana cases into question.

Calvert v. State, 498 N.E.2d 105 (Ind. Ct. App. 1986) (reversible error in forgery trial for judge to fail to recuse himself, whereas prosecutor he had appeared on two occasions against defendant when present case originally filed and had obtained court order for sample of defendant's handwriting which was admitted into evidence at trial).

Andrews v. State, 505 N.E.2d 815 (Ind. 1987) (reversal not warranted, requisite bias not evident in record that merely asserts negative rulings stem from prejudice or bias of judge).

2. Disqualification where impartiality might be reasonably questioned

Indiana Code of Judicial Conduct, Canon 2.11(A) provides in pertinent part: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. . . ." Recusal under Canon 2.11 does not require *actual bias*.

Tyson v. State, 622 N.E.2d 457, 459 (Ind. 1993) (in determining whether judge should recuse himself, question is not whether judge's impartiality is impaired in fact, but whether there exists reasonable basis for questioning judge's impartiality).

Personal knowledge requiring recusal is knowledge acquired from extrajudicial sources, not what judge learned from his participation in case. Matter of Adoption of Johnson, 612 N.E.2d 569, 573 (Ind. Ct. App. 1993).

(a) Must disqualify if actively served as attorney in related matter

Judge must disqualify himself from proceeding in which she has actively served as attorney for one of parties in related matter, regardless of whether actual bias or prejudice exists. Calvert v. State, 498 N.E.2d 105 (Ind. Ct. App. 1986). See also Canon 2.11(A)(6).

Matthews v. State, 978 N.E.2d 438 (Ind. Ct. App. 2012) (the fact that judge had represented defendant on one of his prior unrelated substance offenses that served as the basis for defendant's HSO did not require a mistrial in the guilt/innocence phase of the underlying offense to the HSO; judge's recusal from the HSO phase of the trial was sufficient).

Jackson v. State, 33 N.E.3d 1173 (Ind. Ct. App. 2015) (no need to change judge who had served as prosecutor in prior case State used to support habitual offender charge because defendant did not contest the existence and validity of the predicate conviction).

Williams v. Pennsylvania, 136 S.Ct. 1899 (2016) (Pennsylvania Supreme Court Justice who had given approval to seek death penalty against defendant when he was DA violated due process by not recusing and participating in decision to reinstate death sentence).

(b) Must show bias if attorney in unrelated matter

No reversal, absent showing of prejudice or bias, for prior representation of defendant in unrelated criminal matter. Harden v. State, 538 N.E.2d 244 (Ind. Ct. App. 1989).

See the IPDC Pretrial Manual, Chapter 5, Change of Judge, for more detail about judicial disqualification and recusal.