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Report of the Judicial Disqualification¹ Project

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The views expressed in this draft Report have not been approved by the House of Delegates, the Board of Governors, or the Standing Committee on Judicial Independence, and accordingly, should not be construed as representing the policy of the American Bar Association.

In 2007, the American Bar Association (ABA) Standing Committee on Judicial Independence received an ABA Enterprise Fund Grant to undertake a project on judicial disqualification. SCJI was chaired by Doreen Dodson, Esq. at the time of the project's inception and through the majority of its duration. SCJI retained Indiana University law professor Charles Geyh as the consultant to and director of the project. The assistant to Mr. Geyh is Ms. Kathleen Lee, J.D. Indiana University, 2009. Counsel to SCJI and the project is Konstantina Vagenas, Esq., ABA Manager of Judicial Independence Initiatives and ABA Justice Center Counsel. Project advisors include Judge Marc Amy, Judge Charles Clevert, Roberta Liebenberg, Esq., Meghan Magruder, Esq., Andrea Ordin, Esq., Robert Peck, Esq., and William Weisenberg, Esq.

¹ In this report, “disqualification” and “recusal” are used interchangeably. In practice, some jurisdictions differentiate between the two: recusal sometimes refers to withdrawal of the judge upon his own initiative, or under circumstances in which withdrawal may not be required but is done out of an abundance of caution, as distinguished from disqualification, which is sought by one or more parties and is ordered when applicable law requires. Historically, however, these distinctions are less clear—the term “recuse,” for example, derived from “refuse,” and in its earliest incarnations was the means by which parties could demand the removal of a judge. *See* discussion *infra*, p. . Moreover, ever since the ABA promulgated the first Model Code of Judicial Conduct in 1972, it has used the term “disqualification” to mean withdrawal on the judge’s own initiative *or* on the motion of a party. And as discussed in Part IV of this paper, the Model Code permits judges to initiate withdrawal under circumstances in which withdrawal is necessary: Rule 2.7 states that “A judge shall hear and decide matters assigned to the judge except when disqualification is required.”

The Judicial Disqualification Project was executed in three stages. In stage 1, project staff undertook to research the state of disqualification rules and practice around the country. It conducted a fifty state survey of disqualification rules and practice, and relied upon the results of a survey of chief justices conducted by David Rottman at the National Center for State Courts. Aided by its advisors, project staff reviewed the results of this background investigation, and identified a number of problems with current disqualification rules and practice.

In stage 2, project staff, again aided by its advisors, developed proposed recommendations to address the problems identified in stage 1, and issued a draft report. In stage 3, project staff circulated the draft report, invited public comment, and in light of those comments (and with guidance from its advisors), made further revisions to the recommendations before issuing this final report.

Introduction

In the past five years, disqualification has emerged as a major part of both the problem and the solution in the ongoing national effort to preserve and promote an independent judiciary. In several highly publicized cases, judges have been criticized, sometimes severely, for not disqualifying themselves from cases where the judge had an undisclosed financial interest in, received sizable campaign contributions from, or had a personal relationship with one of the parties. These cases have served as lightning rods for court critics, who have argued that they evidence less than impartial judges who may not be making decisions independently of their financial interests, campaign contributors, or personal friendships.

Meanwhile, in 2002, the U.S. Supreme Court decided *Republican Party of Minnesota v. White*,² which held that judicial candidates have a first amendment right to announce their views on issues that may come before them later as judges. *White* troubled many members of the bench, bar, and academy, who were concerned that judges who announced their views on issues in future cases might impliedly commit themselves to ruling in particular ways, to the detriment of their impartiality. Here, the disqualification regime has become part of the proposed solution—a way to protect litigants from judges whose prior statements on the campaign trail (or elsewhere) amount to express or implied commitments that called their impartiality into question.

The ABA has recently concluded a three year review of the Model Code of Judicial Conduct and made some modest revisions to the Code’s disqualification provisions. The pivotal issues worthy of further exploration, however, do not concern what the disqualification rules say, so much as how judges apply those rules in practice. The most nettlesome disqualification problems have arisen not in cases regulated by the Model Code’s list of specific grounds for disqualification, but in cases falling between the cracks of that list, which are governed by the general directive to disqualify whenever “impartiality might reasonably be questioned.” One goal of this project is to survey disqualification practices around the country, to the end of supplying judges and lawyers with an additional tool to assist them in framing and analyzing disqualification questions of this kind.

Recent media attention has tended to focus on high-profile cases, and whether the judges presiding over given cases erred in failing to disqualify themselves. Criticism of judges for non-disqualification in such situations often implicates underlying procedural

² 563 U.S. 765 (2002).

issues: Should the judge accused of bias or apparent bias be the one to decide whether disqualification is necessary? What kind of showing must a party make to force disqualification? Should the judge who disqualifies himself explain why, on the record? How deferential should higher courts be when reviewing a judge's decision not to disqualify herself? How concerned should we be about procedures that encourage strategic disqualification aimed at removing judges for reasons other than their lack of impartiality? A second goal of this project is to identify disqualification procedures employed in different jurisdictions for the purpose of making recommendations as to those that are optimal.

Part I of this Report summarizes the history of judicial disqualification, and in so doing illuminates and explains the traditional ambivalence that judges have had and continue to have toward disqualification. Part II surveys the current judicial disqualification landscape, with a focus on disqualification rules embedded in state codes of judicial conduct, court rules, and legislative enactments. As Part II reveals, substantive disqualification rules are well developed and more or less consistent across jurisdictions (although there are some significant variations in disqualification procedure), which is in keeping with Part I's history of the emergence and growth of disqualification practice over time. Part III, then, explores a number of problem areas in disqualification practice. Such problems typically arise in cases that are not resolved by specific disqualification requirements. Here, judges are governed only by the general directive to disqualify themselves when their impartiality might reasonably be questioned. And it is here, where traditional reluctance to admit bias or apparent bias has culminated in arguably problematic decisions not to disqualify. Finally, Part IV proposes

a number of recommendations aimed at addressing previously identified problem areas, to the end of bringing disqualification practice in better alignment with disqualification rules.

I. The History of Judicial Disqualification

Judicial disqualification is of ancient origin. Under Roman law, litigants had a right to recuse judges who were “under suspicion.” In 530 A.D., the Justinian Code was amended to state:

It is the clearest right under general provisions laid down from thy exalted seat, that before hearings litigants may recuse judges. A judge being so recused, the parties have to resort to chosen arbitrators, before whom they assert their rights. Although a judge has been appointed by imperial power yet because it is our pleasure that all litigations should proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion to recuse him before issue be joined, so that the cause go to another; the right to recuse having been held out to him . . .³

Subjecting judges “under suspicion” to disqualification became accepted practice in civilian law systems, and was immortalized by Shakespeare in *Henry the Eighth*, where Queen Katharine of Aragon, of Spanish descent, recused her judge, Cardinal Wolsey, in terms consistent with Canon law and the Spanish Code:

I do believe,
Induced by potent circumstances, that
You are mine enemy, and make my challenge.
You shall not be my judge, for it is you
Have blown this coal betwixt my lord and me
Which God’s dew quench. Wherefore I say again
I utterly abhor, yea, from my soul
Refuse you for my judge; whom yet once more
I hold my most malicious foe, and think not

³ Codex of Justinian, lib. III, title 1, No. 16.

At all a friend to truth.⁴

The English common law, in contrast, proceeded on a separate track, owing at least in part to its delegation of fact-finding responsibilities to juries. Apparently proceeding from the premise that the threat posed by bias was limited largely to fact-finding, in common law systems jurors were subject to challenge, but judges were not. William Blackstone alluded to “civil and canon laws,” under which “a judge might be refused upon any suspicion of partiality,” but opined that in England “the law is otherwise,” after early precedent to the contrary, and “it is held that judges or justices cannot be challenged.”⁵ He elaborated: “For the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.”⁶ Conceding that some judges might be overtaken by their biases in isolated cases, Blackstone still concluded that that recusal was unnecessary because “such misbehaviour would draw down a heavy censure from those, to whom the judge is accountable for his conduct.”⁷

Under English common law, recusal was a decidedly limited practice guided by a single, pithy principle first articulated in 1609 by Sir Edward Coke in *Dr. Bonham’s Case*: “No man shall be a judge in his own case.”⁸ While a judge could not be challenged on grounds of bias, he could be removed for having an “interest” in its outcome. Thus, for example, in *Dr. Bonham’s Case*, a judge was disqualified from a case in which he would receive the fines he assessed. One might suppose that disqualification

⁴ WILLIAM SHAKESPEARE, HENRY THE EIGHTH act 2, sc. 4. For a discussion of this passage and its consistency with practice under the Justinian Code, see Harrington Putnam, *Recusation*, 9 CORN. L. Q. 1, 5-7 (1923).

⁵ WILLIAM BLACKSTONE, III COMMENTARIES ON THE LAWS OF ENGLAND 361 (1768).

⁶ *Id.*

⁷ *Id.*

⁸ *Dr. Bonham's Case*, 77 Eng. Rep. 646, 652 (1609).

on grounds of “interest” might logically extend to relationships, such as where the judge was related to a party—but as of the late eighteenth century, not so.⁹ As John Frank, writing in 1947, put it: “In short, English common law practice at the time of the establishment of the American court system was simple in the extreme. Judges disqualified for financial interest. No other disqualifications were permitted, and bias . . . was rejected entirely.”¹⁰ And even rules governing disqualification for conflicts of interest were sometimes set to one side. In 1740, Parliament introduced a precursor to the so-called “rule of necessity,” which provided that when no other judge was readily available to hear a case (as for example, when the case before the court concerned a tax, judicial pay raise or pay cut of financial interest to all judges), otherwise disqualified judges should not decline to sit.¹¹

In the United States,¹² the law of disqualification, like Ravel’s *Bolero*, began quietly but gained in complexity and strength over time.

- In 1792, Congress enacted legislation (which would gradually evolve into what is currently 28 U.S.C. § 455) that codified the common law by calling for disqualification of district judges who were “concerned in interest,” but added that a judge could also be disqualified if he “has been of counsel for either party.”¹³

⁹ *Brookes v. Rivers*, 145 Eng. Rep. 569 (1668).

¹⁰ John Frank, *Disqualification of Judges*, 56 *YALE L.J.* 605, 611-12 (1947).

¹¹ 16 Geo. II, c. 18 § 1 (1743), discussed in Frank, *supra* note 11, at 611.

¹² This bullet-point summary of the history of judicial disqualification in the United States is general in scope, and does not discuss the disqualification laws of individual states. It therefore focuses on developments in the federal system until the twentieth century, when the emergence of the ABA Canons of Judicial Ethics, followed by the Codes of Judicial Conduct, which most states adopted in some form, made it possible to discuss state disqualification rules collectively.

¹³ Act of May 8, 1792, ch. 36, § 11, 1 Stat. 178-79 (1792).

- In 1821, relationship to a party was added as another ground for disqualification.¹⁴
- In 1891, Congress enacted legislation (later codified at 28 U.S.C. § 47) forbidding a judge from hearing the appeal of a case that the judge tried.¹⁵
- In 1911, the precursor to § 455 was further amended to require disqualification where the judge was a material witness in the case.¹⁶
- Likewise in 1911, Congress enacted legislation (later codified as 28 U.S.C. § 144) entitling a party to secure the disqualification of a judge by submitting an affidavit that the judge has “a personal bias or prejudice” against the affiant or for the opposing party.¹⁷
- In 1921, in *Berger v. United States*, the Supreme Court interpreted what would become § 144 as prohibiting the judge from ruling on the truth of matters asserted in the affidavit supplied by the party seeking disqualification and requiring automatic disqualification if the affidavit was facially sufficient.¹⁸
- In 1924, the ABA adopted Canons of Judicial Ethics. Canon 4 stated that “a judge’s official conduct should be free from impropriety and the appearance of impropriety;” Canon 13 provided that “A judge should not act in a controversy where a near relative is a party;” and Canon 29 provided that “A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved.”
- In 1927, in *Tumey v. State of Ohio*, the Supreme Court added a constitutional dimension to the law of disqualification, when it invalidated, on due process grounds, an

¹⁴ Act of March 3, 1821, ch. 51, 3 Stat. 643 (1821).

¹⁵ Act of March 3, 1891, ch. 23, § 21, 36 Stat. 1090 (1891).

¹⁶ Act of March 3, 1911, ch. 231, § 20, 36 Stat. 1090 (1911).

¹⁷ *Id.*

¹⁸ *Berger v. United States*, 255 U.S. 22 (1921).

Ohio statute that authorized the judge to receive court costs assessed against convicted (but not acquitted) defendants:

All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion But it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.¹⁹

- In 1945, disqualification rules briefly became a matter of national concern when Justice Robert Jackson openly criticized Justice Hugo Black for participating in a case argued by a lawyer who had been Black's law partner twenty years before.²⁰

- In 1948, § 455 was further amended to disqualify judges whose relationship to a party's lawyer (not just the party, as had been the case since 1821) would make it improper for the judge to sit. This new statute thus provided:

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with a party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.²¹

- As of the mid-twentieth century, common law aversion to judicial bias as grounds for disqualification continued to exert considerable influence. Section 455 remained silent as to bias. Section 144 ostensibly enabled a party to secure disqualification simply by submitting an affidavit alleging personal bias, but as Professor John Frank wrote at the time:

¹⁹ *Tumey v. State of Ohio*, 273 U.S. 510, 523 (1927).

²⁰ *Jewel Ridge Coal Corp. v. Local No. 6167*, 325 U.S. 161, 897 (1945).

²¹ Comment, *Disqualification for Interest of Lower Federal Court Judges*, 71 MICH. L. REV. 538, 540 (1973).

Frequent escape from the statute has been effected through narrow construction of the phrase “bias and prejudice.” Affidavits are found not “legally sufficient” on the ground that the specific acts mentioned do not in fact indicate “bias and prejudice,” a reasoning which emasculates the *Berger* decision by transferring the point of conflict.²²

Frank warned that “[u]nless and until the Supreme Court gives new force and effect to the *Berger* decision the disqualification practice of the federal district courts will remain sharply limited.”²³

- In 1955, the Supreme Court breathed new life into disqualification for bias, if indirectly, by expanding its interpretation of the due process clause to require that judges be free from bias and the appearance of bias. Less than thirty years earlier, in *Tumey*, the Court had opined that a requirement that judges lack “personal bias” was not a matter of “constitutional validity” but one “merely of legislative discretion.” In *In re Murchison*, however, the Court declared:

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of justice has always endeavored to prevent even the probability of unfairness. . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way “justice must satisfy the appearance of justice.”²⁴

- In 1964, the United States Court of Appeals for the Fifth Circuit articulated a so-called “duty to sit.”²⁵ “It is a judge’s duty to refuse to sit when he is disqualified but it is equally his duty to sit when there is no valid reason for recusation.”²⁶ The goal of the duty to sit is akin to that of the rule of necessity, insofar as both seek to prevent

²² Frank, *supra* note 11, at 629.

²³ *Id.* at 630.

²⁴ 349 U.S. 133, 136 (1955).

²⁵ *United States v. Edwards*, 334 F. 2d 360 (5th Cir. 1964).

²⁶ *Id.* at 362.

disqualification rules from interfering with efficient operation of the courts.²⁷ By 1972, Justice William Rehnquist reported that the duty to sit had been accepted by all circuit courts.²⁸

- In 1969, the United States Senate rejected President Nixon's nomination of Clement Haynsworth to the Supreme Court, at least in part because Haynsworth, as a circuit judge, had not disqualified himself from participating in several cases in which he owned stock or had some other ownership interest in a corporate party, or the party's parent corporation.²⁹

- In 1972, the ABA, responding in part to the Haynesworth episode, adopted the Model Code of Judicial Conduct, which sought to encapsulate the ethics of disqualification into a unified rule.³⁰ A judge was now subject to disqualification "in a proceeding in which his impartiality might reasonably be questioned, including but not limited to" cases in which the judge had an actual bias concerning a party, had served as a lawyer in the matter (or was still with his former firm when the matter was being handled by another firm lawyer), had an interest in the case, or was related to the parties or their lawyers.

- In 1972, Justice William Rehnquist provoked widespread criticism when he declined to disqualify himself from a case in which he, as Assistant Attorney General

²⁷ Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 597-621 (1987).

²⁸ *Laird v. Tatum*, 409 U.S. 824, 837 (1972).

²⁹ Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 736 n. 2 (1973).

³⁰ MODEL CODE OF JUDICIAL CONDUCT, Canon 3C (1972) (current version at MODEL CODE OF JUDICIAL CONDUCT, R. 2.11 (2007)) [hereinafter 1972 MODEL CODE].

under President Nixon, had discussed the district court's opinion in the case before a Senate subcommittee, and expressed his view that the case was non-justiciable.³¹

- In 1974, Congress adopted, with some variations, the 1972 Model Code's disqualification rule in an amendment to § 455, which, by virtue of its requirement that judges disqualify themselves whenever their impartiality might reasonably be questioned, was widely represented as ending the "duty to sit."³²

- In 1990, the ABA revised the 1972 Model Code of Judicial Conduct. It added personal bias against a party's lawyer as grounds for disqualification.³³ In addition, it expanded the "remittal" procedure introduced in the 1972 Model Code by enabling the parties, upon learning of the basis for a judge's disqualification, to waive disqualification for any reason other than actual bias,³⁴ on the theory that even if a judge's impartiality might reasonably be questioned, disqualification was unnecessary if all parties were satisfied that the judge would be fair and impartial.

- In 1999, the ABA added a new ground for disqualification: when a party or party's lawyer or law firm made a contribution to the judge's election campaign in excess of a specified amount.³⁵

- In 2003, the ABA added another new ground for disqualification in response to the Supreme Court's decision in *Republican Party of Minnesota v. White*³⁶: when the

³¹ Memorandum of Mr. Justice Rehnquist, *Laird v. Tatum*, 409 U.S. 824 (1972). For a summary of the criticism that followed, see Jeffrey Stempel, *Rehnquist, Recusal and Reform*, 53 BROOK. L. REV. 589 (1987).

³² JAMES ALFINI, JEFFREY SHAMAN, STEVEN LUBET & CHARLES GARDNER GEYH, JUDICIAL CONDUCT AND ETHICS §4. __ (2007).

³³ MODEL CODE OF JUDICIAL CONDUCT, Canon 3E (1990) (current version at MODEL CODE OF JUDICIAL CONDUCT, R. 2.11 (2007)) [hereinafter 1990 MODEL CODE].

³⁴ *Id.* Canon 3F.

³⁵ MODEL CODE OF JUDICIAL CONDUCT, Canon 3E(1)(e)(1999).

³⁶ 536 U.S. 765 (2002).

judge makes statements that commit or appear to commit the judge to reach a particular result or rule in a particular way.³⁷

- In 2007, the ABA revised the 1990 Model Code, and elevated from comment to black letter a provision requiring disqualification of a judge who, as a government lawyer, had previously participated personally and substantially in or expressed an opinion on the merits of a matter now before the court.³⁸

This truncated history reflects a gradual adoption and expansion of disqualification standards over time. This movement toward acceptance of disqualification rules has been offset, however, by a countervailing impulse that has discouraged judges from fully embracing a disqualification regime.

There is an inherent tension between traditional conceptions of the judicial role and disqualification for bias that has bothered judges and scholars for centuries. As early as the 17th century, Sir Matthew Hale’s “Rules for His Judicial Guidance, Things Necessary to Be Continually Had in Remembrance,” included several rules that focused on impartiality as a defining feature of the judicial role, such as: “That in the administration of justice I carefully lay aside my own passions;” “That I suffer not myself to be prepossessed with any judgment at all, till the whole business, and both parties be heard;” and “That I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard.”³⁹ Over three hundred years later, the Model Code of Judicial Conduct continues to strike a very similar tone, with rules directing that a judge “shall uphold and apply the law, and shall perform all duties of

³⁷ MODEL CODE OF JUDICIAL CONDUCT, Canon 3E(1)(f)(2003).

³⁸ MODEL CODE OF JUDICIAL CONDUCT, Rule 2.11 (2007) [hereinafter 2007 MODEL CODE]. Rule 2.11 of the 2007 Model Code of Judicial Conduct is reprinted in Appendix A of this report.

³⁹ Quoted in J. CAMPBELL, LIVES OF THE CHIEF JUSTICES OF ENGLAND 208 (1873).

judicial office fairly and impartially,”⁴⁰ “shall act at all times in a manner that promotes the independence, integrity and impartiality of the judiciary,”⁴¹ and “shall not be swayed by public clamor or fear of criticism.”⁴² In short, the principle that a “good” judge is an impartial judge is thoroughly engrained in Anglo-American law and legal culture: lawyers who ascend to the bench take an oath to “administer justice without respect to persons, and do equal right to the poor and the rich, and . . . faithfully and impartially discharge and perform all the duties” of judicial office.⁴³

Against the backdrop of these deeply entrenched norms, the judge who disqualifies herself for bias in a given case concedes incapacity to be the impartial arbiter she has sworn to be. This is a concession the common law did not tolerate, as Blackstone explained in the above-quoted passage, when he wrote that “the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.”⁴⁴

Professor John Frank put the point bluntly in 1947: “Disqualification for bias represents a complete departure from common law principles.”⁴⁵ Simply put, disqualification for bias implies a judge’s failure to live up to the centuries-old expectation that he be able to “set aside [his] own passion”⁴⁶—a failure that judges are understandably hesitant to admit even to themselves, let alone others. Indeed, judges encumbered by serious biases can be among those least able or willing to acknowledge them.⁴⁷

⁴⁰ 2007 MODEL CODE, Rule 2.2.

⁴¹ *Id.*, Rule 1.2.

⁴² *Id.*, Rule 2.4.

⁴³ 28 U.S.C. § 453 (2000).

⁴⁴ WILLIAM BLACKSTONE, III COMMENTARIES ON THE LAWS OF ENGLAND 361 (1768).

⁴⁵ Frank, *supra* note 11 at 618-19.

⁴⁶ Matthew Hale, *quoted in* CAMPBELL, *supra* note 40.

⁴⁷ See, e.g., Chris Guthrie, Jeffrey Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORN. L. REV. 777 (2001).

Disqualification for *apparent* bias poses similar problems. First, if judges are loath to acknowledge actual bias because it admits an inability to administer justice impartially and abide by their oaths of office, they may likewise be slow to concede that reasonable people could think they are biased, which connotes a *perceived* inability to be impartial as their job descriptions demand. Second, when a judge acknowledges that she has said or done things that could lead the public to question her impartiality, such a concession may be in tension with the ethical directive that “a judge shall act at all times in a manner that promotes public confidence in the . . . impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.”⁴⁸

In short, many judges have an understandable reluctance to concede disqualifying bias or apparent bias, given the adverse implications of such concessions. This natural disinclination to disqualify is heightened by an appreciation of the administrative need for an adequate supply of judges—a variation on the “duty to sit” and “rule of necessity” doctrines. And so, judges often note—as a supplemental explanation for why disqualification for apparent bias is unnecessary in a given case—if all similarly situated judges were to disqualify themselves it would create administrative burdens on the operation of their courts.⁴⁹

To complicate matters further, the legal realism movement of the early twentieth century cultivated an appreciation for the complexity of judicial decision-making that

⁴⁸ 2007 MODEL CODE, Rule 1.2.

⁴⁹ Charles Gardner Geyh, *Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism*, in *BENCH PRESS: THE COLLISION OF THE COURTS, POLITICS, AND THE MEDIA* 21, 41-43 (2007).

has, in the years since, been widely internalized.⁵⁰ Judges are not automatons who apply the law mechanically, in a political vacuum. They are people too, whose thinking is influenced by their educations, backgrounds, experience, and personal values, and who are subject to the same prejudices that afflict the rest of us.⁵¹ As with the rest of us, it is only natural that a judge's personal prejudices will sometimes get the best of her, or at least appear to do so. When that happens in a case she has been called upon to decide, the judge should step aside, to protect judicial impartiality and promote public confidence in the courts. Animated by these realist sentiments, rule-makers of the past century have imposed ever more rigorous disqualification standards in an effort to encourage disqualification for bias and apparent bias. Judges, however, given the history and tradition of the roles they are sworn to play—remain reluctant to embrace the spirit of these rules. That has given rise to what one scholar describes as a “vicious circle”:

Litigants seeking to recuse unfavorable judges file motions; judges step aside or resist, with the most biased judges the least willing to withdraw; Congress and commentators survey the questionable results, seeking to end them with more sweeping legislation; the new legislation is thrown to the courts, where it undergoes the same pressures that twisted its precursors.⁵²

II. Current State Disqualification Practices

Today, judicial disqualification is regulated by several different and often overlapping sources of law. The most common source for disqualification rules is each

⁵⁰ Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988) (“All major current schools of thought are, in significant ways, products of legal realism. To some extent, we are all legal realists now.”).

⁵¹ Max Radin, “*The Theory of Judicial Decision: Or How Judges Think*” (1925), in AMERICAN LEGAL REALISM (William W. Fisher III et al. eds., 1993) (“Judges, we know, are people. I know a great many. Some were my schoolmates.... They eat the same foods, seem moved by the same emotions, and laugh at the same jokes. Apparently they are a good deal like ourselves.”).

⁵² John Leubsdorf, *Theories of Judging and Judicial Disqualification*, 62 N.Y.U. L. REV. 237, 245 (1987).

state's code of judicial conduct. Most states' codes of conduct and the federal code of conduct are substantially similar. In fact, all states' codes of judicial conduct are consistent with the ABA's Model Code of Judicial Conduct to a meaningful degree.⁵³ Specific language from the Model Code has been adopted by all 50 states, and the structure of the Model Code has been used by nearly all jurisdictions.⁵⁴

Beyond these codes of conduct, other substantive sources of disqualification regulations include state constitutional provisions, statutes, and court rules. These additional rules can create overlapping and occasionally conflicting disqualification requirements, though they often rely on the applicable code of conduct. Many states have different disqualification regulations for civil and criminal cases, and for different levels of the judiciary.

A. The Model Code of Judicial Conduct

Since its adoption of the Canons of Judicial Ethics in 1924, the ABA has taken primary responsibility for drafting model standards of judicial conduct. In 1972, the ABA replaced the Canons of Judicial Ethics with the first Model Code of Judicial Conduct. The Model Code was later revised in 1990 and again in 2007. The 2007 disqualification rule is substantially similar to its 1990 and 1972 counterparts⁵⁵, and one or another of the model code variations serves as the basis for nearly all current state judicial disqualification rules.

⁵³ 2007 MODEL CODE, Rule 2.11. Reprinted in Appendix A of this report. *See also*, 1972 MODEL CODE, Canon 3C; 1990 MODEL CODE, Canon 3E.

⁵⁴ Because the Model Code of Judicial Conduct has been promulgated so successfully, and because state disqualification regulations often comes from a state code of judicial conduct that is substantially similar, this project compares all applicable sources of positive state law to the provisions in the 2007 Model Code.

⁵⁵ Reporter's Notes, 2007 MODEL CODE, Rule 2.11 ("Most changes to this Rule and its accompanying Comment are stylistic and structural rather than substantive.").

*The general or “catch-all” disqualification standard.*⁵⁶ The overarching disqualification provision in the Model Code is the requirement that a judge “shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.” The Model Code focuses on the appearance of impartiality, rather than on a judge’s actual impartiality.⁵⁷ This concern with appearances has deep roots, dating back to the progressive era, and is animated by the view that if public confidence in the courts is to be preserved, judges must not only act properly but appear to act properly as well.⁵⁸ Moreover, if one is concerned about the reluctance of judges to disqualify themselves, there is a strategic benefit to focusing on the appearance of impartiality: judges who are loath to admit actual bias or partiality might be more willing to concede the existence of a perception problem.

In the 2007 Model Code, like its predecessors, the general standard that judges disqualify themselves whenever their impartiality might reasonably be questioned is accompanied by a list of several specific circumstances in which it is presumed that the general standard is met, and where disqualification follows automatically:

*When the judge is biased or has personal knowledge.*⁵⁹ This provision specifically requires that judges disqualify themselves when they have a personal bias concerning a party or a party’s lawyer, and also requires disqualification when the judge has personal knowledge of disputed facts in the proceeding.⁶⁰ Bias and personal

⁵⁶ 2007 MODEL CODE, Rule 2.11(A).

⁵⁷ “Appearances matter because the public’s perception of how the courts are performing affects the extent of its confidence in the judicial system. And public confidence in the judicial system matters a great deal... public confidence in our judicial system is an end in itself.” AMERICAN BAR ASSOCIATION, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY, 10 (2003).

⁵⁸ See generally, Geyh, *supra* note 49 at 21 (describing the evolution of American conceptualization of disqualification for appearance of partiality).

⁵⁹ 2007 MODEL CODE, Rule 2.11 (A)(1).

⁶⁰ *Id.*

knowledge were likewise grounds for disqualification in the 1972 and 1990 Model Codes, although the 1972 Code included no reference to disqualification for bias against a party's lawyer.⁶¹

*When the judge or relatives are parties, lawyers, witnesses or have an interest in the case.*⁶² This provision requires disqualification if the judge's spouse, domestic partner, or a relative to the third degree of relation is a party, lawyer, or material witness, or has more than a de minimis interest that could be substantially affected by the outcome of the proceeding. Apart from the inclusion of domestic partners in 2007, the 1972 and 1990s Codes included essentially the same terms.⁶³

*When the judge or immediate family members have an economic interest.*⁶⁴ This provision requires disqualification when the judge knows that he or his spouse, domestic partner, parent, child, or other family member living in the same household has an economic interest in the case or one of the parties. "Economic interest" is a defined term, and means "ownership of more than a de minimis legal or equitable interest." This provision was likewise a part of the 1972 and 1990 Model Codes.⁶⁵

*When parties or their lawyers contributed to the judge's election campaign.*⁶⁶
This provision requires disqualification when a judge has received aggregate

⁶¹ 1972 MODEL CODE, Canon 3C(1)(a); 1990 MODEL CODE, Canon 3E(1)(a).

⁶² 2007 MODEL CODE, Rule 2.11(A)(2).

⁶³ 1972 MODEL CODE, Canon 3C(1)(d); 1990 MODEL CODE, Canon 3E(1)(d). The provision was revised in 1990 to clarify that a de minimis interest should not disqualify a judge (the provision previously required disqualification only when there was a "substantial interest"). Though the 2007 Model Code does not specifically state in the provision that the interest must be more than de minimis, it defines the disqualifying "economic interest" as "a more than de minimis legal or economic interest." 2007 MODEL CODE, Terminology.

⁶⁴ 2007 MODEL CODE, Rule 2.11(A)(3).

⁶⁵ 1972 MODEL CODE, Canon 3C(1)(c). 1990 Model Code, Canon 3E(1)(c). Like the previous provision, this one was revised in 1990 to clarify that a substantial interest is the same as a de minimis interest, which is now incorporated into the definition of "economic interest."

⁶⁶ 2007 MODEL CODE, Rule 2.11(A)(4). The provision reads:

contributions to her election campaign from a party, lawyer, or law firm involved in the proceeding, in excess of an amount to be set by the jurisdiction. This provision was added to the Model Code by a 1999 amendment.⁶⁷

*When the judge made prior statements committing her to a result.*⁶⁸ This provision requires disqualification when the judge has made a public statement, either while a judge or judicial candidate, that commits or appears to commit her to reach a particular result in the proceeding. This ground for disqualification applies to extrajudicial speech, such as campaign promises, editorials, and the like, and makes an exception for statements made in court proceedings or as part of a decision or opinion. This provision, enacted in response to the *White* decision,⁶⁹ was added to the Model Code in 2003.⁷⁰

*When the judge was previously involved in the case.*⁷¹ In several provisions, the Model Code requires disqualification when the judge was previously involved in the matter as a lawyer,⁷² material witness,⁷³ or a judge in another court.⁷⁴ For judges formerly in private practice, it requires disqualification if another lawyer at the judge's

The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate* contributions* to the judge's campaign in an amount that [is greater than \$[insert amount] for an individual or \$[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].

⁶⁷ MODEL CODE OF JUDICIAL CONDUCT, Canon 3E(1)(e) (2004).

⁶⁸ 2007 MODEL CODE, Rule 2.11(A)(5).

⁶⁹ *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

⁷⁰ MODEL CODE OF JUDICIAL CONDUCT, Canon 3E(1)(f) (2004).

⁷¹ The Code prohibits full time judges from practicing law, 2007 MODEL CODE, Rule 3.10, and so the only circumstance in which a full time judge will encounter cases in which she served as lawyer to one of the parties is when she served in that capacity prior to becoming a judge. Part-time judges, however, may continue to practice law, *Id.*, Application III-V, and so it is possible for a part-time judge to find herself assigned a case in which he is a party's counsel of record.

⁷² 2007 MODEL CODE, Rule 2.11(A)(6)(a).

⁷³ *Id.*, Rule 2.11 (A)(6)(c).

⁷⁴ *Id.*, Rule 2.11 (A)(6)(d).

former firm was handling the matter while the judge was still in practice there.⁷⁵ And for judges formerly in government service, it requires disqualification if the judge, while a government employee, “participated personally and substantially” in the matter or expressed an opinion on the merits.⁷⁶ The 1972 and 1990 Model Code included comparable provisions,⁷⁷ but the 2007 Model Code contains new embellishments. The provision concerning government lawyers is new: the 1972 and 1990 Model Codes relegated the issue to commentary and stated that government lawyers do “not necessarily” have the same relationship to their agencies as private practitioners do to their firms, and therefore (implicitly) that former government lawyers need not disqualify themselves from all matters that were pending in their agencies while they were still there.⁷⁸ The 2007 explicitly states this difference in the treatment of government lawyers. Also new to the 2007 Model Code is the requirement that judges disqualify themselves when they presided over the case in another court.

Other provisions governing disqualification practice. Apart from rules specifying when disqualification is necessary, the Model Code includes two additional provisions worth noting. One requires judges to keep informed of all personal and fiduciary economic interests, as well as the interests of spouses or domestic partners and any minor children living with the judge.⁷⁹ This requirement, also in the 1972 and 1990 Model Codes,⁸⁰ helps ensure that a judge will be aware of economic conflicts, when they arise, that may cause the appearance of impropriety. The other provision concerns what the

⁷⁵ *Id.*, Rule 2.11 (A)(6)(a).

⁷⁶ *Id.*, Rule 2.11 (A)(6)(b).

⁷⁷ 1972 MODEL CODE, Canon 3C(1)(b); 1990 MODEL CODE, Canon 3E(1)(b).

⁷⁸ 2007 MODEL CODE, Reporter’s Explanation of Changes, Rule 2.11 ¶ 4.

⁷⁹ 2007 MODEL CODE, Rule 2.11 (B).

⁸⁰ 1972 MODEL CODE, Canon 3C(2); 1990 MODEL CODE, Canon 3E(2).

1972 and 1990 Model Codes referred to as “remittal of disqualification” (the 2007 Code deletes the caption) and permits agreements between the parties to waive disqualification of a judge for any reason except actual bias or personal knowledge of the facts.⁸¹ Waiver procedures were introduced in a more limited form in the 1972 Model Code,⁸² and liberalized to reach all grounds for disqualification save actual bias and personal knowledge in 1990.⁸³

B. State Disqualification Law

Ascertaining the state of disqualification law is complicated by the applicability of multiple sources of law. State codes of judicial conduct based upon the ABA’s Model Codes are a primary but not the sole source of authority. Other sources include state constitutions, statutes, and court rules. To acquire a more complete picture of disqualification law among the states, a fifty-state survey was undertaken to ascertain which states employ what disqualification provisions. Appendix B provides a comparison of disqualification law in all fifty states and at the federal level, in relation to the 2007 Model Code. It shows which rules have been incorporated by which jurisdiction, if there are any substantive changes to the provision, and the source of law for each jurisdiction’s provision. Appendix C provides citations for each state’s disqualification provisions that were used to create Appendix B, as well as a description of any provisions that vary substantively from the 2007 Model Code. In addition, this report relies on a survey of Chief Justices, recently completed by The National Center for

⁸¹ The rule provides for the waiver of all disqualifying interests except for those found at 2007 MODEL CODE, Rule 2.11(A)(1).

⁸² 1972 MODEL CODE, Canon 3D.

⁸³ 1990 MODEL CODE, Canon 3F.

State Courts, which sought information on disqualification procedures across the states.⁸⁴ As Appendix B reveals, most jurisdictions have substantially similar disqualification requirements, with only limited variations.

*The general or “catch-all” disqualification standard.*⁸⁵ The Model Code’s general provision, requiring disqualification if a judge’s “impartiality might reasonably be questioned,” has been adopted by every jurisdiction, with the possible exceptions of Montana and Michigan.⁸⁶ Language identical to the Model Code is employed in forty-five states. In the remaining three states that have differing language for the rule, the variation comes with a statutory definition of *who* is reasonably questioning the judge’s impartiality, an issue that is left for judicial resolution in most jurisdictions. California requires disqualification if the judge “believes there is a substantial doubt as to his or her capacity to be impartial” or if “a person aware of the facts might reasonably entertain a doubt” as to the judge’s partiality.⁸⁷ Mississippi requires that a judge’s “impartiality might reasonably be questioned by a reasonable person knowing all the circumstances,”⁸⁸ and Wisconsin employs a similar standard.⁸⁹

⁸⁴ State Court Recusal/Disqualification Survey (2007)(unpublished raw survey data, Nat’l Center for State Courts)(on file with project authors) [hereinafter NCSC Survey]. The survey consisted of questions concerning disqualification procedures, tracking, and judicial education on disqualification. The National Center for State Courts received responses from the chief justices’ offices in 32 states.

⁸⁵ 2007 MODEL CODE, Rule 2.11(A).

⁸⁶ Montana does, however, include a more general admonition that a judge “should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor.” MONTANA CANONS OF JUDICIAL ETHICS, Canon 13 (2007). Michigan’s provision states “a judge is disqualified when the judge cannot impartially hear a case.” MICH. COURT RULES §2.003.

⁸⁷ CAL. CIV. PROC. CODE § 170.1 (a)(6)(A) (West 2005). California’s statute specifically adds that there can be no disqualification of a judge for appearance of partiality based solely on the judge’s ethnicity. *Id.* § 170.2.

⁸⁸ MISS. CODE OF JUDICIAL CONDUCT, Canon 3E(1) (2007).

⁸⁹ WIS. SUP. CT. RULE 60.04(4) (“A judge shall recuse himself or herself in a proceeding when the facts and circumstances the judge knows or reasonably should know establish [a specifically mentioned grounds for disqualification, or when] well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge’s ability to be impartial.”)(2007).

*When the judge is biased or has personal knowledge.*⁹⁰ This provision exists in forty-eight states and at the federal level. The only outliers are Montana and Louisiana, which has no equivalent. Thirteen states, however, which follow the 1972 Code, still do not call for disqualification if a judge has bias concerning a party's lawyer.⁹¹

*When the judge or relatives are parties, lawyers, witnesses, or have an interest in the case.*⁹² All jurisdictions require disqualification when a judge, a judge's spouse, or someone who is closely related to either of them is involved in the proceeding as a party, as a fiduciary of a party, or as a lawyer.⁹³ Forty-seven jurisdictions require disqualification when a judge, spouse, or anyone with a third degree of relationship to either, is likely to be a material witness.⁹⁴

There are, however, some differences as to who is closely related enough to trigger automatic disqualification. The 2007 Model Code defines the class to include the judge, the judge's "spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person."⁹⁵ While most states likewise delineate the scope of disqualification with reference to the third degree of relations, some states draw the line in different places. New York, for example, considers relations to the sixth degree⁹⁶; while Oregon and Washington only

⁹⁰ 2007 MODEL CODE, Rule 2.11 (A)(1).

⁹¹ 1972 MODEL CODE, Canon 3(C)(1)(a). Note that the 1990 Model Code did include in the appearance of impropriety considerations any bias concerning a party's lawyer, at Canon 3E(1)(a). The states that have provisions consistent with the 1972 Model Code are: Alabama, Alaska, Colorado, Connecticut, Delaware, Iowa, Massachusetts, Mississippi, New York, North Carolina, Oregon, Pennsylvania, and Washington. See Appendix C for specific citations.

⁹² 2007 MODEL CODE, Rule 2.11(A)(2).

⁹³ *Id.*, Rule 2.11(A)(2)(a-b).

⁹⁴ *Id.*, Rule 2.11(A)(2)(d). The jurisdictions that lack this provision are: Alabama, Louisiana, and Montana.

⁹⁵ 2007 MODEL CODE, Rule 2.11(A)(1). According to the 1972 Model Code, "the third degree of relationship test would, for example, disqualify the judge if his or his spouse's father, grandfather, uncle, brother, or niece's husband were a party or lawyer in the proceeding, but would not disqualify him if a cousin were a party or a lawyer to the proceeding." Commentary. 1972 MODEL CODE, Canon 3(C)(3).

⁹⁶ N.Y. JUD. LAW §14 (McKinney 2001), N.Y. CODE OF JUDICIAL CONDUCT, Canon 3E(1)(d) (2007).

apply the provision to spouses and family members living with the judge.⁹⁷ And California is the only state to date that extends the provision to registered domestic partners⁹⁸ (although it bears emphasis that the Model Code’s reference to domestic partners was newly introduced in 2007).

As to the requirement that judges disqualify themselves if they, their spouses or relatives, or anyone with a third degree of relation have more than a de minimis interest that could be substantially affected by the proceeding, only California, Louisiana, and Washington have no comparable clause.⁹⁹ In Montana and Texas, the clause applies only to the interests of the judge and not spouses or relatives.¹⁰⁰ Only New Jersey and federal jurisdictions do not provide a de minimis exception.¹⁰¹

*When the judge or immediate family members have an economic interest.*¹⁰² All but two states, Georgia and Louisiana, require disqualification if a judge knows that he, or a person in his household, has an economic interest in the proceeding.¹⁰³ Although the terminology selection defines “economic interest” to exclude “de minimis” interests, and further defines “de minimis interests as “an insignificant interest that could not raise a reasonable question regarding the judge’s impartiality,” California is the only state that

⁹⁷ ORE. CODE OF JUDICIAL CONDUCT, Judicial Rule 2-106 (2007). WASH. CODE OF JUDICIAL CONDUCT, Canon 3E(1)(d) (2007).

⁹⁸ CAL. CODE OF JUDICIAL CONDUCT, Canon 3E(5)(e).

⁹⁹ 2007 MODEL CODE, Rule 2.11(A)(2)(c). Note, however, that several states consider different degrees of relationships to be disqualifying. See discussion supra at page _____.

¹⁰⁰ MONT. CODE ANN. § 3-1-803(1). TEX. CIV. PRO. CODE. ANN. § 18(a).

¹⁰¹ N.J. CODE OF JUDICIAL CONDUCT, Canon 3C(1)(d)(iii).

¹⁰² 2007 MODEL CODE, Rule 2.11(A)(3).

¹⁰³ 2007 MODEL CODE, Rule 2.11 (A)(3). While this rule is consistent across 48 states, most jurisdictions maintain language from previous versions of the Model Code. However, there was no substantive change in this provision from 1972 to 2007.

provides a specific, statutory definition of a de minimis economic interest in a party, which it considers to be anything less than \$1500 or a 1% ownership.¹⁰⁴

*When parties or their lawyers contributed to the judge's election campaign.*¹⁰⁵

Only two states have adopted provisions comparable to this one, adopted by the ABA in 1999, which requires a judge to disqualify himself if he received campaign contributions over a designated amount.¹⁰⁶ Mississippi provides for the disqualification of judges when a major campaign donor is a party.¹⁰⁷ Alabama has created a contribution reporting system and “require[s] the recusal of a justice or judge from hearing a case in which there may be an appearance of impropriety because as a candidate the justice or judge received a substantial contribution from a party to the case, including attorneys for the party.”¹⁰⁸ However, there is some question as to the enforceability of this statute.¹⁰⁹

*When the judge made prior statements committing her to a result.*¹¹⁰ This

provision, adopted by the ABA in 2004, requires recusal when a judge makes public

¹⁰⁴ CAL. CIV. PROC. CODE, § 170.5(b).

¹⁰⁵ 2007 MODEL CODE, Rule 2.11(A)(4). The provision reads:

The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate* contributions* to the judge's campaign in an amount that [is greater than \$[insert amount] for an individual or \$[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].

¹⁰⁶ 2007 MODEL CODE, Rule 2.11(A)(4).

¹⁰⁷ MISS. CODE OF JUDICIAL CONDUCT, Cannon 3E(2) (“A party may file a motion to recuse a judge based on the fact that an opposing party or counsel of record for that party is a major donor to the election campaign of such judge. Such motions will be filed, considered and subject to appellate review as provided for other motions for recusal.”).

¹⁰⁸ ALA. CODE §§ 12-24-1, 2. The provision requires all judges to provide the Secretary of State with the names of campaign contributors and the amounts of each donation, and it requires lawyers in appellate cases to certify any contributions they made to the assigned judge's campaign. Parties have a limited time in which they may file disqualification motions if the judge received a threshold level of contributions.

¹⁰⁹ Despite the fact that this statute has existed since 1996, the Supreme Court of Alabama has not adopted rules or procedures to implement it. *See, e.g.* Brackin v. Trimmier Law Firm, 897 So.2d 207, 233-234 (Ala., 2004).

¹¹⁰ 2007 MODEL CODE, Rule 2.11(A)(5).

statements which commit or appear to commit the judge to reach a particular result in a case.¹¹¹ To date, the provision has been adopted in eleven jurisdictions.¹¹²

*When the judge was previously involved in the case.*¹¹³ All jurisdictions require disqualification if a judge served as lawyer for a party, or was associated with a lawyer who represented a party in the matter in controversy.¹¹⁴ There are some limited variations. For example, several states permit, after a certain number of years, judges to hear cases when they were associated with a lawyer who participated substantially in the controversy.¹¹⁵ Most jurisdictions permit a judge to hear a case in which he formerly served as a lawyer for one of the parties but on a different issue. Illinois permits a judge to hear a case involving a party he formerly represented only if seven years have passed since the termination of the relationship.¹¹⁶ California is unique in requiring disqualification if the judge was ever associated with the lawyer for one of the parties in any proceeding.¹¹⁷

As to the requirement that former government employees disqualify themselves if they participated substantially in a matter now before the court,¹¹⁸ only six jurisdictions

¹¹¹ 2007 MODEL CODE, Rule 2.11(A)(5).

¹¹² Arizona, Florida, Iowa, Maryland, Minnesota, Nevada, New Hampshire, New Mexico, Oklahoma, South Dakota, and Wisconsin. These states have all adopted language consistent with the 1999 Amendment to the Model Code, rather than the language of the 2007 Model Code, though there were no substantive changes when this provision was redrafted. See Appendix C for specific citations.

¹¹³ The Code prohibits full time judges from practicing law, 2007 MODEL CODE, Rule 3.10, and so the only circumstance in which a full time judge will encounter cases in which she served as lawyer to one of the parties is when she served in that capacity prior to becoming a judge. Part-time judges, however, may continue to practice law, 2007 MODEL CODE, Application III-V, and so it is possible for a part-time judge to find herself assigned a case in which he is a party's counsel of record.

¹¹⁴ 2007 MODEL CODE, Rule 2.11(A)(6)(a).

¹¹⁵ See, e.g. ARIZ. CODE OF JUDICIAL CONDUCT, Canon 3E (requiring disqualification only if a judge was associated with a lawyer in the proceeding within the previous seven years). Other states with similar provisions are Delaware, Illinois, Michigan, and Nebraska. See Appendix C for specific citations.

¹¹⁶ ILL. SUP. CT. RULE 63, Canon C(1)(c).

¹¹⁷ CAL. CIV. PROC. CODE § 170.1(a)(2)(A).

¹¹⁸ 2007 MODEL CODE, Rule 2.11(A)(6)(b).

have a comparable provision in black letter law.¹¹⁹ It bears note however, that this provision was introduced to the Model Code in 2007.¹²⁰ An additional twenty-six states have adopted Comments comparable to that in the previous versions of the Model Code.¹²¹

All but one jurisdiction has adopted the Model Code's rule requiring disqualification when a judge is likely to be a material witness in the proceeding.¹²² Only Montana has no such provision. Fifteen states also require disqualification if a lawyer who was formerly associated with the judge is likely to be a material witness in the case.¹²³

Finally, eighteen jurisdictions¹²⁴ require disqualification when a judge has presided over the case previously in another court.¹²⁵ A handful of these states require a judge to disqualify himself if his spouse or anyone with a third degree of relation to either of them presided over the case in another court.¹²⁶

Other provisions governing disqualification practice. Forty-five jurisdictions require that judges remain aware of their economic interests and of the economic interests

¹¹⁹ Alaska, California, Delaware, Georgia, Kentucky, and Texas. See Appendix C for specific citations.

¹²⁰ In the 1990 Model Code, commentary notes that a government agency lawyer “does not ordinarily have an association with other lawyers” in his agency that is akin to that shared by lawyers within private firms, for which reason the bar on a judge hearing any matter that was being handled by his firm while he was in private practice there does not require disqualification of government lawyers except when “the judge’s impartiality might reasonably be questioned because of such association.” 1990 MODEL CODE, Canon 3E(1)(b) Commentary.

¹²¹ See discussion *supra*, page ____.

¹²² 2007 MODEL CODE, Rule 2.11 (A)(6)(c).

¹²³ Connecticut, Delaware, Iowa, Kentucky, Massachusetts, Minnesota, Mississippi, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Texas, and Utah. See Appendix C for specific citations.

¹²⁴ Alabama, Arkansas, California, Florida, Georgia, Hawaii, Indiana, Louisiana, Montana, New Hampshire, New Mexico, Ohio, Oregon, South Carolina, Tennessee, Virginia, Washington, and Wisconsin.

¹²⁵ 2007 MODEL CODE, Rule 2.11(A)(6)(d). See Appendix C for specific citations.

¹²⁶ See e.g. FLA. CODE OF JUDICIAL CONDUCT, Canon 3E(1)(e).

of those in the same household.¹²⁷ When it comes to permitting parties to waive a disqualification, forty-four states have adopted provisions permitting parties to agree to waive any disqualifying interests of a judge except bias. Five states, however, permit the waiver of any disqualification by the parties,¹²⁸ and seven states prohibit waiver of disqualification for additional reasons.¹²⁹ Federal judges may accept waivers of disqualification from parties only in cases where their impartiality might reasonably be questioned, and not for any of the specifically enumerated conflicts.¹³⁰ New Jersey expressly does not permit any waiver of disqualification,¹³¹ and five states do not have any black letter provisions on waiver of disqualification.¹³²

C. State Disqualification Procedures

While the substantive rules for disqualification are fairly consistent across jurisdictions, the process for deciding disqualification motions filed by litigants varies more widely. In every jurisdiction, there are two ways that a judge may be removed from a case to which she has been assigned: on her own initiative, or upon the motion of a party. If litigants file the request, they must follow the jurisdiction's requirements for timeliness and specificity, which vary greatly between jurisdictions.

Most jurisdictions only provide for disqualification for cause, and require parties to make a showing of the grounds for disqualification. Nineteen states, however, have peremptory challenges for judges, enabling litigants to disqualify judges without a

¹²⁷ 2007 MODEL CODE, Rule 2.11(B). The jurisdictions that lack this provision are: Louisiana, Maine, Michigan, Mississippi, and Montana. See Appendix C for specific citations.

¹²⁸ Alaska, Arizona, Colorado, North Carolina, and Texas. See Appendix C for specific citations.

¹²⁹ Alabama, California, Massachusetts, New York, Ohio, Oregon, and Washington. See Appendix C for specific citations.

¹³⁰ 28 U.S.C. § 455.

¹³¹ N.J. CODE OF JUDICIAL CONDUCT, Canon 3D (“A judge disqualified by the terms of this Canon may not avoid disqualification by disclosing on the record the disqualifying interest and securing the consent of the parties.”).

¹³² Indiana, Louisiana, Montana, Pennsylvania, and West Virginia. See Appendix C for specific citations.

showing of cause.¹³³ When available, peremptory challenges are typically limited to one per party, with a maximum of two per litigation.¹³⁴ Furthermore, most states only permit parties to remove a judge without a showing of cause before the judge has ruled on any contested matter.¹³⁵

Most of the states that employ peremptory challenges limit their availability to trial judges, presumably because the supply of appellate judges is more limited.¹³⁶ Other states further restrict the use of peremptory challenges in specific types of courts or for classes of judges. For example, Idaho permits peremptory challenges in all cases except for those in drug courts and mental health cases.¹³⁷ By contrast, Texas permits parties a statutory “strike” only for visiting district judges and appellate judges sitting by assignment.¹³⁸ Furthermore, a handful of states further limit peremptory challenges to specific kinds of litigation. For example, Nevada only permits peremptory challenges in civil cases.¹³⁹

There are three general approaches to the review of peremptory challenges in the states that permit them. First, there are states such as Indiana¹⁴⁰ and Missouri¹⁴¹, which have a pure peremptory system—a party need simply file a motion to disqualify a judge for bias for the judge to be disqualified. The motions are not evaluated, and there is no

¹³³ States that permit peremptory challenges of at least some judges are: Alaska, Arizona, California, Hawaii, Idaho, Illinois, Indiana, Minnesota, Missouri, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Washington, Wisconsin, and Wyoming. See Appendix C for specific citations.

¹³⁴ See, e.g. ALASKA STAT. § 22.20.022; IDAHO R. CIV. PRO., Rule 40(d)(1).

¹³⁵ RICHARD E. FLAMM, *Judicial Disqualification: Recusal and Disqualification of Judges* § 26.6 at 776 (2d ed. 2007).

¹³⁶ See, e.g. 735 ILL. COMP. STAT. 5/2-1001(a)(2); WYO. RULES CIV. PRO., Rule 40.1(a).

¹³⁷ IDAHO CRIM. PRO., Rule 25.

¹³⁸ TEX. GOV'T CODE, Rule §74.053 (trial judges); TEX. GOV'T CODE, Rule §75.551 (appellate judges).

¹³⁹ NEV. SUP. CT. RULE 48.1.

¹⁴⁰ IND. CODE § 35-36-5.

¹⁴¹ MO. REV. STAT. § 545.660.

minimum legal sufficiency required. Second, there are states such as South Dakota¹⁴² and Alaska¹⁴³, which require parties to submit signed affidavits swearing to the belief of prejudice, but no other showing is required. Finally, states such as Hawaii¹⁴⁴ require that parties allege sufficient grounds for prejudice (but need not show that the state grounds are true) before disqualifying the judge.

In the majority of states that do not employ peremptory challenges, upon reviewing the motion to disqualify, if the judge concludes that disqualification is required, the judge may dispense with a hearing on the motion and withdraw. If the judge does not withdraw at that juncture, jurisdictions handle the review of motions to disqualify in three different ways.¹⁴⁵

The most common approach is for the target judge review the motion on the merits.¹⁴⁶ Alternatively, several states require that the motion be decided on its merits by a different judge.¹⁴⁷ A blended approach, adopted by a significant number of states and at the federal level, requires the subject judge to review the motion first for legal sufficiency (i.e., to assess whether the allegations in the motion, if true, would necessitate disqualification), but assigns another judge to rule on the merits of the motion (i.e., to ascertain whether the allegations are true).¹⁴⁸

¹⁴² S.D. CODIFIED LAWS § 15-12-21.

¹⁴³ ALASKA STAT. § 22.20.022.

¹⁴⁴ HAW. REV. STAT. § 601-7.

¹⁴⁵ See discussion, *infra* p. __.

¹⁴⁶ Alabama, Arkansas, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New York, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Washington. NCSC Survey, *supra* note 84.

¹⁴⁷ Alaska, Arizona, North Dakota, Ohio, Oregon, Utah, Vermont, and Virginia. NCSC Survey, *supra* note 84.

¹⁴⁸ California, Connecticut, Georgia, Kansas, Louisiana, Montana, Nevada, North Carolina, Texas, Wisconsin, Wyoming, and West Virginia. See Appendix C for specific citations.

While these are the most common variations, there are others as well. For example, in Colorado and Minnesota, disqualification motions in criminal cases are heard by the same judge, but in civil cases are heard by a different judge.¹⁴⁹ South Dakota has a two step disqualification process, in which a litigant first has a hearing with the target judge, who decides if there is cause for disqualification.¹⁵⁰ If the request is denied, the litigant then files a motion for disqualification, which is heard by a separate judge. New Jersey permits the target judge to decide whether to hear the motion based on its merits or to appoint three disinterested persons to hear the motion.¹⁵¹

No matter who is hearing the motion, there is the concern that motions to disqualify will be filed to delay the proceedings, to disgrace the judge, or for other strategic reasons. To address this concern, Montana specifically permits sanctions to be levied by the judge against a party who brings an improper motion for disqualification.¹⁵² While no other state specifically provides for sanctions for improper disqualification motions, frivolous motions generally (presumably including motions to disqualify) may be sanctionable under other court rules. Only Nevada specifically bans sanctions for judicial disqualification motions.¹⁵³

Judges who hear disqualification motions, whether for themselves or for another judge, may or may not file an opinion about whether disqualification is warranted. In most states, there is no requirement that a judge issue a memo, opinion or statement about why he is withdrawing or refusing to withdraw in response to a disqualification motion.

¹⁴⁹ COLO. RULES CIV. PROC., RULE 97; COLO. RULES CRIM. PROC., RULE 21(B); MINN. RULES CIV. PROC., § 63.02, 03; *and* MINN. RULES CRIM. PROC., § 26.03, SUBDIV. 13(3).

¹⁵⁰ S.D. CODIFIED LAWS, § 15-12-21.1.

¹⁵¹ N. J. STAT. ANN., § 2A:15-50.

¹⁵² MONT. CODE ANN. § 3-1-803(1)(d).

¹⁵³ NEV. REV. STAT. § 1.225(6).

At least six states require that judges explain their decisions, but in many states with no such requirement, judges nonetheless often issue some sort of statement explaining their rulings.¹⁵⁴

Information concerning when judges within a jurisdiction do and do not disqualify themselves is not typically gathered. Only four jurisdictions reported having centralized systems for collecting any information on disqualification.¹⁵⁵ Furthermore, these jurisdictions collect only statistical data; they do not track the reasons for disqualifications. Alaska, which has the most comprehensive collection system, employs a computerized case management system—*Court View*—to track the number of cases that are reassigned because of recusal, including those cases reassigned by peremptory challenge. Minnesota employs a similar case management system that records any recusal, notice to remove, or request to remove for bias or prejudice. In Vermont, the Administrative Judge for Trial Courts collects and tracks statistical information on disqualifications. North Dakota takes a much more limited approach, collecting information on disqualification only when all the judges in a district are disqualified from a case.

If a litigant is unsatisfied with a judge's decision not to disqualify, he can appeal. The standard of review applied by the appellate court is most commonly an abuse of discretion standard. One commentator reports that this is the law in twenty eight states and in every federal circuit.¹⁵⁶ In jurisdictions that apply this standard, it is typically

¹⁵⁴ NCSC Survey, *supra* note 84. The six states are: Delaware, Illinois, Iowa, Montana, Vermont, and Wyoming.

¹⁵⁵ NCSC Survey, *supra* note 84.

¹⁵⁶ FLAMM, *supra* note 134 at §33.1. The states that apply the abuse of discretion standard are Alaska, Arizona, Arkansas, California, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Vermont, Virginia, and Washington.

applied in both civil and criminal proceedings. Other states employ a comparably stringent “clearly erroneous” standard or its equivalent.¹⁵⁷ Four states have adopted a de novo standard of review.¹⁵⁸

III. Recent Problems

Every year, a small number of judges violate clear and specific disqualification rules, e.g., by presiding over cases in which close relatives are parties, lawyers or witnesses; by manifesting a palpable bias against one of the litigants; or by previously (or in the case of part-time judges, simultaneously) serving as counsel for one of the parties in the matter now before the court.¹⁵⁹ Often, rule violations are the product of honest, if questionable judgment, such as when a judge concludes that the exigencies of a particular case justify him ruling on a matter involving a relative, or when a judge declines to step aside because he does not recognize his own bias. Occasionally, violations are a result of deliberate indifference to disqualification standards. Either way, however, these cases illustrate the rules operating as they should: to correct, and when necessary, discipline judges who do not comply with disqualification requirements.

More difficult to evaluate are matters falling outside the scope of clear disqualification rules. Often, judges are guided only by a general directive to step aside if their “impartiality might reasonably be questioned.” Sometimes, judges are guided by more specific disqualification rules, but the application of those rules ultimately circle

¹⁵⁷ *Id.* These jurisdictions are Alabama, Connecticut, District of Columbia, and Kentucky.

¹⁵⁸ *Id.* These jurisdictions are Colorado, Florida, Minnesota and Wisconsin. However, Minnesota’s precedent is in tension. *Compare* Hooper v. State, 680 N.W. 2d 89 (Minn. 2004) (applying abuse of discretion standard); *State v. Dorsey*, 701 N.W.2d 238 (Minn. 2005) (holding that whether a judge has violated the Code of Conduct “is a question of law we review de novo”).

¹⁵⁹ For a summary of recent cases, see ALFINI, SHAMAN, LUBET & GEYH, *supra* note 33 at Chapter 4 (4th Ed. 2007).

back to an interpretation of the more general directive to disqualify when impartiality might reasonably be questioned. For example, Rule 2.11(A)(3) tells judges to disqualify themselves if they or their family members have “an economic interest in the subject matter in controversy,” and Rule 2.11(A)(2)(c) tells judges to disqualify themselves if they or their family members have any other “interest that could be substantially affected by the proceeding.” In both cases, however, the rules exempt “de minimis” interest,¹⁶⁰ which is defined to mean “an insignificant interest that could not raise a reasonable question regarding the judge’s impartiality.” In other words, close cases involving interests that may or may not be disqualifying turn once again on whether the judge’s impartiality might reasonably be questioned.

This Report explores four problem areas, three specific and one general. The three specific problem areas are not exhaustive of the unsettled issues judges confront when parsing disqualification rules. Rather, they are illustrative of the of disqualification questions that judges must resolve with reference to non-specific, broadly worded standards. Those three specific problem areas in turn, implicate a fourth general problem area concerning the procedures courts employ to resolve disqualification questions.

- The first specific problem area concerns judges who preside over cases in which campaign contributors appear as parties or counsel. Although the ABA amended the Model Code in 1999 to include a more specific disqualification rule for campaign contributions, to date only two jurisdictions employ such a provision.

- The second specific problem area concerns judges who made prior statements that committed or appeared to commit them to reach a particular result in a matter now

¹⁶⁰ Rule 2.11(A)(c) exempts “de minimis” interests in the rule itself, while Rule 2.11(A)(3) identifies “economic interest” as a defined time, in which the definition exempts “de minimis” interests.

before the court. In 2004, the ABA amended its Model Code of Judicial Conduct to include a rule requiring disqualification in such instances, but to date only eleven jurisdictions have adopted it. Cases in this second “problem area” are few, but are likely to become more common in the aftermath of the Supreme Court’s decision in *Republican Party of Minnesota v. White*.¹⁶¹

- A third specific problem area concerns relatives and friends: relatives who are employed by parties or their lawyers, and friends or former colleagues who appear before the judge as counsel, parties or witnesses. Here, judges must assess the need for disqualification without the benefit of a specific rule, which has given rise to recurrent problems in the Supreme Court and lower courts.

- A fourth, more general problem area, arises out of a discussion of the preceding three. The breadth of disqualification standards at issue in these three (and other) specific problem areas affords judges considerable discretion in evaluating the need to disqualify. That discretion can be constrained (or not) by the procedures they employ to answer disqualification questions, and it is disqualification procedures that are the focus of this fourth problem area.

A. Campaign Contributions

In 2000, judicial candidates in all supreme court races raised \$45 million¹⁶²; in 2002, they raised \$29 million¹⁶³; and in 2004, they raised \$42 million.¹⁶⁴ When “outlier” races in Alabama, Illinois, and West Virginia are excluded, spending in the fourteen remaining states that held supreme court elections increased by 167% between 2000 and

¹⁶¹ 536 U.S. 765 (2002).

¹⁶² Common Cause of Ohio, *The Politicization of the Judiciary* (2005).

¹⁶³ Justice at Stake Campaign, *2004 State Supreme Court Election Overview*, Mar. 9, 2005.

¹⁶⁴ *Id.*

2002, and another 163% between 2002 and 2004.¹⁶⁵ Between 2004 and 2006, average spending on advertising in supreme court races increased from \$1.5 million to \$1.6 million.¹⁶⁶

The focus of media attention has been on supreme court races, and data on lower courts generally and trial courts in particular, is not widely available. Anecdotally, however, some lower courts have experienced dramatic increases in campaign spending. In California, aggregate spending in trial court races was \$7.2 million in 2002, up from \$4.1 million and \$2.9 million in 1996 and 1998.¹⁶⁷ In 2002, a survey of over 2400 judges found that 45% of lower court judges felt under pressure to raise money for their campaigns during election years, as compared to 36% of high court judges.¹⁶⁸ In the 2005-06 election cycle, trial lawyers and corporate interests in a southern Illinois race combined to give more than \$3.3 million to two candidates for a seat on the state court of appeals, quadrupling the state record. Madison County, Illinois witnessed a \$500,000 trial court campaign, and a Missouri trial court judge was denied retention after an out-of-state group poured \$175,000 into a campaign to defeat him.

The recent influx of money into judicial campaigns is attributable in large part to increased interest group involvement, in the form of direct contributions to judicial candidates and independently organized campaigns in support of or opposition to the candidates. Most interest group spending has been focused on a group of so-called “tort reform” issues that concern judicial rulings on punitive damages, products liability, medical malpractice, and insurance liability. As one commentator explains, “the tort

¹⁶⁵ Rachel Paine Caulfield, *The Foreboding National Trends in Judicial Elections 2* (June 24, 2005).

¹⁶⁶ JAMES SAMPLE, LAUREN JONES & RACHEL WEISS, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2006*, 3 (2007).

¹⁶⁷ “Judicial Elections: Change and Challenge,” Paper delivered at California Judicial Council (June 2005).

¹⁶⁸ Discussed in *JUSTICE IN JEOPARDY*, *supra* note 57 at 38.

wars have pitted the plaintiffs' bar and labor unions, aligned with Democratic candidates, against the defense bar and business, aligned with Republicans."¹⁶⁹ Thus, in 2006, the two highest sources of contributions were business interests and lawyers, with 44% of all funds donated by the former and 21% by the latter.¹⁷⁰ Outside of groups devoted to the tort reform issue, there have been other interest groups that have actively sought to defeat incumbents (sometimes successfully) because of an opinion a judge wrote or joined concerning such issues as capital punishment, criminal sentencing, abortion, gay rights, education funding, and water rights.¹⁷¹

With interest groups pouring money into judicial races for the apparent purpose of influencing the outcomes of judicial elections, it is unsurprising that the public thinks that judges are influenced by the campaign contributions they receive. In Texas, a 1998 survey sponsored by the state Supreme Court found that 83% of Texas adults thought that money had an impact on judicial decisions.¹⁷² In Ohio, a 1995 survey reported that nine out of ten respondents believed that campaign contributions influenced judicial decisions.¹⁷³ And in Pennsylvania, a 1998 poll sponsored by a special commission appointed by the Pennsylvania Supreme Court, found that nine out of ten voters believed that judicial decisions were influenced by large campaign contributions.¹⁷⁴

In 1998, the ABA's Task Force on Lawyers' Political Contributions concluded that:

¹⁶⁹ Deborah Goldberg, *Interest Group Participation in Judicial Elections*, in RUNNING FOR JUDGE, *supra* note 161 at 73, 81-82; *see also*, Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OH. ST. L. J. 43 (2002).

¹⁷⁰ James Sample, Lauren Jones & Rachel Weiss, *supra* note 166 at 18.

¹⁷¹ Charles Gardner Geyh, *supra* note 169 at 49-50.

¹⁷² Sup. Ct. of Tex., State Bar of Tex. & Tex. Office of Ct. Admin., *The Courts and the Legal Profession in Texas - The Insider's Perspective* (May 1999).

¹⁷³ T.C. Brown, *Majority of Court Rulings Favor Campaign Donors*, CLEVELAND PLAIN DEALER, Feb. 15, 2000 1A.

¹⁷⁴ Executive Summary, ABA TASK FORCE REPORT ON JUDICIAL CAMPAIGN FINANCE, Nov., 1998 at 2.

[I]t is imperative to adopt a system for recusal in connection with campaign contributions. The bench and bar face unblinkable evidence that campaign contributions severely erode public confidence in courts. To ignore this challenge is, we submit, to say that public confidence in courts does not matter.¹⁷⁵

In 1999, the ABA revised the disqualification provisions of its 1990 Model Code of Judicial Conduct to require automatic disqualification whenever a lawyer, law firm or party who appears before a judge made a contribution to that judge's campaign in excess of a specified amount. The rule was subsequently retained in the 2007 Model Code.¹⁷⁶

In the eight years since its promulgation, no state has adopted the ABA Model Code's version of an automatic disqualification provision for campaign contributions, and only two states include a comparable version in their code. As a consequence, when a party seeks a judge's disqualification because the judge has received campaign contributions from a party or lawyer, the issue turns on a more general inquiry into whether the judge's impartiality "might reasonably be questioned." And to date, motions to disqualify judges on such grounds "hardly ever succeed."¹⁷⁷

There are several possible explanations for why judges may be reluctant to disqualify themselves from hearing cases in which lawyers or parties have made sizable contributions to their campaigns. First, and perhaps foremost, judges take an oath to be impartial, are committed to honoring that oath, and may truly believe that they can decide cases fairly, without regard to whether litigants or their counsel contributed to their campaigns. Second, judges often suspect that a party who seeks disqualification is doing

¹⁷⁵ LAWYERS' POLITICAL CONTRIBUTIONS, *supra* note 167 at 37.

¹⁷⁶ 2007 MODEL CODE, Rule 2.11.

¹⁷⁷ John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69, 87 (2003). For a discussion of cases rejecting the need for judges to disqualify themselves from cases in which lawyer-contributors appear before them as counsel, *see* FLAMM, *supra* note 134 at §9.4 (The argument for disqualification "has repeatedly been rejected by appellate courts in a number of states where judges are elected.").

so for strategic reasons—because the judge is unlikely to share the party’s view on the merits—and not because the party truly fears that the campaign contributions the judge has received may compromise his impartiality. Third, although judges are mindful of the appearance problem created when contributors appear before them as parties or counsel, they may worry that disqualifying themselves would only make matters worse, by seeming to validate the public suspicion that judges are beholden to their benefactors, and by encouraging nefarious parties and lawyers to force the disqualification of judges whose views are unsympathetic to theirs, by contributing to their campaigns. Fourth, judges regard campaign fundraising as an unpleasant necessity, and may not look favorably on a rule that says to avoid disqualification (and still meet their funding goals) judges must do even more fundraising by soliciting more donors for smaller amounts.

In short, there is an impasse. The press and public are skeptical of judges who rule in cases of interest to their contributors. Judges are reticent about withdrawing from such cases. And so, when judges refuse to step aside when their contributors come before them, they have been excoriated by the press in a series of episodes:

- In 2002, a West Virginia trial court entered judgment on a \$50 million jury verdict against Massey Energy Company.¹⁷⁸ In 2004, Massey Chairman, CEO and President Don Blankenship spent \$3.5 million to support the campaign of conservative supreme court candidate Brent Benjamin in his successful bid to unseat the more liberal incumbent, Chief Justice Warren McGraw. A 2004 political cartoon published in a West Virginia newspaper depicted a parcel service employee announcing a “special delivery”

¹⁷⁸ For a discussion of the facts presented here, see Lawrence Messina, *Court Overturns Judgment Against Massey*, CHARLESTON GAZETTE, Nov. 22, 2007, at 13A; Jake Stump, *Plaintiffs Fight to get Benjamin off Appeal; Justice has Refused to Recuse Himself from Case Involving Massey Energy*, CHARLESTON DAILY MAIL, Aug. 21, 2006, at 1A.

as he wheeled Justice Benjamin into the Supreme Court in a box labeled “\$3.5 million courtesy of Massey Coal and special interests.” Benjamin subsequently declined to disqualify himself from hearing the Massey Energy appeal, characterizing the request as the product of “surmise, conjecture and political rhetoric.” In 2007, in a 3-2 decision with Benjamin in the majority, the West Virginia Supreme Court overturned the verdict against Massey (which, with the accumulation of post-judgment interest had ballooned to over \$73 million). In an angry dissent, Justice Larry Starcher wrote, “I am one judge voting on this case who can say I owe nothing to Mr. Blankenship one way or another,” adding that “fortunately, the public can see through this kind of transparent foolishness.” To complicate matters further, Starcher had previously declined to disqualify himself from hearing the case despite prior public statements calling Blankenship “stupid” and “a clown,” which prompted Massey to file suit in federal court challenging the West Virginia Supreme Court’s disqualification procedures.

- In 2003, the Illinois Supreme Court heard oral arguments in an appeal from a \$1 billion judgment against State Farm Insurance, approximately half of which was attributable to damages for breach of contract.¹⁷⁹ In the 2004 race for an open seat on the supreme court, the candidates raised a total of \$9.3 million (over and above sizable expenditures in independent campaigns). Democrats and trial lawyers supported appellate Judge Gordon Maag, while Republicans and business groups supported Circuit Judge Lloyd Karmeier, who aligned himself with the interests of insurers by emphasizing the need to “fix” the “medical malpractice crisis” created by “phony lawsuits.” Karmeier prevailed. Despite having received more than \$350,000 in direct contributions from State

¹⁷⁹ For a summary of the facts described in this case, see Deborah Goldberg, James Sample, & David Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L. J. 503, 509-12 (2007).

Farm employees and others representing or otherwise assisting the company in its case, Justice Karmeier declined to disqualify himself from participating in the State Farm appeal. In 2005, a closely divided court overturned the damages assessed against State Farm for breach of contract, with Justice Karmeier casting the deciding vote. The U.S. Supreme Court subsequently declined to review the case.

- In 2006, the New York Times published an article on the Ohio courts, that led off with a report on the reelection of Justice Terrence O'Donnell, who accepted “thousands of dollars” from the political action committees of companies that were defendants in two suits then pending before the court.¹⁸⁰ “Weeks after winning his race Justice O'Donnell joined majorities that handed the companies significant victories,” the article noted, adding that Justice O'Donnell's conduct was unexceptional, because in one of the two cases all four justices in the majority had taken contributions from affiliates of the defendant-companies, while all three dissenters had received contributions from lawyers for the plaintiffs. Overall, the Times reported that “in the 215 cases with the most direct potential conflicts of interest” arising from campaign contributions, “justices recused themselves just nine times.”

- Similar cases have recently received press attention in Alabama,¹⁸¹ Florida,¹⁸² Kansas,¹⁸³ Nevada,¹⁸⁴ Texas,¹⁸⁵ and Wisconsin.¹⁸⁶

¹⁸⁰ Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, § 1, available at 2006 WLNR 16983797.

¹⁸¹ Mike Linn, *Group Wants Cabb off Case*, MONTGOMERY ADVERTISER (Ala.), Jan. 24, 2007 (reporting on a pro-business group's claim that the Alabama Chief Justice “is not fit in this case to dispense justice” because she accepted contributions from a lawyer in the case).

¹⁸² Elaine Silvestrini, *Public Thinks: Campaign Cash Sways Judges*, TAMPA TRIBUNE (Fla.), Nov. 4, 2006 (reporting on judicial campaign contributions from lawyers and the public perception that they influence judges).

¹⁸³ Editorial, *Politics, Justice*, LAWRENCE JOURNAL-WORLD, Mar. 29, 2007 (highlighting perceive appearance problem when judge dismissed criminal charges against an abortion provider after accepting contributions from the doctor's lawyers).

B. Pledges, Promises, Commitments and Apparent Commitments on Issues that Come Before the Court.

In 2002, the Supreme Court decided *Republican Party of Minnesota v. White*.¹⁸⁷ In *White*, the Court invalidated the so-called “announce clause” in the Minnesota Code of Judicial Conduct, which it construed to bar a judge from announcing “his views on any specific, nonfanciful legal question within the province of the court for which he is running.” The Court ruled that the announce clause imposed a content-based restriction on judicial speech that was subject to strict constitutional scrutiny and could survive only if it was “narrowly tailored” to serve a “compelling government interest.” While the Court appears to have acknowledged the possibility that the state had a compelling interest in preserving an open-minded and, hence, impartial judiciary, the Court did “not believe that the Minnesota Supreme Court adopted the announce clause for that purpose.” Rather, concluded the Court, the *real* purpose for the clause was to “undermin[e] judicial elections” by “preventing candidates from discussing what the elections are about.”¹⁸⁸

The implications of *White* remain uncertain but are potentially far-reaching. Critics of the decision who are committed to restricting what judges may say and with whom they may associate as a means to preserve judicial impartiality and its appearance have construed *White* narrowly, to mean only that states may not prevent judicial

¹⁸⁴ Michael J. Goodman and William C. Rempel, *Justice v. Justice*, L.A. TIMES, June 8, 2006, at A1 (reporting on judges who “routinely rule in cases involving friends, former clients and business associates—and in favor of lawyers who fill their campaign coffers”).

¹⁸⁵ Charlie Savage, *As Texas Judge, Gonzales Heard Donors’ Cases*, BOSTON GLOBE, Jan. 27, 2005 (questioning whether Texas justice should have heard cases in which insurance companies and their law firms contributed to his reelection campaign).

¹⁸⁶ Dee Hall, *Can Our Elected Judges be Neutral? Campaign Contributions From Special Interest Groups Can Create an “Appearance of Conflict of Interest,” Some Say*, WIS. STATE JOURNAL, Apr. 9, 2007, at A1 (reporting on revelation that pro-choice school group had campaigned aggressively to elect a justice who cast the deciding vote upholding the constitutionality of a school voucher plan).

¹⁸⁷ 536 U.S. 765 (2002).

¹⁸⁸ *Id.* at 788.

candidates from stating their views on disputed legal issues. For them, *White* does not apply to restrictions on speech outside the context of judicial campaigns and does not affect the state’s authority to restrict other forms of campaign speech, such as pledges or commitments, where the nature of the state’s interest in regulating the speech is more compelling or otherwise different.

Whether the critics will be vindicated, however, remains unclear. The basic approach taken by the Court in *White* was to regard state-imposed restrictions on the content of judicial speech as presumptively invalid—a presumption that the state cannot overcome without a compelling justification. Whether the state’s interest in preserving impartiality or the appearance of impartiality is a justification sufficiently compelling to uphold other content-based restrictions on judicial speech within or without judicial campaigns remains to be seen. Lower courts are sharply divided, with some overturning code of conduct restrictions on pledges, promises, commitments, and political activities, and others upholding them.¹⁸⁹

In 2003, in direct response to the Supreme Court’s decision in *White*, the ABA repealed a clause in Canon 5 of the 1990 of the Model Code, which prohibited judicial candidates from making statements that “appear[] to commit” them with respect to issues that could come before them later as judges, and amended Canon 3E to include a new provision subjecting judges who make such statements to disqualification. These changes were retained when the Model Code was revised in 2007.¹⁹⁰

¹⁸⁹ The Brennan Center for Justice includes a good summary of lower court decisions in the aftermath of *White*, on their web page. See http://www.brennancenter.org/stack_detail.asp?key=348&subkey=35327.

¹⁹⁰ 2007 MODEL CODE, Rule 2.11.

Only eleven jurisdictions have adopted this new disqualification provision.¹⁹¹ Those that have not are left to determine, under the general standard, whether a judge's impartiality "might reasonably be questioned" if she makes statements that commit or appear to commit her to reach a particular result or rule in a particular way in a future case.

To date, judges have been reluctant to exploit their newly discovered rights.¹⁹² Court critics claim that judges decline to take positions on disputed legal issues because they fear defeat at the ballot box if they inform the electorate of their views. Court defenders assert that it is because judges do not want to compromise their impartiality by taking positions the public may construe as commitments.¹⁹³ In either case, there has been little opportunity to assess whether judges who do take such positions will indeed be subject to disqualification later. There is, however, reason to suspect that it is only a matter of time before such opportunities begin to arise more often. One social scientist who has studied how the states have responded to *White*, found that those jurisdictions which relaxed their restrictions on campaign speech the most, "are seeing a change in how judicial candidates promote themselves and how they attack their opponents," and

¹⁹¹ See discussion *supra* page _____. Also, note that South Dakota requires all written candidate questionnaires to be filed, *see* Appendix C.

¹⁹² There are, however, several examples to the contrary: a Nevada judge campaigned for re-election by touting his record of fighting crime and upholding the death penalty but did not withdraw from later cases involving the death penalty; a Kentucky judge promoted his campaign by discussing his positions on abortion and gun control; an Illinois judge presented himself as a candidate who would crack down on predators by keeping them in jail and away from children. *See* Roy Schotland, *Impacts of White*, 55 Drake L. Rev. 625, 632-36 (2005).

¹⁹³ For example, in Miami-Dade County, Fla., *White* is reported to have "surprisingly little impact... [T]he legal and civic culture in Miami-Dade County explicitly and implicitly discourages candidates from engaging in issue-oriented speech... [and] a campaign strategy focusing on legal experience and judicial temperament is preferred by the candidates over one that emphasizes politically divisive issues." Roy Schotland, *New Challenges to States' Judicial Selection*, 95 Geo L.J. 1077, 1096-97 (2007), *quoting*, Rebecca Mae Salokar, *After White: An Insider's Thoughts on Judicial Campaign Speech*, 26 JUST. SYSS. J. 149 (2005).

anticipated that “judicial candidates in these states will increasingly rely on the ability to distinguish themselves from their opponents based on controversial issue positions.”¹⁹⁴

Although experience with the issue is limited, one might reasonably speculate that judicial candidates who seek voter support by taking firm positions on issues they are likely to decide as judges will be reluctant to disqualify themselves when those issues arise, insofar as the voters who supported them are, in effect, counting on their candidate to make decisions they were elected to make. More generally, judges who have taken an oath to be impartial may naturally resist the conclusion that their previously stated views on legal issues, however forcefully expressed, compromise their impartiality or appear to do so.

One recent study found that the public’s confidence in the courts is unaffected by judges who take positions on disputed legal issues (that same study found that public confidence in the courts *is* adversely affected by judges who hear cases affecting their contributors).¹⁹⁵ Such findings suggest a need to avoid generalizations and unverified assumptions when analyzing whether a given statement of view is likely to call a judge’s impartiality into question. They may likewise lend support to judges who are predisposed to believe that their prior statements, or even their commitments and pledges on the campaign trail or elsewhere do not call their impartiality into question.

¹⁹⁴ Rachel Caulfield, *The Changing Tone of Judicial Election Campaigns as a Result of White*, in *RUNNING FOR JUDGE*, *supra* note 161 at 34, 55.

¹⁹⁵ In his Kentucky-based study, James Gibson found that “when groups with direct connections to the decision-maker give contributions, legitimacy suffers substantially.” He likewise found that when candidates use attack ads, legitimacy is adversely affected, albeit to a lesser degree. Finally, Gibson explored the impact of candidate position-taking on public confidence, and found none. James Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New Style” Judicial Campaigns* 7 (March 21, 2007).

The Mississippi Supreme Court’s decision in *Mississippi Commission on Judicial Performance v. Wilkerson*¹⁹⁶ illustrates the kind of appearance problems associated with public statements that may become more common in the aftermath of *White*, even in states that do not have contested judicial elections. In that case, a county judge wrote a letter to his local newspaper, stating that “I got sick on my stomach” after reading an article about legislation in other states “granting gay partners the same right to sue as spouses,” adding that “in my opinion, gays and lesbians should be put in some type of mental institute instead of having a law like this passed for them.” The Commission on Judicial Performance concluded that the judge’s conduct violated the Code of Judicial Conduct directive that judges “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,” but the Mississippi Supreme Court held that after *White*, the judge had a right to make the statements in question. In the court’s view “forcing . . . judges to conceal their prejudice” would undermine “the more compelling state interest of providing an impartial court for all litigants.”¹⁹⁷ If enforcement of the Code dissuaded judges like Wilkerson from speaking their minds, “unsuspecting gays or lesbians” would be “[u]naware of the prejudice and not know[] that they should seek recusal,” which “surely would not work to provide a fair and impartial court to those litigants.”¹⁹⁸ While upholding Judge Wilkerson’s right to publish his letter, the Mississippi Supreme Court predicted disqualification troubles ahead:

We feel obliged to point out that, having publicly expressed his view that “gays and lesbians should be put in some type of mental institute,” Judge Wilkerson will doubtless face a recusal motion from every gay and lesbian citizen who visits his court. We can predict that the rationale for the motions will be that Judge Wilkerson is prejudiced against gays and

¹⁹⁶ 876 So. 2d 1006 (Miss. 2004).

¹⁹⁷ *Id.* at 1015.

¹⁹⁸ *Id.*

lesbians, and he has a preconceived belief that their mental capacity as a class of people is inferior to society in general. Judge Wilkerson, on the other hand, may believe he can be fair to gays and lesbians in his court. Thus, in publicly announcing views which-although constitutionally allowed nevertheless cast doubt on his impartiality, Judge Wilkerson has created a paradox for himself. Even if he feels it is his duty to refuse to recuse; yet, should he deny the recusal motions, he faces a substantial risk of future complaints with the Commission.¹⁹⁹

It bears emphasis that the “problem” at issue here is not that judges who have made commitments or apparent commitments to decide future cases in specific ways are declining to disqualify themselves in significant numbers. It is too early in the post-*White* environment for that to be a serious possibility, for which reason the problem is necessarily more speculative. Rather, disqualification has been proposed as an antidote for an anticipated influx of impartiality-compromising campaign promises, commitments and apparent commitments in the aftermath of *White*. Such an antidote will be effective only if it is used. Given the traditional reluctance of judges to concede that their impartiality might reasonably be questioned, it is reasonable to anticipate problems ahead.

C. Friends and Relatives

For many years, the Model Code has mandated disqualification whenever a close relative appears before the judge as a party, lawyer or witness.²⁰⁰ The Code does not specifically address, however, whether a judge must disqualify himself from presiding over cases in which a relative is employed by the law firm of a party’s attorney, where the relative may profit directly or indirectly by the firm’s success in the case. Apart from the general directive to disqualify when the judge’s impartiality might reasonably be questioned, the Model Code requires disqualification when a close relative “has more

¹⁹⁹ *Id.* at 1015-16.

²⁰⁰ 2007 MODEL CODE, Rule 2.11.

than a de minimis interest that could be substantially affected by the proceeding,” with “de minimis” being separately defined as “an insignificant interest that could not raise a reasonable question regarding the judge’s impartiality.”²⁰¹

The issue made headlines in 2000, when the press reported that Justice Scalia’s sons, both lawyers, had worked at different firms that each represented the Bush campaign, one before the Florida courts and the other before the U.S. Supreme Court in matters that culminated in the Supreme Court’s decision in *Bush v. Gore*,²⁰² in which Justice Scalia cast a decisive fifth vote in favor of soon-to-be President Bush.²⁰³ In a policy statement issued in 1993 by several members of the Supreme Court with relatives who were practicing lawyers, the signatories opined that “a relative’s partnership in the firm appearing before us, or his or her previous work as a lawyer on a case that later comes before us, does not automatically trigger” disqualification, because “if that were the intent of the law, the per se ‘lawyer-related recusal’ provisions . . . would have expressed it.”²⁰⁴ Rather, they concluded, disqualification was unnecessary when the relative at issue had acted as a lawyer at an earlier stage in the proceedings, and was likewise unnecessary when the relative’s firm represented a party before the Supreme Court, as long as the firm communicated “written assurance that income from Supreme Court litigation is, on a permanent basis, excluded from our relatives’ partnership shares.”²⁰⁵ Outside of the Supreme Court, the practice is inconsistent, with disqualification being called for in some jurisdictions and not others.²⁰⁶

²⁰¹ *Id.*, Rule 2.11(A)(2)(c).

²⁰² 531 U.S. 98 (2000).

²⁰³ Adam Cohen, *Can the Court Recover?*, TIME (magazine), Dec. 25, 2000, at 76

²⁰⁴ Press Release, Chief Justice Rehnquist et al., Statement of Recusal Policy (Nov. 1, 1993).

²⁰⁵ *Id.*

²⁰⁶ See cases cited in FLAMM, *supra* note 134 at § 7.5.

When it comes to former colleagues, the Model Code disqualifies judges from hearing cases litigated by lawyers at the judge's former firm only if the judge was still at the firm when it undertook the matter.²⁰⁷ It says nothing about whether a close personal and professional association with former partners and associates spanning years and sometimes decades is ever enough to require the judge's disqualification from cases in which those lawyers enter an appearance as counsel, as long as the matter arose after the judge left the firm. Decisional law varies widely: some jurisdictions have a per se rule against judges sitting on cases litigated by their former firms for a period of time; other jurisdictions conclude that the need for disqualification must be assessed with reference to multiple factors (such as the size of the firm, how long the lawyer was with the firm, whether the lawyer has continuing ties, financial or otherwise, to the firm or its lawyers, and how long it has been since the judge discontinued his association with the firm), while still others permit the judge to sit as long as his former firm was not handling the matter while the judge was still in practice there.²⁰⁸

The Model Code likewise includes no specific guidance concerning law clerks, and whether judges must disqualify themselves when former clerks appear before them as counsel, or when current clerks have pending or accepted offers from firms representing clients in cases before the judge. Once again, decisional law is varied and inconsistent.²⁰⁹

The Code also says nothing about whether a judge must disqualify herself when a party, lawyer or key witness is an acquaintance, a personal friend, best friend, love

²⁰⁷ 2007 MODEL CODE, Rule 2.11(A)(6)(a).

²⁰⁸ See cases cite in FLAMM, *supra* note 134 at § 8.9.

²⁰⁹ *Id.*, §§ 8.6-8.8.

interest (other than a “domestic partner”), or for that matter a rival or an enemy.²¹⁰ When the Code offers no specific guidance, the default option, as always, is to revert back to the general directive that a judge must disqualify herself if her impartiality might reasonably be questioned. History is replete with examples of judges presiding over cases in which longtime acquaintances and friends, professional and personal, have appeared before them as parties, counsel or witnesses.²¹¹ In 2004, the issue made national news when Justice Scalia declined to disqualify himself from hearing a case in which Vice President Dick Cheney was a named party, after flying with the Vice President on a government jet to Louisiana for a weekend of duck hunting, while the appeal was pending. More recently, the Chief Justice of West Virginia was in the spotlight for being photographed on vacation with the president of an energy company while the company had a major case pending before the supreme court (the same president who reportedly contributed over \$3 million to the campaign of another justice on the supreme court who subsequently declined to disqualify himself, as recounted in the discussion of campaign contributions).²¹²

Reactions of commentators to the issue of whether judges must disqualify themselves when friends or relatives appear before them as parties, lawyers or witnesses, have run the gamut. At one end of the spectrum, Richard Flamm observes that “a judge may be no more disposed to rule in favor of a friend than to lean over backwards to maintain an appearance of neutrality,” and therefore, “the mere fact that a judge happens to be friends with a party, an attorney, or someone else who has an interest in a

²¹⁰ The only exception is that the Model Code requires disqualification when the judge’s spouse or domestic partner appears as a party, lawyer or witness. 2007 MODEL CODE, Rule 2.11(A)(2).

²¹¹ RONALD ROTUNDA & JOHN DZIENKOWSKI, *THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY*, §§ 10.3-28 (2007-08).

²¹² ADAM LIPTAK, *West Virginia: Coal Company Verdict Thrown Out*, N.Y. TIMES,

proceeding before the judge does not support a reasonable inference of judicial bias.”²¹³

At the other extreme, Jeremy Miller argues that friendship (as distinguished from acquaintance) with a party or lawyer to a proceeding should be a specific ground for disqualification, because “[f]riendship is loyalty, and loyalty to one side of a case (be it a named party or lawyer) is the perfect antonym to impartiality. Partiality being the perfect definition of a bad judge.”²¹⁴ Again, courts have gone both ways, for the most part leaning against disqualification, but sometimes determining that a particular relationship is so personal that disqualification is necessary.²¹⁵ The press, in contrast, was overwhelmingly critical of Justice Scalia’s refusal to step aside in the Cheney case, and numerous editorials took the position that it undermines public confidence in the courts for a judge to hear cases in which a close friend is a party.²¹⁶

D. When Impartiality Might Reasonably be Questioned and Problems with Disqualification Procedure

The foregoing problems are illustrative, not exhaustive. How much stock may judges hold in a corporate party before it becomes a disqualifying “economic interest,” which the Model Code defines to exclude “de minimis” interests that could not raise “reasonable question as to a judge’s impartiality?” Suppose that the judge attended an expense paid educational seminar at a beach resort on a subject germane to a pending

²¹³ FLAMM, *supra* note 134, § 8.2.

²¹⁴ JEREMY MILLER, *Judicial Recusal and Disqualification: The Need for a per se Rule on Friendship (Not Acquaintance)*, 33 PEPP. L. REV. 575, 579 (2006).

²¹⁵ ALFINI, SHAMAN, LUBET & GEYH, *supra* note 33, section 4.09.

²¹⁶ *See, e.g. The Court's Honor at Stake*, STAR-LEDGER (Newark, N.J.), Mar. 19, 2004 at 20; *Duck Blinded: Scalia's Trip Doesn't Pass Smell Test*, OKLAHOMAN, Feb. 19, 2004 at 12A; *Justice in a Bind*, N.Y. TIMES, Mar. 20, 2004 at Sec A. P. 12; *Position Looks Compromising*, SUN-SENTINEL (Fort Lauderdale, Fla.), Feb. 3, 2004 at 16A; *Scalia's Conflict of Interest*, DENVER POST, Jan. 26, 2004 at B-07; *Scalia Tries To Duck Conflict With Waterfowl Reasoning*, TAMPA TRIBUNE (Fla.), Jan. 26, 2004 at 18.

case that was sponsored by a party before the court in that case—is disqualification necessary? The Model Code says nothing about it.²¹⁷

The common thread that weaves these problem areas together is the applicability of a non-specific disqualification standard that must be resolved with reference to whether the conduct at issue gives rise to a public perception of partiality. Most disqualification problem areas are governed by the general directive that judges disqualify themselves whenever their impartiality “might reasonably be questioned,” i.e., when the public could *perceive* the judge to be partial. When problems arise in areas that are regulated by more a more specific disqualification standard, it is often because the interpretation of the rule turns on other debatable issues of public perception. Thus, whether a judge must disqualify himself because of an earlier, “apparent commitment” to rule in a particular way, will turn on whether a judge’s prior statements create the *perception* that the judge has compromised her impartiality by wedding herself to specific outcomes in future cases. Similarly, whether a judge must disqualify herself for having an “economic interest” in a party turns on whether a judge’s financial stake is enough to raise a “reasonable question” as to her impartiality, i.e., whether the judge’s stockholdings in a corporate party are sufficient to create the perception that the judge will be partial toward that party.

There is an understandable disinclination of judges to disqualify themselves on the grounds that their impartiality might reasonably be questioned. To concede that one’s conduct may have created the perception of partiality is in apparent tension with the ethical obligation to “act at all times in a manner that promotes public confidence in the

²¹⁷ The Code does, however, touch upon this issue in its rules governing reimbursement expenses. ABA Model Code of Judicial Conduct, Rule 3.14 (2007).

independence, integrity and impartiality of the judiciary.” Moreover, the judge who takes an oath to be impartial and firmly believes that she can be impartial in a given case may be loath to credit arguments that a reasonable observer would think otherwise. This disinclination is often compounded by the suspicion that disqualification requests are motivated less by concern for the apparent partiality of the judge than by a strategic desire to exclude a judge who is likely to be unsympathetic on the merits. Finally, there are practical problems to frequent disqualification that judges wish to avoid: evenly divided supreme courts; an acute shortage of judges in rural areas; an inadequate workforce to handle the business of urban courts.

In the absence of a consensus as to when disqualifying perception problems arise, judges have a natural tendency to err on the side of non-disqualification. In 1995, Jeffrey Shaman and Jona Goldschmidt published the results of a survey conducted in four states, under the auspices of the American Judicature Society.²¹⁸ The survey featured 71 questions broken down into three categories: bias, relationships and conflicts of interest. Unsurprisingly, perhaps, they found that judges were most comfortable disqualifying themselves when confronted with conflicts of interest—the basis for disqualification with an English common law pedigree and the deepest roots in American law, where “the survey showed a sensitivity to conflicts of interest and a concern for judicial impartiality.”²¹⁹ As to personal relationships, they found that “a slight majority of the responding judges were ambivalent regarding the decision to disqualify, while one-third indicated a strong disposition against disqualification,”²²⁰ and made a similar finding

²¹⁸ JEFFREY SHAMAN, JONA GOLDSCHMIDT, *JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES* (1995).

²¹⁹ *Id.* at 69.

²²⁰ *Id.* at 1.

with respect to bias.²²¹ Overall, they found that “almost three-fourths of the responding judges gave answers evidencing a high level of ambivalence across all questions raising the disqualification issue.”²²²

Resort to disqualification is further discouraged by the procedures many judicial systems employ to litigate disqualification requests—a point developed in a recent article by Deborah Goldberg, James Sample and David Pozen.²²³ As discussed in Part II, in most jurisdictions, a party must show that the judge in question is partial or appears to be so, and must make such a showing to the target judge, who will be ruling on the merits of the party’s case if the request to disqualify is denied. In most jurisdictions, judges are under no obligation to explain their decisions to disqualify (or not), which contributes to an information shortfall on when disqualification is appropriate. This information shortfall is further compounded by the failure of most jurisdictions to collect data on disqualification practices within their states. And most appellate courts let stand trial court decisions not to disqualify, absent an abuse of discretion.

Disqualification standards have become ever more rigorous over time, as the bar, the Congress, and media pundits have embraced the view that judges are people too, who are subject to the same prejudices as the rest of us, and ought not to hear cases in which those prejudices influence their decision-making. And judges have adopted the more rigorous disqualification standards that the bar has proposed—but have resisted fully implementing those standards, at least in part because they imply that the target judge’s capacity to render impartial judgment is compromised. To overcome that implication, the rules have been further modified to require disqualification whenever a judge’s

²²¹ *Id.*

²²² *Id.* at 1-2.

²²³ Deborah Goldberg, James Sample, David Pozen, *supra* note 179.

impartiality might reasonably be “questioned” (i.e., even if the judge is not partial in fact), but uncertainties surrounding the application of this standard, coupled with lingering reluctance to concede appearance problems has culminated in an ongoing series of episodes in which judges have been harshly criticized for declining to disqualify themselves.

III. Recommendations

As reflected in the background sections of this report, the issue of judicial disqualification in the United States implicates a complex interplay of concerns:

- First, the law governing judicial disqualification has, over the course of time, moved in the direction of expanding the grounds for disqualification. This movement may be explained in part with reference to a gradual abandonment of the fiction that judges, by virtue of the oath they take and the role they play as neutral arbiters of disputes, are somehow incapable of bias.

- Second, those interested in how we assure the sound accountability of our judges—including the American Bar Association—have become increasingly concerned with public confidence in the courts and how the judiciary is perceived. As a consequence, disqualification law has reoriented itself toward addressing appearance problems, and whether a judge’s impartiality “might reasonably be questioned.” The net effect of subjecting judges to disqualification for perceived—and not just actual—partiality is to expand significantly the circumstances in which disqualification is necessary (in the kinds of instances in which perception problems cannot be viewed lightly).

- Third, the judicial oath of office and traditional conceptions of the judicial role give rise to a presumption of impartiality that judges are loath to abandon. To concede actual bias can be construed as a failure to abide by the oath of office; and to concede perceived bias can be construed as conceding an appearance of impropriety that codes of judicial conduct direct judges to avoid. And so, judges remain reluctant to internalize an emerging regulatory regime that calls for more frequent disqualification.

- Fourth, judges are mindful of the administrative burdens that disqualification can place on courts—burdens that can be especially acute on appellate courts and trial courts in rural areas. When such burdens are coupled with the belief (often correct) that disqualification motions may be filed strategically, because the movant fears that a judge will be unsympathetic to the merits of the movant’s claims, and not because the movant doubts the judge’s impartiality, it further discourages judges from taking disqualification as seriously as they otherwise might.

- Fifth, disqualification procedures typically give considerable deference to the subject judge’s assessment of his own bias or apparent bias, which, for reasons explained above, judges are reluctant to acknowledge. To complicate matters further, few state judiciaries systematically gather information on judicial disqualification, which creates an information vacuum that further complicates the ability of states to develop a rational body of law to which judges can refer when evaluating the merits of disqualification motions.

- Sixth, several widely reported episodes in which judges have been excoriated in the media for failing to disqualify themselves have made a national issue of non-disqualification, and raised the stakes in the ongoing disqualification debate. These

episodes underscore in a very public way, the seeming disconnection between the gradual movement toward more stringent disqualification standards for apparent bias, on the one hand, and the continued reluctance of judges to embrace those standards on the other.

A review of these developments leads to the conclusion that, despite protracted efforts to enhance public confidence in the judiciary by making disqualification rules more rigorous, disqualification remains underutilized for at least two reasons. First, current disqualification practice over-relies on judicial self-evaluation. Given the difficulty that judges may have in detecting or acknowledging their own biases or perceived biases, reform efforts must logically focus on ways in which the inherent limitations in judges' self-evaluation, may be reduced. Second, information on disqualification practices and standards is often inadequate. If disqualification requirements are to be internalized among judges, then providing judges with the data and guidance necessary to overcome their reticence to disqualify in gray areas and providing the public with sufficient information to support public confidence, are critical.

A. Reforming Judicial Self-Evaluation

Reforming the practice of judges ruling on whether they should disqualify themselves presents a paradox. On the one hand, the judiciary should be presumptively impartial. There is thus an understandable reluctance to undercut that presumption by creating rules prohibiting judges from evaluating their own qualifications to sit under circumstances that imply they are incapable of being impartial in such matters. On the other hand, when a non-frivolous question arises as to whether a judge is or appears to be unfit to sit, having the allegedly unfit judge decide her own fitness may undermine public confidence in the impartiality of the judicial process to as great if not a greater extent.

The reason is obvious enough: the judge whose disqualification is sought stands accused of having an interest, relationship or bias in connection with a pending matter that eclipses or appears to eclipse her capacity to be impartial—which would logically include her capacity (or apparent capacity) to impartially assess her own impartiality.

The key to escaping this paradox is to make clear that relieving judges of the full burden of deciding whether they are qualified to sit need not be in tension with a presumption of impartiality. Judges who are truly committed to rendering impartial justice must be committed to its appearance as well as its reality, for if the public perceives that its judges are less than impartial, public confidence in the courts will suffer regardless of whether judges are impartial in fact. For that reason, the Model Code of Judicial Conduct declares that a judge “shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary.”²²⁴ Thus, the message underlying reforms that diminish or eliminate the need for targeted judges to rule on motions for their own disqualification is that the judiciary’s commitment to preserving public confidence in the impartiality of its judges inspire it to adopt measures that promote the appearance of impartiality without regard to whether such measures are needed to promote impartiality in fact. In other words, relieving a targeted judge of the duty to rule on his own disqualification need not imply that the judge is presumptively incapable of ruling impartially, any more than requiring a judge to recuse when his impartiality might reasonably be questioned implies that he is presumptively partial.

There are several procedures that different states have adopted to reduce or eliminate their reliance on the rulings of subject judges to resolve disqualification issues.

²²⁴ Model Code of Judicial Conduct, Rule 1.3 (2007).

None is perfect, and given the differing problems, needs and political cultures of the various jurisdictions, no one procedure or combination of procedures may be optimal for all states. For that reason, this Report recommends that states adopt measures to reduce or eliminate their reliance on the rulings of subject judges from the following menu of options, without recommending any specific recommendation alone or in combination with others.

1. States should consider adopting a peremptory challenge procedure

As noted in the background section of this report, nineteen states employ a procedure for peremptory challenge of judges. In some jurisdictions, a party may simply request a substitution of judges.²²⁵ In other jurisdictions, the request must be accompanied by an affidavit of prejudice alleging that a fair trial cannot be had before the assigned judge.²²⁶ In either case, substitution of the judge follows automatically, with no further proceedings.

To the extent that parties with legitimate concerns about a judge's impartiality decline to raise those concerns for fear of alienating the judge if a disqualification motion fails, the peremptory challenge offers a convenient solution. The procedure obviates the need for protracted inquiries into the target judge's impartiality. And while more systematic data are not available, anecdotal evidence offered by lawyers and judges from jurisdictions with peremptory challenge procedures suggests that in those states, post-substitution disqualification issues surface less frequently.

ABA Standards of Judicial Administration relating to trial courts formerly included procedures for peremptory challenge:

²²⁵ See e.g. Mont. Code Ann. § 3-1-804 (2005).

²²⁶ WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING, ORIN KERR, CRIMINAL PROCEDURE §22.4(d) (2007-08); see also Alaska Stat. 22.20.022(a) (2005).

A party should be permitted a peremptory challenge of the judge to whom a matter has been assigned, subject to the following restrictions: (1) a party may have only one such challenge in a case; (2) the challenge must be asserted immediately upon the matter's having been assigned to the judge against whom the challenge is made and before he has made any decision regarding it; and (3) the party must be ready to proceed in the matter without delay upon its reassignment to another judge.²²⁷

Among the states that employ peremptory challenge procedures, Arizona is illustrative. In Arizona, peremptory challenges of judges are permitted explicitly in both the Rules of Civil Procedure and in the Rules of Criminal Procedure.

In criminal cases, "other than a death penalty case, each side is entitled as a matter of right to a change of judge."²²⁸ Each litigation is considered as having only two sides, with all codefendants or consolidated parties being considered on the same side, unless special circumstances make their interests adverse. In death penalty cases, any party may, regardless of previous use of peremptory challenges, request a change of judge without cause within ten days of assignment. The rule provides that, in order to get a change of judge in a criminal case, the party must "fil[e] a pleading entitled 'Notice of Change of Judge' signed by counsel, if any, stating the name of the judge to be changed."²²⁹ The notice must also include a statement that

"the request is made in good faith and not: 1. For the purpose of delay; 2. To obtain a severance; 3. To interfere with the reasonable case management practices of a judge; 4. To remove a judge for reasons of race, gender or religious affiliation; 5. For the purpose of using the rule against a particular judge in a blanket fashion by a prosecuting agency, defender group or law firm... 6. To obtain a more convenient geographical location; or 7. To obtain advantage or avoid disadvantage in connection with a plea bargain or at sentencing..."²³⁰

²²⁷ ABA Standards of Judicial Administration, Standards Relating to Trial Courts §2.32(b) (1976).

²²⁸ ARIZ. R. CRIM. PRO., Rule 10.2.

²²⁹ *Id.*

²³⁰ *Id.*

The notice must be filed within 10 days of “[a]rraignment, if the case is assigned to a judge... at or prior to the arraignment; [f]iling of the mandate from an Appellate Court with the clerk of the Superior Court; [or] actual notice to the requesting party of the assignment of the case to a judge.”²³¹ If the judge is assigned to the case less than 10 days before trial the notice must be filed by 5:00 p.m. on the following day. Finally, the parties can inform the court of another available judge who they have agreed upon, and their request may be honored, which would “preclude further changes of judge as a matter of right.”²³²

In civil cases,²³³ Arizona also permits peremptory challenges of judges as a matter of right upon the “fil[ing] of a ‘Notice of Change of Judge’” which may be signed by an attorney and which specifically “shall neither specify grounds nor be accompanied by an affidavit.”²³⁴ However, the notice must “contain certification... that the notice is timely, the parties has not waived the right [to the peremptory challenge], and the party has not previously been granted a change of judge as a matter of right in the case.”²³⁵ The notice must be filed 60 days or more before the trial date is set, or, if a judge is not assigned that early, within 10 days of assignment. However, if a party’s motion is untimely filed, they are not precluded from filing another that is timely if possible. The request may also be informal: “a judge may honor an informal request” by recording the date of the request and the name of the party making the request.²³⁶ This is sufficient for making a request

²³¹ *Id.*

²³² *Id.*

²³³ Ariz. Civ. Proc., Rule 42(f). Specifically applies to “any action pending in superior court, except an action pending in Arizona Tax Court.” *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

to remove a judge without cause. Finally, the provision states that parties waive the right to a change of judge as a matter of right when:

(i) the party agrees to the assignment; or (ii) after notice to the parties: the judge rules on any contested issue; or the judge grants or denies a motion to dispose of one or more claims or defenses in the action; or the judge holds a scheduled conference or contested hearing; or trial commences.²³⁷

There are several concerns that have been raised with respect to peremptory challenge procedures.

- One over-arching concern, alluded to in the introduction to this section, is that peremptory challenge procedures arguably undermine the traditional presumption of judicial impartiality that can be rebutted only for cause. Judges acclimated to substitution procedures, however, may view the issue quite differently. One Milwaukee judge, for example, observed that if judges are truly committed to the impartiality of their judiciary, they should be indifferent to which of their number tries a given case, and if a litigant is uncomfortable with the assigned judge, enabling that litigant to substitute simply underscores the judiciary's collective commitment to impartial justice.

- A second concern is that peremptory challenge procedures can be abused by parties and lawyers who are less concerned about impartial justice than “judge-shopping.”²³⁸ This problem has been addressed by strictly limiting peremptory challenges to one per side. In the event that a party questions the impartiality of a substituted judge, the issue must be resolved with recourse to the normal disqualification process. Some have suggested that data on peremptory challenge rates may be relevant to judicial performance, on the theory that high substitution rates bear adversely on a

²³⁷ *Id.*

²³⁸ WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING, ORIN KERR, *supra* note 222.

judge's impartiality.²³⁹ Because preemptive challenges can be purely tactical, and because the justification for their use is to put litigants at ease even when their assigned judges are not partial in fact, using challenge rates as an indicator of judicial performance is ill-advised.

- A third, and related concern is that lawyers may abuse the peremptory challenge procedure by seeking blanket disqualification against specific judges for reasons that may have nothing to do with the judge's impartiality (for example, because the judge has a reputation for being a harsh or lenient sentencer).²⁴⁰ One side effect of such a tactic may be to create imbalances within the system, in which some judges are underutilized. This problem has been addressed in different ways. One way is to employ a system of non-random substitution, in which replacement judges are selected from a pool limited to those who are frequently subject to peremptory challenge, which simultaneously adds to the docket of otherwise underutilized judges and creates a disincentive for strategic challenges (if, for example, defense counsel systematically seek the substitution of harsh sentencers, a comparably harsh sentencer is likely to be substituted for the challenged judge). A second approach has been to withdraw peremptory challenge privileges from firms or agencies that systematically abuse the peremptory challenge process.²⁴¹

- A fourth concern is that peremptory challenges must be used at the outset of the case, before the parties may have acquired information calling the judge's impartiality into question. Clearly, peremptory challenge procedures must not be available after

²³⁹ Geoffrey P. Miller, *Bad Judges*, 83 Tex. L. Rev. 431, 482 (2004); *see also* FLAMM, *supra* note 134 § 26.1, at 756 n. 21 (2nd Ed. 2007).

²⁴⁰ Jennifer Simpson, *Automatic Judicial Disqualification Under Idaho Criminal Rule 25(A): A Necessary Lawyering Tool or Potential Nuclear Weapon?*, 43 IDAHO L. REV. 239 (2006)

²⁴¹ *State v. City Court of the City of Tuscon*, 150 Ariz. 99, 722 P.2d 267 (1986); *State v. Erikson*, 589 N.W. 2d 481 (Minn. 1999).

proceedings have begun; otherwise, a party could exploit the procedure by demanding a new judge and derailing the case the moment that proceedings take a disadvantageous turn. While this does mean that a peremptory challenge procedure will be unavailable to address concerns relating to the judge's impartiality that surface after the case has begun, it merely underscores the need for meaningful disqualification procedures to remain in place to address such problems when they arise.

- A fifth and final concern relates to the constitutionality of peremptory challenge procedures, which is an issue that has arisen in jurisdictions where legislative imposition of the procedure on unwilling judiciaries has been challenged as an unconstitutional intrusion upon the judicial function.²⁴² Although these challenges have usually (but not always) failed, they do counsel the need for sensitivity and interbranch cooperation when contemplating such reforms.

2. States should consider assigning contested disqualification motions to a different judge.

The peril of authorizing or requiring judges to rule on motions for their own disqualification is potentially two-fold. First is the perception problem: a judge who has an alleged interest, relationship or bias that may lead her to favor one party over the other is being asked to rule on the allegedly disfavored party's request that the judge step aside, which smacks of the fox guarding the henhouse. Second is the concern that despite their best efforts, honorable judges may not be fully able to recognize and bracket out their biases.²⁴³ The peril of assigning disqualification motions to a non-target judge is likewise two-fold. First, it may send an unwelcome message that the subject judge cannot

²⁴² FLAMM *supra* note 134 at §26.3 (2nd Ed. 2007).

²⁴³ *See* Pub. Utils. Comm'n of D.C. v. Pollak, 343 U.S. 451, 466 (1952) (Frankfurter, J.) ("reason cannot control the subconscious influence of feelings of which one is unaware."); *see also* Chris Guthrie, Jeffery J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 Cornell L. Rev. 777, 814-821 (2001).

be trusted to rule impartially. Second, it is inefficient insofar as a second judge must take the time to review the file and acquaint herself with facts already familiar to the subject judge.

As discussed in Part II, states have adopted three different approaches: one group of states assigns the subject judge to resolve all disqualification motions; a second group of states automatically refers disqualification motions to another judge for hearing; and a third group of states directs the target judge determine the timeless and facial sufficiency of the motion, and if the motion survives this threshold review, assigns it to a second judge for a ruling on the merits.

An example of the first approach, where the subject judge is responsible for ruling on a disqualification motion, can be found in Michigan. A statute requires that a party file a timely motion alleging specific grounds for disqualification and an affidavit of veracity. The rule then, quite simply, provides that “[t]he challenged judge shall decide the motion.”²⁴⁴

Illinois is an example of the second approach, where a judge other than the target judge evaluates disqualification motions. An Illinois statute provides: “Upon the filing of a petition for substitution of judge for cause, a hearing to determine whether the cause exists shall be conducted as soon as possible by a judge other than the judge named in the petition.”²⁴⁵ Illinois also provides that the target judge “need not testify but may submit an affidavit if the judge wishes” to assist the judge evaluating the disqualification motion.²⁴⁶ The Illinois model is a typical example of how many states assign a disqualification motion to another judge for a decision on the merits. However, in Texas,

²⁴⁴ Mich. Ct. Rules, Rule 2.003(C)(3).

²⁴⁵ 735 Ill. Comp. Stat. 5/2-1001 (a)(3).

²⁴⁶ *Id.*

if a motion to disqualify is filed following correct procedures, the target judge must either disqualify herself or request that the presiding judge of the administrative judicial district forward the case to another judge to be decided on the merits.²⁴⁷ Furthermore, Ohio is unique in permitting litigants to file disqualification motions against trial judges directly with the Ohio Supreme Court.²⁴⁸

An example of the third, mixed approach is found in Georgia. There, the subject judge makes an initial evaluation of a motion to recuse before sending it to a different judge for review. The court rule provides:

When a judge is presented with a motion to recuse, or disqualify, accompanied by an affidavit, the judge shall temporarily cease to act upon the merits of the matter and shall immediately determine the timeliness of the motion and the legal sufficiency of the affidavit, and make a determination, assuming any of the facts alleged in the affidavit to be true, whether recusal would be warranted. If it is found that the motion is timely, the affidavit sufficient and that recusal would be authorized if some or all of the facts set forth in the affidavit are true, another judge shall be assigned to hear the motion to recuse. The allegations of the motion shall stand denied automatically. The trial judge shall not otherwise oppose the motion.²⁴⁹

The judge that is the subject of a disqualification motion may be best acquainted with all relevant circumstances bearing on her fitness to proceed. But that does not mean that the subject judge is best positioned to rule on such motions.²⁵⁰ As two recent commentators observe, “the fact that judges in many jurisdictions decide on their own disqualification and recusal challenges . . . is one of the most heavily criticized features of

²⁴⁷ TEXAS RULES CIV. PROC., Rule 18a.

²⁴⁸ OHIO REV. CODE § 2701.03.

²⁴⁹ Geo. Unif. Sup. Ct. Rule 25.3.

²⁵⁰ See Guthrie, *supra* note 241.

of U.S. disqualification law, and for good reason.”²⁵¹ Another commentator explains why:

The appearance of partiality and the perils of self-serving statutory interpretation suggest that, to the extent logistically feasible, another judge should preside over [disqualification] motions. To permit the judge whose conduct or relationships prompted the motion to decide the motion erodes the necessary public confidence in the integrity of a judicial system which should rely on the presence of a neutral and detached judge to preside over all court proceedings.²⁵²

And yet another echoes that “[t]he Catch-22 of the law of disqualification is that the very judge being challenged for bias or interest is almost always the one who, at least in the first instance, decides whether she is too conflicted to sit on the case.”²⁵³ In short, vesting responsibility for deciding disqualification motions in the target judge alone is ill-advised for reasons too obvious to ignore. The overriding point is not that a judge whose disqualification is sought is presumptively biased against the movant, but that in a system devoted to impartial justice, litigants are entitled to a process that is above suspicion.

Divesting the target judge of all authority to act when disqualification motions are filed avoids this problem. The third option—authorizing the subject judge to review the timeliness and facial validity of motions before turning those that pass this threshold over to a second judge for a ruling on the merits—obviates the need for a second judge to waste time on patently defective motions and may stake out an acceptable middle ground, provided that the subject judge’s discretion to deny the motions is circumscribed.

3. States Should Consider Making the Appellate Standard of Review More Rigorous

²⁵¹ James Sample, David Pozen, *Making Judicial Recusal More Rigorous*, 46 JUDGES’ J. 17, 21 (2007).

²⁵² Leslie W. Abrahamson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 561 (1994).

²⁵³ Amanda Frost, *Keeping Up Appearances: A Process Oriented Approach to Judicial Recusal*, 53 U. Kan. L. Rev. 531, 571 (2005).

As discussed in the background section of this report, most jurisdictions employ a highly deferential standard of review that will not disturb a trial judge’s ruling on the merits of a disqualification motion, absent an abuse of discretion or clear error. Deferential review may not be especially problematic in jurisdictions that assign non-target judges to rule on the merits of disqualification motions, where a measure of deference to the trial judge’s assessment is defensible. Such an approach is highly problematic, however, in jurisdictions that rely on the target judge to evaluate her own interests, relationships or biases.²⁵⁴ Ordinarily, when the rulings of trial judges are afforded deference on appeal, it is because the trial judge’s proximity to parties, testimony and other evidence, gives her a better understanding of the facts relevant to the ruling than an appellate court confined to a paper record. When, however, the trial judge is allegedly self-interested, deference to her judgment is unwarranted—her familiarity with the circumstances surrounding the disqualification motion is offset by the perception that she may have an extrajudicial motivation to remain in the case and act on her self-interest.²⁵⁵

It is therefore recommended that state supreme courts revisit the standard of review applicable to disqualification decisions, and consider a more searching de novo standard, or its equivalent. Colorado is one jurisdiction that has employed a more searching standard of review over disqualification decisions; appellate courts in that state “examine the disqualification issue de novo.”²⁵⁶ This is because “[t]he trial court’s ruling was necessarily premised upon the legal sufficiency of the motion and affidavits. Such a

²⁵⁴ See Deborah Goldberg, James Sample & David E. Pozen, *supra* note 179 at 531-32.

²⁵⁵ Guthrie *supra* note 241.

²⁵⁶ *People v. Julien*, 47 P.3d 1194, 1197 (Colo.,2002).

Furthermore, as the Colorado Supreme Court held in 1915, issues of disqualification are of paramount importance and thus must be exactly reviewed:

The first ideal in the administration of justice is that the judge must be free from bias and partiality. Men are so agreed on this principle that any departure therefrom shocks their sense of justice. A party may be interested only that his particular case should be justly determined, but the state is concerned not only for that, but also that the judiciary shall enjoy an elevated rank in the estimation of mankind.²⁵⁸

4. States Should Consider Creating Procedures for Review of Decisions Concerning the Disqualification of High Court Judges and Clearer Standards

The most high-profile examples of judges declining to disqualify themselves in the teeth of a public outcry have arisen on supreme courts where the target judge effectively has the first and final word on his own disqualification.²⁵⁹ To the extent that disqualification rules are a part of state codes of conduct that subject judges to discipline or removal if violated, the procedures in place to discipline supreme court justices could conceivably be used to redress at least some failures to disqualify. The problem, however, is that the disciplinary process is not intended to serve as a form of appellate review, and so is not structured to provide relief to litigants in pending litigation. Moreover, to the extent that judges are disciplined for non-disqualification, it is typically limited to egregious, willful violations.²⁶⁰

Contested motions for the disqualification of a supreme court justice are rare, but as the West Virginia and Illinois examples make clear, if they are mishandled when they

²⁵⁷ *Smith v. Dist. Court*, 629 P.2d 1055, 1056 (Colo.1981); see also, *People v. Dist. Court*, 192 Colo. 503, 506, 560 P.2d 828, 832 (1977).

²⁵⁸ *People ex rel. Burke v. District Court*, 60 Colo. 1, 152 P. 149 (1915).

²⁵⁹ See generally *Avery v. State Farm Mut. Auto. Ins. Co.*, 126 S. Ct. 1470 (2006); *Cheney v. U.S. Dist. Court for the D.C.*, 542 U.S. 367 (2004); and Lawrence Messina *supra* note 177.

²⁶⁰ James Alfini, Steven Lubet, Jeffrey M. Shaman, & Charles Gardner Geyh, *Judicial Conduct & Ethics* §4.01 (4th Ed. 2007).

arise, they can seriously damage public confidence in the integrity and impartiality of a judicial system.²⁶¹ It is unacceptable that a justice of the West Virginia Supreme Court who won election with the support of large contributions in excess of \$3 million from a party in a pending case, possesses the unilateral authority to decline to disqualify himself from that case and cast the deciding vote in favor of his contributor.²⁶²

To avoid such problems, state supreme courts should consider adopting procedures for the review of disqualification motions that relieve the subject justice of sole authority to decide such motions—either by subjecting a decision of the target justice denying disqualification motions to review by the rest of the court,²⁶³ or by assigning the motion to a special panel of retired judges in the first instance. The chief objection to such a proposal would likely be that such review procedures would divert the court’s scarce resources, and that second guessing the judgment of a colleague could strain collegiality on the court.²⁶⁴ These costs, however, must be balanced against the benefits to public confidence that would accrue by avoiding the perception that the fox is guarding the henhouse when an allegedly self-interested justice possesses the exclusive authority to rule on whether her self-interest is disqualifying.²⁶⁵

5. States Should Consider Adopting more Specific Disqualification Rules: ABA Model Rules 2.11(A)(4) and 2.11(A)(5)

The problems associated with target judges evaluating disqualification motions are exacerbated when the judge’s discretion is open-ended. Suppose, for example, that a party moves to disqualify the judge on the grounds that he received a campaign

²⁶¹ See generally Lawrence Messina *supra* note 166; and Adam Liptak & Janet Roberts *supra* note 180.

²⁶² Lawrence Messina *supra* note 166.

²⁶³ TIMOTHY J. GOODSON, *Duck, Duck, Goose: Hunting for Better Recusal Practices in the United States Supreme Court in Light of Cheney v. United States District Court*, 84 N.C. L. Rev. 181, 217-220 (2005).

²⁶⁴ *Id.* at 219-220.

²⁶⁵ *Id.* at 217-219 (*Discussing Justice Scalia’s memorandum from Cheney v. United States District Court, in which he declined to recuse himself*).

contribution from one of the parties. If the applicable disqualification rule provides that the judge must disqualify himself if his “impartiality might reasonably be questioned,” and the judge decides that the contribution would not raise such concerns, a reasonable observer might nonetheless wonder whether the judge’s interpretation of this relatively unguided standard was influenced by a desire to stay in the case and help his contributor. On the other hand, if the applicable disqualification rule forbids judges from hearing cases in which a party has contributed more than \$1000 to the judge’s campaign, and the judge declines to disqualify himself because the contributor in question gave less than that amount, perception problems associated with the target judge denying the motion to disqualify are diminished.

It bears emphasis, however, that while more specific disqualification rules may reduce appearance problems associated with subject judges deciding motions for their own disqualification, it does not eliminate them. When, for example, a judge declines to disqualify himself from hearing a case in which a remote relative is a party, on the grounds that the relative is not within the specified degree of relation for which disqualification is required under Model Rule 2.11, an issue may remain as to whether the judge’s impartiality might reasonably be questioned if the judge maintains a close, personal relationship with the relative-party.²⁶⁶ Similarly, a more specific disqualification rule that calls upon judges to withdraw when they have made prior public statements that commit or appear to commit them to rule a specific way in a pending case, may not eliminate perception problems associated with the subject judge ruling on his own disqualification. If the concern is that the judge in question may, in light of his prior statements, be overly-vested in achieving a specific outcome in a pending case, such

²⁶⁶ See Jeremy M. Miller *supra* note 211 at 578-79.

a concern is not be obviated by that allegedly self-interested judge finding that his prior statements did not rise to the level of a disqualifying, apparent commitment.

While more specific disqualification rules may only reduce but not eliminate suspicions that arise when judges rule on their own disqualification, such rules nonetheless enhance the guidance offered to judges, consistent with the objectives of additional recommendations included in the next section of this report. For example, a disqualification rule that clearly requires a judge to disqualify herself if she made prior public statements committing her to decide an issue now before the court in a specific way ends any uncertainty that might otherwise exist as to whether such commitments could reasonably call a judge's impartiality into question.

Requiring disqualification for prior commitments and apparent commitments. To date, only a minority of jurisdictions have adopted the specific disqualification standard of ABA Model Code Rule 2.11(A)(5) requiring disqualification when the judge has made a prior public statement that “commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.” It is recommended that state supreme courts revisit their codes of conduct and adopt Rule 2.11(A)(5), in light of the rationale offered here.

Requiring disqualification when campaign contributors appear as parties or lawyers. To date no jurisdictions have adopted the specific disqualification standard of Rule 2.11(A)(4), requiring disqualification in cases where parties or lawyers before the judge have contributed to the judge's campaign in an amount over a specified limit (although two states have related provisions). Jurisdictions that have already established meaningful contribution limits in judicial campaigns, where the state has effectively

determined that contributions below the specified limit do not call the judge's impartiality into question, may, but not necessarily will, obviate the need for more specific disqualification rules. For example, contribution limits may not account for lawyers within firms who aggregate contributions, and may not differentiate between courts (so that a reasonable limit for a supreme court race may not be reasonable in a trial court race).

In jurisdictions without contributions limits, which could be aided by Rule 2.11(A)(4), there is some concern that such a rule could be misused for strategic purposes. Under the existing model rule, a judge who has received campaign contributions from parties or lawyers in excess of the amount specified must disqualify himself unless, as stated in Rule 2.11(C), "the parties and lawyers agree . . . that the judge should not be disqualified." As written, lawyers or future litigants seeking to avoid particular judges could contribute to the campaigns of those judges in amounts that exceed the limit, and then decline to waive disqualification. Such game-playing could be avoided through the simple expedient of enabling the non-contributing (or rule-compliant) opposing party or parties to waive disqualification unilaterally, on the premise that if a party is untroubled that her opponent or her opponent's counsel contributed to the judge's campaign in excess of the specified limit, questions about the judge's impartiality dissipate. It is therefore recommended that the ABA Ethics Committee consider an amendment to Rule 2.11 that would allow for unilateral waivers by non-contributing parties under Rule 2.11(A)(4), and that jurisdictions adopt the Rule, as amended.

B. Information and Guidance

The common law's hostility toward disqualification was at least technically overruled by modern disqualification rules and statutes, but a deeply entrenched antipathy to disqualification persists. This antipathy does not manifest itself in garden variety cases where the judge quietly withdraws on her own initiative because she owns stock in a corporate party, or is related to one of the lawyers. Nor is it typically an issue in cases where the judge is unaware of a specific disqualifying interest or relationship until it is called to his attention by motion—e.g., where the judge was previously unaware that a close relative had recently acquired a controlling interest in one of the parties. Rather, ambivalence toward disqualification is most pronounced when issues arise as to bias or apparent bias (i.e., where a judge's impartiality might reasonably be questioned). Judges swear to be impartial, are convinced of their own capacity to set their passions aside, and can find suggestions to the contrary, embedded in motions to disqualify, insulting.²⁶⁷ They are understandably inclined to question the motives of movants—who may gain a tactical advantage if the judge withdraws—which further fuels the suspicion that the motion is not grounded in actual concern about the judge's neutrality. And for judges to credit the suggestion that they are biased or perceived to be biased is to concede an implicit failure to abide by their oaths and the Code of Conduct.

One consequence of judicial ambivalence about disqualification has been to diminish the quantity and quality of information that is available. Judges who summarily disqualify themselves from a given case may perceive no need to report their reasons. Judges affronted by challenges to their impartiality, who suspect that movants are strategically motivated, may be loath to elaborate on their denials. And judges who grant motions to disqualify may characterize their decisions as discretionary and motivated by

²⁶⁷ Flamm, *supra* note 134.

abundance of caution, rather than as mandatory and dictated by applicable disqualification rules (implicitly denying that their impartiality might reasonably be questioned, but mooted the issue by recusing), which obscures any legal analysis the judges may offer in support of their rulings.

1. State judiciaries should gather data on disqualification decisions.

Most states make no systematic effort to gather information on judicial disqualification. Some, however, do. Collecting such data is desirable for several reasons. First, it would enable court administrators to ascertain disqualification rates within the state and track upward and downward trends to the end of assessing the impact, if any, on the judiciary's resource needs. Second, it would allow administrators to identify and, if need be, address regional disparities in disqualification rates. Third, it would permit administrators to pinpoint disqualification "problems" as they arise, by identifying upward trends in disqualification motions in specific areas, such as campaign contributions, corporate stockholding, campaign promises, etc. Fourth, it would provide additional information to judges as to the circumstances in which their colleagues across the state are and are not disqualifying themselves, to the end of better informing individual disqualification determinations.

A possible objection to such a proposal is that it could increase the frequency of motions to disqualify by making data available to lawyers that they would use to support such motions. One of the primary findings of this report is that judicial disqualification may be underutilized (one cannot resolve this issue conclusively because the necessary data—data this recommendation seeks to generate—remain unavailable). If, as a consequence of adopting this recommendation, additional, non-frivolous disqualification

motions are filed, that—by itself—is not a legitimate ground for objection. If, on the other hand, the concern is that lawyers and litigants would be inspired to file frivolous motions to disqualify, the problem lies not with access to additional information about disqualification standards and practice, but to misuse of such information, which logically ought to be resolved with reference to procedures already in place to address litigation abuses.

2. Judges Should be Encouraged to Explain the Reasons for Their Disqualification

As a general proposition, it is desirable for judges to give reasons for their rulings: it contributes to due process by reassuring the parties that judicial decisions are not arbitrary, and by furnishing appellate courts with a record to review on appeal. Decisions related to disqualification and recusal, however, may present special issues. When a judge withdraws on her own initiative, there is no motion to grant or “ruling” to make, which arguably renders explanation unnecessary. Even when a judge withdraws upon the motion of a party, any error is seemingly harmless and the need for appellate review is obviated, thereby rendering explanation arguably superfluous. Moreover, some worry that if judges were required to give reasons for withdrawing from cases – on motion or sua sponte – it could lead to disqualification standards set by the “lowest common denominator,” in which judges who withdraw out of an abundance of caution when disqualification is not technically required will, in effect, set “precedent” that other judges will be pressured to follow.

These concerns are understandable, and may militate against *requiring* judges to state the grounds for their disqualification. They are, however, overstated, and do not

counsel against *encouraging* judges to explain their rulings.²⁶⁸ Model Code of Judicial Conduct Rule 2.7 states that “A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11, or other law.” The comment accompanying Rule 2.7 explains that “judges must be available to decide matters that come before the courts,” and that “[u]nwarranted disqualification may bring public disfavor to the court and to the judge personally.” Moreover, “[t]he dignity of the court, the judge’s respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge’s colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.” Offering an explanation, however brief, for a judge’s decision to withdraw furthers the purpose of Rule 2.7 by reassuring the parties and the public that disqualification is being used for the right reasons.

On a related note, the concern that if judges are required to explain their decisions to step down it will make precedent of overly cautious decisions to withdraw where disqualification is not truly necessary, pays insufficient heed to the thrust of Rule 2.7. When disqualification standards were revised in the 1970’s to require disqualification whenever a judge’s impartiality might reasonably be questioned, the change was defended in part as a way to encourage judges who were loath to concede actual bias, to disqualify themselves on the theory that they might be more willing to concede a perception problem (i.e. that their impartiality might be questioned).

The Code, however, does not tolerate further slippage by authorizing judges loath to concede that their impartiality might reasonably be questioned, to recuse themselves when disqualification is unnecessary. To the contrary, Rule 2.7 explicitly prohibits such

²⁶⁸ See generally Sarah M.R. Cravens, *In Pursuit of Actual Justice*, 59 Ala. L. Rev. 1 (2007).

a course. By offering explanations for their decisions to withdraw, judges are encouraged to come to terms with the interplay between Rule 2.11 and 2.7. And by discussing the reasons for disqualification more openly, more coherent disqualification standards may emerge.

Because judges typically explain their decisions only when they deny motions to disqualify themselves, the primary source of interpretive guidance on when disqualification is necessary is appellate court decisions reversing trial courts that have denied disqualification motions – where the lower court’s failure to disqualify is so egregious that it amounts to a reversible clear error or abuse of discretion. If we are to take disqualification seriously, it is important that more judges explain their decisions to disqualify – or not –if only briefly. Accordingly, it is recommended that judges be encouraged to state the grounds for their disqualification.

3. State Supreme Courts Supply Greater Guidance to Their Judges on When a Judge’s Impartiality Might Reasonably be Questioned.

Disqualification standards are clarified by rules that reduce room for the exercise of discretion and require judges to disqualify themselves in specific circumstances, such as when someone within a specified degree of relation to the judge appears as a party or lawyer. This report has urged states to adopt additional rules of this sort, that are incorporated in the Model Code but have not been widely adopted, to clarify the need for disqualification in cases when parties or lawyers have contributed to the judge’s campaign in excess of a specified threshold, or when the judge has made prior public statements that commit or appear to commit her reach a particular result.

It is not feasible, however, to capture in specific rules every circumstance in which disqualification is desirable. First, it would be unwieldy to draft a code that lists

every conceivable situation, however infrequent, in which disqualification would be called for. Second, one cannot anticipate every situation in which disqualification would be desirable. And third, there are some situations in which the desirability of disqualification turns on circumstances unique to the case at hand. Accordingly, a more general, overarching directive that judges disqualify themselves whenever their impartiality might reasonably be questioned is critical to the success of the disqualification regime.

The problem with a general directive to disqualify when impartiality might reasonably be questioned, however, is that it is likely to be underutilized among judges who—as the background section of this report explains—may be quite reticent to concede that their impartiality could be doubted. To ensure that this general directive is taken seriously, states should provide judges with greater guidance as to the circumstances in which their impartiality might reasonably be questioned. At least two treatises have devoted considerable discussion to this question, and it would serve no useful purpose to reproduce that discussion here.²⁶⁹ It may, however, be helpful to provide some additional direction as to the inquiries judges should undertake when evaluating whether their impartiality might reasonably be questioned in a given case.

As a preliminary matter, it is an almost universal practice to evaluate whether a judge's impartiality might reasonably be questioned from the perspective of a reasonable, well-informed person—and not from the perspective of the litigants, the judge, or the media. Thus, whether the judge can be impartial or thinks she can be impartial may be

²⁶⁹ JAMES J. ALFINI, STEVEN LUBET, JEFFREY M. SHAMAN, CHARLES GARDNER GEYH, *JUDICIAL CONDUCT AND ETHICS*, 4.04 (4th Ed. 2007); RICHARD E. FLAMM, *JUDICIAL DISQUALIFICATION*, Chapter 5 (2nd Ed. 2007).

relevant to whether she is biased in fact, but does not resolve whether her impartiality might reasonably be questioned.

The judge's initial task is to identify the allegedly disqualifying relationship, interest or occurrence, be it a personal or professional friendship, a campaign contribution, a public statement, etc. If the allegedly disqualifying circumstance does not trigger automatic disqualification under a specific rule, it then becomes necessary to assess whether that circumstance might nonetheless lead a reasonable, well-informed person to question the judge's impartiality. This is almost inevitably a question of degree that may be aided by a series of inquiries. Professor Leslie Abramson has elaborated on the inquiries judges should undertake in such situations, and his work has informed the recommended inquiries that follow.²⁷⁰

The background section to this report detailed four specific disqualification problem areas, three of which are germane here:²⁷¹ when the judge receives large campaign contributions from lawyers and parties; when the judge makes public statements pledging, committing or appearing to commit to reach particular results in future cases; and when someone with whom the judge has a personal or professional relationship appears as party or counsel.

Campaign Contributions. With respect to campaign contributions, the ABA has already recommended the creation of a specific disqualification provision, which this report urges states to adopt. Jurisdictions that have not adopted such a specific disqualification provision, however, must evaluate whether a campaign contribution

²⁷⁰ Leslie Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably be Questioned,"* 14 GEO. J. LEGAL ETHICS 55 (2000).

²⁷¹ The fourth, relating to disqualification procedures, do not implicate concerns with respect to substantive disqualification standards.

gives rise to the need for disqualification with reference to whether the judge's impartiality might reasonably be questioned.

When the allegedly disqualifying circumstance concerns a campaign contribution the judge has received from a party or a party's lawyer, the judge should logically inquire into the following issues:

- The size and importance of the contribution: The greater the size of the contribution, the greater the perception of influence, and the greater the risk that a judge's impartiality might reasonably be questioned. Similarly, the more important the contribution to the campaign and the judge's success—the more problematic its impact on perceived impartiality, insofar as increases the judge's apparent dependence on the contributor.²⁷²

- The timing of the contribution: The closer in time between the contribution and the case in which the contributor appears, the greater the perception that the contribution is seeking to influence judicial decision-making.²⁷³

- The relationship between the contributor and the case: The more direct the relationship between the contributor and the case, the greater the perception problem may be—for example, all else being equal, contributions from parties may create greater perception problems than contributions from interested observers.²⁷⁴

- Whether the contribution is made directly to the judge or is an independent expenditure: All else being equal, independent expenditures on a judge's behalf may not give rise to the same perception of a quid pro quo relationship as direct contributions; however, when an independent expenditure is significant enough to create the perception

²⁷² See generally Lawrence Messina *supra* note 166; Avery v. State Farm *supra* note 35.

²⁷³ *Id.*

²⁷⁴ See Avery v. State Farm *supra* note 35.

that it was important to the campaign's success, the perceived dependence of the judge on that expenditure may call the judge's impartiality into question when the contributor later comes before the judge as a party or lawyer.

- Contribution limits: If the contribution is below a state specified contribution limit, it may reduce perception problems, subject to exceptions discussed above.²⁷⁵

Public Statements. When the allegedly disqualifying circumstance concerns public statements that the judge made relating to a party, or matter before the court (including, but not limited to statements expressly or impliedly promising or committing to reach a particular result), the judge should logically inquire into the following issues:

- Whether the remarks indicate prejudgment of a party, lawyer, witness or issue: When, for example, the judge states her intention to rule a particular way before a matter is heard, it may call the judge's impartiality into question.

- The context and timing of the remarks: When a judge's remarks on a party or issue before the court are made on the record, in a judicial proceeding and in light of evidence presented, they are less likely to raise doubts about the judge's impartiality than when the remarks are offered in an extrajudicial context, before the case is heard.

- The tenor of the remarks: When remarks made about a party or issue—even in a judicial proceeding—are so intemperate or excessive as to suggest that the judge may harbor an extrajudicial bias, it may call the judge's impartiality into question.

Relationships. When the allegedly disqualifying circumstance concerns a personal or professional relationship between the judge and a party, lawyer, witness or victim, the judge should logically inquire into the following issues:

²⁷⁵ See discussion at pp. 73-74, *supra*.

- The nature of the relationship: the closer the relationship—personal or professional—the likelier that it may be perceived as affecting the judge’s impartiality.
- Duration, recency and frequency of the relationship: the longer the relationship, the more recent the relationship, and the more frequent the contact, the likelier that a reasonable person might question the judge’s impartiality.
- Significance of the case to the other party to the relationship: The more significant the impact of the case on the other party to the relationship, the greater the perception problem may be—e.g., a judge’s relationship with an uncontested fact witness may be less problematic than a relationship with a civil defendant who stands to lose his livelihood.
- Relevance of the relationship to the case: If the relationship has some connection to the case, as for example, where the parties to the relationship previously discussed the matter now before the court, it may increase doubts as to the judge’s capacity to remain impartial.²⁷⁶
- Dependence: To the extent that the judge has a personal or professional dependence on the relationship, it may increase the perception of partiality.²⁷⁷
- Preferential treatment: If the judge has received preferential business treatment from the other party to the relationship, it may give rise to questions about the judge’s ability to remain impartial.

Conclusion

From humble beginnings, that called upon a judge to recuse himself only when he would otherwise be “a judge in his own case,”²⁷⁸ to today’s detailed disqualification

²⁷⁶ See *Cheney v. District Court supra* note 255.

²⁷⁷ See generally *Avery v. State Farm; Cheney v. District Court supra* note 255.

regime, judicial disqualification in the United States has evolved and expanded the list of conflicts that demand judicial disqualification. Modern rules that are calculated to encourage disqualification not just when a judge may be less than impartial, but where the judge's impartiality might reasonably be questioned, are in tension with the traditional presumption of judicial impartiality. For a judge to concede actual bias may be a violation of her oath of office; and to concede perceived bias may be a violation of directives embedded in codes of judicial that judges act at all times to promote public confidence in the impartiality of the judiciary.

Substantive disqualification rules are more elaborately detailed than ever before, and with only infrequent exceptions, are more or less uniform across jurisdictions. Disqualification procedures, on the other hand, are more widely varied, and typically still leave considerable power in the hands of the very judge whose impartiality is in question—a judge who is understandably reluctant to acknowledge her own bias or apparent bias. Moreover, few jurisdictions gather information on judicial disqualifications, further limiting the development a rational body of law to which judges can refer when evaluating the merits of disqualification motions.

The net effect is that, despite a fundamentally sound disqualification regime across the states, judicial disqualification is not being taken as seriously as it should. In recent years, judges have been criticized for not disqualifying themselves from cases in which parties or lawyers have made substantial contributions to their election campaigns, and good friends have appeared as lawyers or litigants. And in the near future, one can anticipate more cases in which judges decline to disqualify themselves after making prior public statements that impliedly commit them to reaching a particular result. To address

²⁷⁸ Dr. Bonham's Case, 77 Eng. Rep. 646, 652 (1609).

these concerns, this Report has recommended that jurisdictions take steps to 1) reduce the role that target judges play in evaluating their own qualifications and 2) provide better guidance, through additional information and resources, on when a judge's "impartiality might reasonably be questioned."