

Practical steps toward an impartial judiciary

There are several easily implemented ways that state supreme courts can supply greater guidance to judges on when disqualification is justified.

In 2007, the American Bar Association Standing Committee on Judicial Independence began a project to study judicial disqualification. The project has produced a draft report that includes recommendations, for example, that states consider adopting a peremptory challenge procedure and consider assigning contested disqualification motions to a judge other than the one who is the subject of the motion.¹

One of the report's recommendations should not be controversial: state supreme courts should supply greater guidance to their judges on when disqualification is justified. Following are several easily implemented ways for courts to provide more direction before a judge presides in a case and, therefore, decrease the chances that a judge's impartiality might be questioned after he or she renders a decision.

1. Adopt more specific disqualification rules

In most states, disqualification rules are contained in the code of judicial conduct (in a few states, the standards are in statutes or rules). Most states start with the same rule as the *ABA Model Code of Judicial Conduct* that "a judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might rea-

sonably be questioned" (Canon 3E of the 1990 model code, Rule 2.11 of the 2007 model code). The rules then list specific examples of circumstances that require disqualification, for example, when a family member appears as an attorney in a case.

The draft report advocates adoption of several rules from the model code that have not been adopted in many states. For example, in 1997, the ABA revised the model code to provide that a judge is disqualified from cases in which a party, a party's lawyer, or the law firm of a party's lawyer has contributed to the judge's campaign over a limit to be set by each state. No state has adopted this provision.

In 2003, the ABA revised the model code to require disqualification if the judge, while a judge or a judicial candidate, has "made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy." Approximately 12 states have adopted this provision.

The 2007 revisions to the model code added two new specific grounds for disqualification. Rule 11A(6)(b) provides that a judge is disqualified if, while serving in gov-

ernmental employment, the judge "participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy." New Rule 11A(6)(b) disqualifies a judge who "previously presided as a judge over the matter in another court."

Even after the 2007 revisions, however, the model code does not include specific rules for many common situations such as when an attorney in a case is a judge's former law partner or a partner of a judge's relative, when a judge has a social relationship with a party or attorney, or when a party is a former client of the judge, although some commenters made suggestions for such provisions during the code revision process.

As they consider revisions to their codes, states should establish specific rules that will clarify the question of disqualification in these and other situations. For example, if a state has caselaw or an advisory opinion that already addresses whether disqualification is required under specific circumstances, the state's code could be revised to expressly incorporate that rule, making the code as comprehensive as possible. Commentary explaining when disqualification is *not* necessarily required (for example, when a party files a complaint against the judge with the conduct commission) would also be helpful.

1. The draft report is accessible at http://www.abanet.org/judind/pdf/JDP_DRAFT_FOR_DISCUSSION_PURPOSES_9-08.pdf.

Obviously, the code of judicial conduct cannot become a 900-page treatise on disqualification (see *Judicial Disqualification and Recusal* by Richard Flamm²), but there are some common situations that could easily be addressed by specific rules in the code to provide more guidance for judges.

2. Education, information, prevention

No matter how clear the disqualification rules are, they will not help if judges do not think about or even know about them. State supreme courts should make every effort to ensure that judges are frequently reminded of the requirement to disqualify when impartiality might reasonably be questioned so that they are always conscious of that obligation. For example, judicial education opportunities for new judges and for experienced judges should include sessions on disqualification.

Moreover, at the beginning of each year, the court could circulate the disqualification rules (indeed the entire code of judicial conduct) to all judges via e-mail with a reminder to read them. The information could include summaries of significant cases and advisory opinions on the issue from the previous year. On the home-page of the court system web-site, there could be a link to a section devoted wholly to disqualification with additional links to the disqualification rules (both in

the code and in statutes or other rules), the procedures for disqualification, and cases and advisory opinions interpreting the rules.

3. Establish and support a judicial ethics advisory committee

Forty-three states, the District of Columbia, and the U.S. Judicial Conference have established judicial ethics advisory committees to which judges can submit inquiries regarding the propriety of contemplated future action under the code of judicial conduct. Most committees post their opinions on-line, and some sites are searchable and have topic indices.³

Of the approximately 450 judicial ethics advisory opinions issued in 2008, about 70 dealt with disqualification. Not all committees will answer questions about the propriety of disqualification in a particular, pending case, but some do,⁴ and all will address anticipated disqualification issues. For example, if a judge's child becomes a partner in a local law firm that may appear before the judge in a future case, the judge can ask the advisory committee for guidance beforehand.

In 2008, the Connecticut Supreme Court created the newest advisory committee for judges. Since its establishment, the Connecticut Committee on Judicial Ethics has issued 25 informal opinions, posting summaries on-line. One opinion answered an inquiry about whether a judge is disqualified from a criminal case in which the defendant previously was before the judge as a delinquent or parent in a child protection matter. The committee's conclusion: disqualification was not required unless the judge believed his or her impartiality might be impaired by knowledge previously gained in the other matter.

The state supreme courts in the seven states that do not have a judicial ethics committee (Idaho, Iowa, Michigan, Mississippi, Montana, South Dakota, and Wyoming) would provide a valuable service for their judges by establishing an advisory

committee. The existing committees in several states appear to be dormant or at least have not released an opinion on their web-site in years, and committees in several states have no web-sites. State courts should supply the encouragement and support necessary for these committees to be active and transparent in providing and disseminating advice and should encourage judges to make inquiries of advisory committees.

4. Automated conflict screening

After years of newspaper stories and conduct complaints about federal judges sitting in cases involving parties in which they owned stock, in 2006, the U.S. Judicial Conference approved a policy requiring courts to implement automated conflict screening that will identify financial conflicts of interest in a case and notify the judge. Each judge develops a list of conflicts (for example, lawyers to whom the judge is related and corporations in which the judge owns stock), while the clerk's office obtains and enters information from the parties. Using the matching mechanisms in the software, the judge or staff can compare the two databases to screen for conflicts on a regular schedule, including screening new matters as they are filed.

While automated screening is not foolproof, state courts should employ similar software to help judges implement their disqualification obligations and avoid inadvertently overlooking a conflict.

As the state courts begin a long-term debate on the best way to use judicial disqualification to promote public confidence in judicial impartiality, these few easy steps can jump-start the process. ☺

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2. The book was reviewed in the July-August 2008 issue of JUDICATURE.

3. There is a link to advisory committee web-sites at http://www.ajs.org/ethics/eth_advis_comm_links.asp.

4. For example, the Nebraska Judicial Ethics Committee recently addressed, at a judge's request, a disqualification issue raised by a parent in a pending termination of rights proceeding. The question was whether the judge should recuse because the spouse of another judge would be testifying in the case. The committee noted that, to comply with the exception to the prohibition on ex parte communications for expert advice, the judge had verified to the committee that the parties had been notified that the committee had been consulted and received a copy of the request for an opinion and promised to provide to the parties a copy of the committee's opinion letter and an opportunity to respond. The committee advised that the judge was not automatically disqualified from the case. *Nebraska Advisory Opinion 08-3*.