



“No man shall be a judge in his own case.”

TAKING DISQUALIFICATION SERIOUSLY

by the ABA JUDICIAL
DISQUALIFICATION PROJECT

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*.

In 2007, the American Bar Association's (ABA) Standing Committee on Judicial Independence (SCJI) received an Enterprise Fund Grant from the ABA to undertake a project on judicial disqualification. The resulting Judicial Disqualification Project is currently preparing a report, and resolution to the ABA's House of Delegates, that surveys the state of disqualification rules and practice around the country, identifies problems, and proposes reforms.

This article is excerpted, in large part, from the Project's draft report. It first summarizes the history of disqualification, which highlights the movement toward more rigorous disqualification rules across the country, and then surveys the current state of disqualification rules and practice across the states. Despite the gradual evolution of robust and widely adopted disqualification rules, judges appear to remain reluctant to fully embrace a rigorous disqualification regime, for reasons discussed in the third part of the article. The article concludes by identifying two specific problem areas that the Project will seek to address in its effort to encourage effective disqualification standards and practice

History and evolution

Under English common law, recusal¹ 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.” While a judge could not be challenged on grounds of bias, he could be removed for having an “interest” in its outcome. For example, in *Dr. Bonham's Case*, a judge was disqualified from a case in which he would receive the fines he assessed. However, disqualification for “interest” did not extend to relationships, such as where the judge was

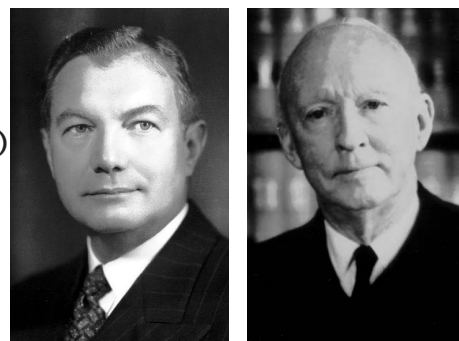
The Judicial Disqualification Project of the American Bar Association's Standing Committee on Judicial Independence surveyed the state of disqualification rules and practice around the country to identify problems and propose reforms.

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Based on comments and suggestions received at a hearing on the draft report and recommendations at the ABA meeting in early August, project staff is making revisions. The ABA's Standing Committee on Judicial Independence will then propose resolutions for adoption by the ABA House of Delegates, to implement the Report's recommendations.

The full report is available at <http://www.abanet.org/judind/home.html>
1. In this article, “recusal” and “disqualification” are used interchangeably; some jurisdictions distinguish between recusal as withdrawal on the judge's initiative and disqualification as withdrawal initiated on the motion of a party, but the 2007 ABA Model Code of Judicial Conduct uses the term “disqualification” in both contexts.

In 1945, Justice Robert Jackson (left) openly criticized Justice Hugo Black (right) for participating in a case argued by a lawyer who had been Black's law partner 20 years before.



related to a party. As Professor John Frank explained: “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.”² In contrast to civil law systems, under which “a judge might be refused upon any suspicion of partiality,” William Blackstone noted that in England “the law is otherwise,” and, “it is held that judges or justices cannot be challenged.”³ 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.”

In the United States, the law of disqualification began quietly but gained in complexity and strength over time:

In 1792, Congress enacted legislation 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.” In 1821, relationship to a party was added as another ground for disqualification. In 1891, Congress enacted legislation forbidding a judge from hearing the appeal of a case that the judge tried, and 20 years later, federal law was further amended to require disqualification

from cases in which the judge was a material witness.

In 1911, Congress enacted legislation entitling a party to disqualify a judge by submitting an affidavit that the judge has “a personal bias or prejudice” against the affiant or for the opposing party. In 1921, in *Berger v. United States*, the Supreme Court found that this statute prohibited rulings on the truth of matters asserted in these affidavits and required automatic disqualification if the affidavit was facially sufficient.

Common law aversion to judicial bias as grounds for disqualification, however, continued to exert considerable influence. While the law ostensibly enabled a party to secure disqualification simply by submitting an affidavit alleging personal bias, Professor John Frank noted at the time:

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.⁴

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.”⁵

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 *Turney v. State of Ohio*, the Supreme Court added a constitutional dimension to the law of disqualification when it invalidated, on due process grounds, an Ohio statute that authorized the judge to receive court costs assessed against convicted (but not acquitted) defendants. 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 20 years before. (*Jewel Ridge Coal Corp. v. Local No. 6167*). In 1948, federal law was further amended to disqualify judges who had a relationship to a party’s lawyer (not just the party, as had been the case since 1821) to sit.⁶ 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.

In 1964, in *United States v. Edwards*, the United States Court of Appeals for the Fifth Circuit articulated a so-called “duty to sit.” 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 recusal.” By 1972, Justice William Rehnquist reported that the duty to sit had been accepted by all circuit courts (*Laird v. Tatum*).

In 1969, the United States Senate rejected President Nixon’s nomination of Clement Haynsworth to the Supreme Court, in part because Haynsworth, as a circuit judge, had not disqualified himself in several cases in which he had some owner-

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

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

4. Frank, *supra* n. 2, at 629.

5. *Id.* at 630.

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

ship interest in a corporate party, or the party's parent corporation.⁷ 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.⁸ A judge was now subject to disqualification "in a proceeding in which his impartiality might reasonably be questioned." That same year, however, Justice William Rehnquist provoked widespread criticism when he declined to disqualify himself from a case in which he, as Assistant Attorney General, had discussed the district court's opinion in the case before a Senate subcommittee, and expressed his view that the case was non-justiciable.⁹ Two years later, Congress adopted, with some variations, the 1972 Model Code's disqualification rule, 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."¹⁰

In 1990, the ABA overhauled the 1972 Model Code of Judicial Conduct. It added personal bias against a party's lawyer as grounds for disqualification, and it expanded the "remittal" procedure by enabling the parties to waive disqualification for any reason other than actual bias.¹¹ In 1999, the ABA amended the 1990 Code to require disqualification when a party or party's lawyer contributed to the judge's election campaign in excess of a specified amount; and amended the 1990 Code again in 2003 to require disqualification when a judge made prior statements that committed or appeared to commit the judge to reach a particular result or rule in a particular way. And in 2007, the ABA undertook a major revision of 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. (See page 10).

State disqualification laws

State codes of judicial conduct, which are based upon the ABA's Model Codes in the vast majority of states, serve as the primary—but not the sole—source of disqualification authority. Other sources include state constitutions, statutes, and court rules. As discussed below, state disqualification rules are generally consistent with the Model Code.

*The general or "catch-all" disqualification standard*¹²

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. Language identical to the Model Code is employed in 45 states. In the remaining three states¹³ 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.

*When the judge is biased or has personal knowledge.*¹⁴

This provision exists in 48 states and at the federal level. The only outliers are Montana and Louisiana, which have no equivalent.¹⁵

*When the judge or relatives are parties, lawyers, witnesses, or have an interest in the case.*¹⁶

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.

Forty-seven jurisdictions require disqualification when a judge, spouse, or anyone within a third degree of relationship to either, is likely to be a material witness.¹⁷

*When the judge or immediate family members have an economic interest.*¹⁸

All states but Georgia and Louisiana require disqualification if a judge knows that he, or a person in his household, has an economic interest in the proceeding.¹⁹ The terminology section of the Code 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."

*When parties or their lawyers contributed to the judge's election campaign.*²⁰

Only two states have adopted provisions comparable to that adopted by the ABA in 1999, which requires a judge to disqualify himself if he received campaign contributions over a designated amount. Mississippi provides for the disqualification of judges when a major campaign donor is a party.²¹ 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."²² However, there is some question as to the enforceability of this statute.²³

*When the judge made prior statements committing her to a result.*²⁴

This provision, adopted by the

7. Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 736 n. 2 (1973).

8. MODEL CODE OF JUDICIAL CONDUCT, Canon 3C (1972) (current version at MODEL CODE OF JUDICIAL CONDUCT, R. 2.11 (2007)).

9. 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).

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

11. MODEL CODE OF JUDICIAL CONDUCT, Canon 3E (1990) (current version at MODEL CODE OF JUDICIAL CONDUCT, R. 2.11 (2007)).

12. 2007 MODEL CODE, Rule 2.11(A).

13. California, Mississippi, and Wisconsin.

14. 2007 MODEL CODE, Rule 2.11 (A)(1).

15. Thirteen states, however, do not call for disqualification if a judge has bias concerning a party's lawyer, consistent with the 1972 Model Code: Alabama, Alaska, Colorado, Connecticut, Delaware, Iowa, Massachusetts, Mississippi, New York, North Carolina, Oregon, Pennsylvania, and Washington.

16. 2007 MODEL CODE, Rule 2.11(A)(2).

17. The jurisdictions that lack this provision are: Alabama, Louisiana, and Montana.

18. 2007 MODEL CODE, Rule 2.11(A)(3).

19. *Id.*

20. 2007 MODEL CODE, Rule 2.11(A)(4).

21. MISS. CODE OF JUDICIAL CONDUCT, Canon 3E(2).

22. ALA. CODE §§ 12-24-1, 2.

23. 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. Trimmer Law Firm*, 897 So.2d 207, 233-234 (Ala., 2004).

24. 2007 MODEL CODE, Rule 2.11(A)(5).



William Blackstone noted that in England “it is held that judges or justices cannot be challenged.” 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.”

Procedural rules

While the substantive rules for disqualification are fairly consistent across jurisdictions, the procedural rules for judicial disqualification vary 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.

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 showing of cause.³⁹ When available, peremptory challenges are typically limited to one per party, with a maximum of two per litigation.⁴⁰ Furthermore, most states only permit parties to remove a judge without a showing of cause before the judge has ruled on any contested matter.⁴¹

ABA in 2003, requires recusal when a judge makes public statements which commits or appears to commit the judge to reach a particular result in a case. To date, the provision has been adopted in 11 jurisdictions.²⁵

*When the judge was previously involved in the case.*²⁶

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. Most jurisdictions also 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.

As to the requirement that former government employees disqualify themselves if they participated substantially in a matter now before the court,²⁷ only six jurisdictions have a comparable provision in black letter law.²⁸ It bears note however, that this provision was introduced to the Model Code in 2007.²⁹ An additional 26 states have adopted Comments comparable to that in the previous versions of the Model Code.

Every state except Montana has adopted the Model Code’s rule requiring disqualification when a judge is likely to be a material witness in the proceeding.³⁰ 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.³¹

Finally, 18 jurisdictions³² require disqualification when a judge has presided over the case previously in another court.³³ A handful of these states require a judge to disqualify if his spouse or anyone with a third degree of relation to either of them presided over the case in another court.³⁴

Other provisions governing disqualification practice.

Forty-five jurisdictions require that judges remain aware of their economic interests and of the economic interests of those in the same household.³⁵ When it comes to permitting parties to waive a disqualification, 44 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,³⁶ and seven states prohibit waiver of disqualification for additional reasons.³⁷ New Jersey expressly does not permit any waiver of disqualification, and five states do not have any black letter provisions on waiver of disqualification.³⁸

25. Arizona, Florida, Iowa, Maryland, Minnesota, Nevada, New Hampshire, New Mexico, Oklahoma, South Dakota, and Wisconsin. These provisions have been challenged as unconstitutional, on the grounds that they violate the judge’s first amendment freedom of speech. To date, most of those challenges have been rejected. For a summary of those cases, see: http://www.brennancenter.org/stack_detail.asp?key=348&subkey=35327.

26. 2007 MODEL CODE, Rule 2.11(A)(6)(a).

27. 2007 MODEL CODE, Rule 2.11(A)(6)(b).

28. Alaska, California, Delaware, Georgia, Kentucky, and Texas.

29. 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.

30. 2007 MODEL CODE, Rule 2.11(A)(6)(c).

31. Connecticut, Delaware, Iowa, Kentucky, Massachusetts, Minnesota, Mississippi, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Texas, and Utah.

32. Alabama, Arkansas, California, Florida, Georgia, Hawaii, Indiana, Louisiana, Montana, New Hampshire, New Mexico, Ohio, Oregon,

South Carolina, Tennessee, Virginia, Washington, and Wisconsin.

33. 2007 MODEL CODE, Rule 2.11(A)(6)(d).

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

35. 2007 MODEL CODE, Rule 2.11(B). The jurisdictions that lack this provision are: Louisiana, Maine, Michigan, Mississippi, and Montana.

36. Alaska, Arizona, Colorado, North Carolina, and Texas.

37. Alabama, California, Massachusetts, New York, Ohio, Oregon, and Washington.

38. Indiana, Louisiana, Montana, Pennsylvania, and West Virginia. For New Jersey’s provision, see N.J. CODE OF JUDICIAL CONDUCT, Canon 3D (“A judge... may not avoid disqualification by disclosing on the record the disqualifying interest and securing the consent of the parties.”).

39. 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. Due to interpretive differences, some include Kansas (see map, page 27) and not Texas (Kansas State Code Annotated Section 20-311(d)(b); TEX. GOV’T CODE, Rule § 74.053, § 75.551).

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

41. Richard E. Flamm, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 776 (2nd Ed 2007).

In the case of disqualification for cause, which is permitted in all jurisdictions, a judge presented with a motion to disqualify may conclude that disqualification is required and withdraw without a hearing on the motion. If the judge does not withdraw at that juncture, jurisdictions handle the review of motions to disqualify in three different ways.

The most common approach is for the subject judge to review the motion on the merits.⁴² Alternatively, several states require that the motion be decided on its merits by a different judge.⁴³ A blended approach, adopted by a significant number of states, 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).⁴⁴

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.⁴⁵ 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.⁴⁶

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. 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.⁴⁷

Information concerning when judges within a jurisdiction do and do not disqualify themselves is not typically gathered. However, at least four jurisdictions—Alaska, Minnesota, North Dakota, and Vermont—have mandatory reporting practices for disqualification proceedings.

If a litigant is unsatisfied with a judge's decision not to disqualify, it can be appealed. 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 28 states and in every federal circuit.⁴⁸ In jurisdictions that apply this standard, it is typically applied in both civil and criminal proceedings. Other states employ a comparably stringent "clearly erroneous" standard or its equivalent.⁴⁹ Four states have adopted a *de novo* standard of review.⁵⁰

Ambivalence about disqualification

The movement toward acceptance of more rigorous disqualification rules, discussed above, has been offset 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."⁵¹

Over 300 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 judicial office fairly and impartially,"⁵² "shall act at all times in a manner that promotes the independence, integrity and impartiality of the judiciary,"⁵³ and "shall not be swayed by public clamor or fear of criticism."⁵⁴ The principle that a "good" judge is an impartial judge is thus thoroughly engrained in Anglo-American law and legal culture, and 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.⁵⁵

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

42. Alabama, Arkansas, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New York, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Washington.

43. Alaska, Arizona, North Dakota, Ohio, Oregon, Utah, Vermont, and Virginia.

44. California, Connecticut, Georgia, Kansas, Louisiana, Montana, Nevada, North Carolina, Texas, Wisconsin, Wyoming, and West Virginia. State Court Recusal/Disqualification Survey (2007) (unpublished raw survey data, Nat'l Center for State Courts) (on file with project authors). 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.

45. MONT. CODE ANN. § 3-1-803(1)(d).

46. NEV. REV. STAT. § 1.225(6).

47. Delaware, Illinois, Iowa, Montana, Vermont, and Wyoming.

48. Flamm, *supra* n. 41, 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.

49. *Id.* Alabama, Connecticut, District of Columbia, and Kentucky.

50. *Id.* 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*").

51. Quoted in J. Campbell, LIVES OF THE CHIEF JUSTICES OF ENGLAND 208 (1873).

52. 2007 MODEL CODE, Rule 2.2.

53. *Id.*, Rule 1.2.

54. *Id.*, Rule 2.4.

55. 28 U.S.C. § 453 (2000).

be. This is a concession the common law did not tolerate, as Blackstone explained 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.”⁵⁶

Professor John Frank put the point bluntly: “Disqualification for bias represents a complete departure from common law principles.”⁵⁷ 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”⁵⁸—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.

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.”⁵⁹

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.⁶⁰

To complicate matters further, the legal realism movement of the early twentieth century cultivated an appreciation for the complexity of judicial decision making that has, in the years since, been widely internalized.⁶¹ 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.⁶² 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—sometimes 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.⁶³

Conclusion

There are two impediments to breaking the vicious circle described above: first is over-reliance on judges targeted with disqualification motions to enforce the disqualification regime, which puts the enforcement of rules aimed at maintaining rigorous disqualification standards in the hands of judges understandably predisposed not to question their own impartiality; and second is the inadequacy of information being disseminated to judges about disqualification standards, given the absence of systematic data collection on disqualification, the traditional reluctance of judges to explain their disqualification decisions, and the insufficiency of general guidance on when a judge’s impartiality “might reasonably be questioned.” The Judicial Disqualification Project of the ABA’s Standing Committee on Judicial Independence is ongoing, and will be proposing recommendations in the coming months to address these and related problems. ❧

The ABA Judicial Disqualification Project was established by the ABA Standing Committee on Judicial Independence (SCJI), which is chaired by Doreen Dodson, Esq. SCJI retained Indiana University law professor Charles Geyh as the director of and consultant to the project (cgeyh@indiana.edu), and the assistant to the director is Ms. Kathleen Lee, J.D. Indiana University, 2009. Counsel to SCJI and the project is Konstantina Vagenas, Esq., Manager of Judicial Independence Initiatives. Project advisors include Judge Marc Amy, Judge Charles Clevert, Roberta Liebenberg, Esq., Meghan Magruder, Esq., Andrea Ordín, Esq., Robert Peck, Esq., and William Weisenberg, Esq.

56. BLACKSTONE, *supra* n. 3

57. Frank, *supra* n. 2, at 618-19.

58. Matthew Hale, *quoted in* CAMPBELL, *supra* n. 51.

59. 2007 MODEL CODE, Rule 1.2.

60. 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).

61. 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.”).

62. Max Radin, “*The Theory of Judicial Decision: Or How Judges Think*” (1925), in William W. Fisher III et al. eds., AMERICAN LEGAL REALISM (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.”).

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