

**REVISED DRAFT FOR DISCUSSION AND COMMENT ONLY  
As Accepted and Reported by Committee on July 31, 2009**

**AMERICAN BAR ASSOCIATION**

**STANDING COMMITTEE ON JUDICIAL INDEPENDENCE**

**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

- 1 RESOLVED, that the American Bar Association adopt the following recommendations  
2 of the Judicial Disqualification Project, dated \_\_\_\_, in order to improve judicial  
3 disqualification standards, practices, and procedures among the states and promote public  
4 confidence in the courts;  
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6 FURTHER RESOLVED, that the following recommendations set forth in the Project be  
7 transmitted to the highest court of each state and territory and to any other entities which  
8 have regulatory responsibility for judicial disqualification standards, practices, and  
9 procedures in the jurisdiction.

10 RECOMMENDATIONS FOR IMPROVING JUDICIAL DISQUALIFICATION  
11 STANDARDS, PRACTICES AND PROCEDURES AMONG THE STATES  
12

- 13 I. States<sup>1</sup> should reduce reliance on self-evaluation by the judge whose  
14 disqualification is sought as the means by which judicial disqualification  
15 questions are typically resolved.  
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17 Having a motion to disqualify resolved by the very judge whose impartiality has been  
18 called into question can create legitimate problems of public perception. Because an  
19 impartial judiciary should be indifferent to which judge is assigned to decide a given  
20 question, States should address this perception problem by reducing reliance on the  
21 judge to resolve challenges to his or her own impartiality. While no single means to  
22 this end may be optimal in every jurisdiction, States should consider implementing  
23 one or more of the following:  
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- 25 A. In the event that a disqualification motion is denied, States should  
26 consider adopting a uniform procedure for assigning contested  
27 disqualification motions to a different judge.  
28 B. State courts should consider adopting a *de novo* standard of appellate  
29 review in matters in which judges' decisions not to disqualify  
30 themselves are challenged.  
31 C. When high court judges decline party requests to disqualify  
32 themselves, States should consider establishing procedures for review  
33 of those decisions by the remainder of the court, by a specially  
34 constituted court, or by an advisory board.  
35 D. States should consider adopting judicial substitution or peremptory  
36 challenge procedures for trial judges.  
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- 38 II. States should provide greater guidance to judges and obtain information from  
39 judges about judicial disqualification issues and decisions.  
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41 Judges are often ambivalent about disqualification because a party's allegations that a  
42 judge appears to be biased or self-interested are in tension with the presumption of  
43 impartiality or may be motivated by tactical considerations. One consequence of this  
44 ambivalence is that judges do not always explain their decisions about disqualification as  
45 fully as they explain other procedural and substantive issues. While this is  
46 understandable, it can create an information deficit detrimental to informed judicial  
47 decision-making. To increase the availability of information about judicial  
48 disqualification, States should consider implementing one or more of the following:  
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- 50 A. States should consider gathering and disseminating data about judicial  
51 disqualification within their jurisdictions.

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<sup>1</sup> When capitalized, "States" as used herein refers to courts or legislatures, depending upon which has regulatory authority over the judicial disqualification standard, practice or procedure within the jurisdiction. The term "States" also encompasses U.S. Territories.

- 52 B. The judiciary in each State should consider encouraging judges to  
53 explain the reasons for their judicial disqualification decisions.
- 54 C. Through judicial education programs and otherwise, States should  
55 consider providing more systematic guidance to the judiciary about  
56 when a judge's impartiality might reasonably be questioned
- 57 D. States should consider the following factors when giving guidance to  
58 judges concerning when the campaign support a judicial candidate  
59 receives might reasonably call his or her impartiality into question:  
60 (1) The level of support given, directly or indirectly, by a  
61 litigant in relation both to aggregate support (direct and  
62 indirect) for the individual judge's campaign and to the  
63 total amount spent by all candidates for that judgeship;  
64 (2) If the support is monetary, whether any distinction  
65 between direct contributions or independent expenditures  
66 bears on the disqualification question;  
67 (3) The timing of the support in relation to the case for  
68 which disqualification is sought;  
69 (4) If the supporter is not a litigant, the relationship, if any,  
70 between the supporter and (i) any of the litigants, (ii) the  
71 issue before the court, (iii) the judicial candidate, and (iv)  
72 the total support received by the judicial candidate and the  
73 total support received by all candidates for that judgeship.

## REPORT

### Introduction and Background

Every year, a small number of judges violate clear and specific disqualification rules, *e.g.*, by presiding over matters 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. Often, rule violations are the product of honest, if questionable judgment, such as when a judge concludes that the exigencies of a particular matter justify ruling on a matter involving a relative, or when a judge declines to step aside because he or she does not recognize his or her 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 default rule, such as the one embodied in MODEL CODE OF JUDICIAL CONDUCT (“Model Code”) R. 2.11 and 28 U.S.C. § 455, 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 back to an interpretation of the more general directive to disqualify when impartiality might reasonably be questioned. For example, Rule 2.11(A)(3) requires 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) instructs 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,<sup>2</sup> which is defined to mean “an insignificant interest that could not raise a reasonable question regarding the judge’s impartiality.” In other words, close matters involving interests that may or may not be disqualifying turn once again on whether the judge’s impartiality might reasonably be questioned.<sup>3</sup>

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 disqualification questions that judges must resolve with only the guidance of 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 matters 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,<sup>4</sup> to date only two jurisdictions<sup>5</sup> have adopted comparable rules.

- 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 before the court. In 2004, the ABA amended its Model Code to include a rule requiring disqualification in such instances, but to date only eleven jurisdictions have adopted it. Matters in this second “problem area” are few, but are likely to become more common in

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<sup>2</sup> 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 term that expressly exempts “*de minimis*” interests.

<sup>3</sup> The judge whose impartiality is being questioned is sometimes referred to herein as the “target” judge.

<sup>4</sup> MODEL CODE OF JUDICIAL CONDUCT, R. 2.11(A)(4).

<sup>5</sup> To wit: Alabama and Mississippi.

the aftermath of the Supreme Court's decision in *Republican Party of Minnesota v. White*.<sup>6</sup>

- A third specific problem area concerns relatives, current and former business colleagues, 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 both the federal and state judiciaries, from the U.S. Supreme Court on down.

- 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 (if any) employed to answer disqualification questions, and such disqualification procedures are the focus of this fourth problem area.

Disqualification standards have become ever more rigorous over time, as the bar, the legislatures, 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 matters in which those prejudices influence their decision-making. While judges have often adopted the more rigorous disqualification standards the bar has proposed, they 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 impartiality "might reasonably be questioned" (*i.e.*, even if the judge is not partial

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<sup>6</sup> 536 U.S. 765 (2002).

in fact). Uncertainties surrounding the application of this standard, however, coupled with lingering reluctance to concede appearance problems, have culminated in an ongoing series of episodes in which judges have been harshly criticized for declining to disqualify themselves.

## Recommendations

A review of the foregoing 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.

### **I. States should reduce reliance on self-evaluation by the judge whose disqualification is sought as the means by which judicial disqualification questions are typically resolved.**

Having a motion to disqualify resolved by the very judge whose impartiality has been called into question can create legitimate problems of public perception. Indeed, a recent poll found that over 80% of the public thinks that disqualification motions should be assigned to a different judge.<sup>7</sup> Because an impartial judiciary should be indifferent to which judge is assigned to decide a given question, States should address this perception problem by reducing reliance on the judge to resolve challenges to his or her own impartiality. While no single means to this end may be optimal in every jurisdiction, States should consider implementing one or more of the following:

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<sup>7</sup> Justice at Stake Campaign, Press Release, Poll: Huge Majority Wants Firewall Between Judges, Election Backers (Feb. 22, 2009), *available at* <http://www.justiceatstake.org/node/125>.

A. In the event that a disqualification motion is denied, States should consider adopting a uniform procedure for assigning contested disqualification motions to a different judge.

States have adopted three different approaches to who decides judicial disqualification motions: one approach assigns the judge whose impartiality is being questioned to resolve all disqualification motions; a second automatically refers disqualification motions to another judge for hearing; and a third directs the target judge to determine the timeliness and facial sufficiency of the motion, and if the motion survives this threshold review, assigns it to a second judge for a ruling.

The judge whose impartiality is being questioned may be best acquainted with all relevant circumstances bearing on his or her fitness to proceed. That does not mean, however, that the target judge is best positioned to rule on such motions.<sup>8</sup> 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 both in appearance and in fact, 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 target judge to review the timeliness and facial validity of a disqualification motion before turning those that pass this threshold scrutiny over to a second judge for a ruling on the merits of the motion—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 target judge’s discretion to deny the motions is circumscribed.

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<sup>8</sup> See Guthrie, *supra* note 241.

B. State courts should consider adopting a *de novo* standard of appellate review in matters in which judges' decisions not to disqualify himself or herself are challenged.

Most jurisdictions employ a highly deferential standard of appellate 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 his or her own interests, relationships, or biases.<sup>9</sup>

It is therefore recommended that States revisit the standard of review applicable to disqualification decisions and consider a more searching standard, such as *de novo* review.

C. When high court judges decline party requests to disqualify themselves, States should consider establishing procedures for review of those decisions by the remainder of the court, by a specially constituted court, or by an advisory board.

The most high-profile examples of judges declining to disqualify themselves in the teeth of a public outcry have arisen on courts of last resort, where the target judge (or justice, as the case may be) effectively has the first and final word on his or her own disqualification.<sup>10</sup> To the extent that disqualification rules are a part of state codes of conduct that, if violated, subject judges to discipline or removal, the procedures in place to discipline state high court justices could conceivably be used to redress at least some failures to disqualify. The disciplinary process is not, however, intended to serve as a

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<sup>9</sup> See Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L. J. 503, 532-532 (2007).

<sup>10</sup> See generally *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009); *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005), *cert. denied*, 547 U.S. 1003 (2006); *Cheney v. U.S. Dist. Court*, 541 U.S. 913 (2004) (mem.) (Scalia, J.) (denying recusal motion).

form of appellate review and so is not structured to provide relief to litigants in pending litigation. Moreover, to the extent that judicial refusal to disqualify is subject to discipline, it is typically limited to egregious, willful violations.<sup>11</sup>

To avoid such problems, state high courts should consider adopting procedures for the review of disqualification motions that relieve the target 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,<sup>12</sup> by a specially constituted court, or by an advisory board, *e.g.*, a special panel of retired judges.

D. States should consider adopting judicial substitution or peremptory challenge procedures for trial judges.

Currently nineteen states employ a procedure for peremptory challenge of judges. In some jurisdictions, a party may simply request a substitution of judges.<sup>13</sup> 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.<sup>14</sup> In either case, substitution of another 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

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<sup>11</sup> ALFINI ET AL., *supra* note 2, §4.01.

<sup>12</sup> See Timothy J. Goodson, Comment, *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).

<sup>13</sup> See *e.g.* MONT. CODE ANN. § 3-1-804 (2005).

<sup>14</sup> See WAYNE LAFAYE, JEROLD ISRAEL, NANCY KING, ORIN KERR, CRIMINAL PROCEDURE §22.4(d) (2007-08); see also ALASKA STAT. 22.20.022(a) (2005).

jurisdictions with peremptory challenge procedures suggests that post-substitution disqualification issues surface less frequently.

## **II. States should provide greater guidance to judges and obtain more information from judges about judicial disqualification issues and decisions.**

Judges are often ambivalent about disqualification, because a party's allegations that a judge appears to be biased or self-interested are in tension with the presumption of judicial impartiality and often are motivated by tactical considerations. One consequence of this ambivalence is that judges do not always explain their decisions about disqualification as fully as they do other procedural and substantive issues. While this is understandable, it can create an information deficit detrimental to informed judicial decision-making. To increase the availability of information about judicial disqualification, states should consider implementing one or more of the following suggestions:

### A. States should consider gathering and disseminating data about judicial disqualification within their jurisdictions.

Most states make no systematic effort to gather information on judicial disqualification, although some do. Collecting such data is desirable for several reasons. First, it would enable court administrators to ascertain disqualification rates within the state and geographical subdivisions thereof and to track upward and downward trends in order to assess 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 are and are not disqualifying themselves, to the end of better informing individual disqualification determinations.

B. The judiciary in each State should consider encouraging judges to explain the reasons for their judicial disqualification decisions.

As a general proposition, it is desirable for judges to give reasons for their rulings: Doing so contributes to due process by reassuring the parties that judicial decisions are not arbitrary and facilitating appellate review. Decisions related to disqualification and recusal, however, may present special issues. When a judge recuses himself or herself, there is no motion to grant or “ruling” to make, which arguably renders explanation unnecessary. Even when a judge withdraws upon motion, 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 matters – 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 do not, however, counsel against *encouraging* judges to explain their rulings.<sup>15</sup> Model Code 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

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<sup>15</sup> See generally Sarah M.R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1 (2007).

“[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 matters 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.

Because judges typically explain their decisions only when they deny motions to disqualify themselves, the primary sources of interpretive guidance on when disqualification is necessary are appellate decisions, especially reversals where the lower court’s failure to disqualify is so egregious that it amounts to a 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 while maintaining the confidentiality of their personal information.

C. Through judicial education programs and otherwise, States should consider providing more systematic guidance to the judiciary about when a judge’s impartiality might reasonably be questioned.

It is not feasible to capture in specific rules every circumstance in which disqualification is desirable. 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 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. The full Judicial Disqualification Report provides more specific suggestions as to the additional guidance that would be helpful.

D. States should consider the following factors when giving guidance to judges concerning when the campaign support a judicial candidate receives might reasonably call his or her impartiality into question.

Recent developments, most notably the Supreme Court’s decision in *Caperton v. A.T. Massey Coal Co.*,<sup>16</sup> underscore the importance of offering judges guidance on when campaign support may call a judge’s impartiality into question. It bears emphasis that the disqualification standard under the Model Code and the Conduct Codes of almost every state, which require a judge to recuse when his or her “impartiality might reasonably be questioned,” is broader than the due process standard triggered by a “probability of bias.” Whatever uncertainties remain concerning future applications of the due process standard can be obviated to a significant extent if States have clear guidelines to implement more exacting disqualification rules in their codes of conduct. The resolution identifies several factors for States to consider in offering guidance to their judges-- factors derived from the Brief for Conference of Chief Justices as Amicus Curiae, the underlying report of the Judicial Disqualification Project, and the majority opinion in the *Caperton* case:

(1) The level of support given, directly or indirectly, by a litigant in relation both to aggregate support (direct and indirect) for the individual judge’s campaign and to the total amount spent by all candidates for that judgeship;

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<sup>16</sup> 129 S. Ct. 2252 (2009).

- (2) If the support is monetary, whether any distinction between direct contributions or independent expenditures bears on the disqualification question;
- (3) The timing of the support in relation to the case for which disqualification is sought;
- (4) If the supporter is not a litigant, the relationship, if any, between the supporter and (i) any of the litigants, (ii) the issue before the court, (iii) the judicial candidate, and (iv) the total support received by the judicial candidate and the total support received by all candidates for that judgeship.

Respectfully submitted,  
William K. Weisenberg, Chair  
Standing Committee on Judicial Independence  
February 2010