AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON JUDICIAL INDEPENDENCE
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATIONS FOR IMPROVING JUDICIAL DISQUALIFICATION PRACTICES AND PROCEDURES AMONG THE STATES

RESOLVED, that the American Bar Association adopt the following recommendations of the Judicial Disqualification Project, dated October 8, 2010, in order to improve judicial disqualification practices and procedures among the States[*/] and promote public confidence in the State courts:

I. Each State should have in place clearly articulated procedures, whether statutory or judicial rules-based, for the handling of disqualification determinations and the review of denials of such motions. These procedures should be designed to produce resolutions of judicial disqualification issues that are both prompt and meaningful.

II. In States in which judges face election of any kind:

A. States should consider adopting disclosure requirements for litigants and lawyers that have provided, directly or indirectly, campaign support in an election involving a judge before whom they are appearing, in order to facilitate a determination whether, under the circumstances, the judge's impartiality might reasonably be called into question.

B. States should consider providing guidance to judges about their disclosure obligations and about the circumstances under which presiding over a case involving litigants or lawyers who previously contributed to an election involving the judge might reasonably be perceived as calling the judge's impartiality into question.

C. States should consider providing improved case management systems or other resources to help their judges promptly identify recusal issues.

[*/] When capitalized, the term "State" or "States" as used herein refers to courts or legislatures (unless the context otherwise requires, *e.g.*, State judiciaries), depending on which has regulatory authority over the judicial disqualification practices and procedures within the jurisdiction, and also encompasses the District of Columbia and U.S. territories, and the term "state courts" includes the non-Article III courts in the District of Columbia and U.S. territories.

FURTHER RESOLVED, that the recommendations and report of the Judicial Disqualification Project be transmitted to the highest court of each State and to any other entities which have regulatory responsibility for judicial disqualification practices, and procedures in the jurisdiction.

STANDING COMMITTEE ON JUDICIAL INDEPENDENCE
REPORT OF THE JUDICIAL DISQUALIFICATION PROJECT

Introduction

In recent years, judicial disqualification[1] has emerged as an important policy issue in several states and an important focus of discussion and debate on ways to improve both the reality – and the public perception – of the fairness and impartiality of our court system. That focus has been sharpened because of intense public scrutiny and criticism in several highly publicized cases[2] of refusals by judges to recuse themselves in circumstances where, as the default standard articulated in the Model Code of Judicial Conduct puts it, "the judge's impartiality might reasonably be questioned."[3]

---

[1] Strictly speaking, "recusal" traditionally refers to a judge's withdrawal from a case *sua sponte*, while "disqualification" refers to the motion of a litigant asking the judge to step down. *See, e.g.*, Forrest v. State, 904 So.2d 629, 629 n.1 (Fla. App. 2005) (noting that "[r]ecusal is the process by which a trial court voluntarily removes itself, while disqualification is the process by which a party seeks to remove a judge from the case"). In many jurisdictions, however, this distinction has not been observed or the two terms have been conflated. *See, e.g.*, Hendrix v. Sec'y, Fla. Dept of Corrections, 527 F.3d 1149, 1152 (11th Cir. 2008) (using the terms interchangeably); Advocacy Org. v. Motor Club Ins. Ass'n, 472 Mich. 91, 97 (2005) (Weaver J., concurring) (observing that recusal is the "process by which a judge is disqualified on objection of either party (or disqualifies himself or herself) from hearing a case."). *Cf.* John Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43, 45 n.7 (1970) (observing that amendments to the federal disqualification statute, 28 U.S.C. § 455, have rendered the term "recusal" obsolete).

The ABA's 1972 Code of Judicial Conduct and subsequent versions have used the term "disqualification" to mean *both* withdrawal *sua sponte* and upon motion of a party. Likewise in this report, no distinction shall be drawn between the two terms.

[2] *See* Caperton v. A.T. Massey Coal Co., 223 W. Va. 624, 679 S.E.2d 223 (2008), *rev'd,* 129 S. Ct. 2252 (2009); Avery v. State Farm Mutual Auto Ins. Co., 835 N.E.2d 801 (Ill. 2005), *cert. denied*, 547 U.S. 1003 (2006); Cheney v. U.S. Dist. Ct., 541 U.S. 913, 915-916 (2004) (mem.) (Scalia, J.) (denying recusal motion).

[3] MODEL CODE OF JUDICIAL CONDUCT [hereinafter Model Code] R. 2.11 (2010), *available at* http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf. This Report does not propose any amendments to the Model Code.

The ABA has traditionally taken the leading role in providing guidance to the States on matters of judicial ethics and judicial conduct.[4] Since 2007, the ABA Standing Committee on Judicial Independence ("SCJI" or the "Committee") has been working on a project to survey disqualification rules and practices in state courts around the country, to identify problems and uncertainties that arise under existing regimes, and, if and as appropriate, to propose reforms. The Judicial Disqualification Project ("JDP") has conducted research, solicited comments on particular ideas and proposals (primarily within the ABA but also from certain outside entities with a strong interest in the area, such as the Conference of Chief Justices), and gradually refined the thinking of the Committee's membership on these issues.

It bears mention here that the focus of the JDP has been on the State judiciaries and not the federal. Notwithstanding that focus, this Report benefits from the guidance provided by federal case law, some of which is cited herein. Indeed, much of the law on judicial disqualification as it has developed in this country, and the concomitant guidance to the judiciary as a whole and the practicing bar, has been the product of federal decisions.[5] Nevertheless, it should be emphasized that the transformation of the landscape described below has been occasioned by dramatic changes in judicial elections and judicial campaign finance, neither of which has any relevance whatever to the federal judiciary.

By the time the JDP was inaugurated in 2007, judicial disqualification issues had already assumed a critical level of importance as a result of the Supreme Court's decision in *Republican Party of Minnesota v. White*, 563 U.S. 765 (2002). Since the JDP began working, however, that level of importance has steadily and markedly increased in the wake of the Court's decisions in *Caperton v. A.T. Massey Coal, Co.*, 129 S. Ct. 2252 (2009), and *Citizens United v. Fed. Election*

[4/] The ABA's activity in this area dates back to 1924 when it first adopted the Canons of Judicial Ethics. At that time, the default standard was that "a judge's official conduct should be free from impropriety and the appearance of impropriety." ABA CANONS OF JUDICIAL ETHICS, Canon 4 (1924). Other, more specific standards provided that a judge should not sit on a case in which "a near relative is a party," *id.* Canon 13, or perform or take part in "any judicial act in which his personal interests are involved," *id.* Canon 29.

[5/] For a representative sampling, *see* Liteky v. United States, 510 U.S. 540 (1994); Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988); Pesnell v. Arseneault, 543 F.3d 1038 (9th Cir. 2008); Chase Manhattan Bank v. Affilated FM Ins. Co., 343 F.3d 120 (2d Cir. 2003); Bieber v. Dept of the Army, 287 F.3d 1358 (Fed. Cir. 2002); Sullivan v. Chesapeake & Ohio Ry. Co., 947 F.2d 946 (6th Cir. 1991); In re Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1314 (2d Cir. 1988), *cert. denied sub nom*. Milken v. SEC, 490 U.S. 1102 (1989); Davis v. Xerox, 811 F.2d 1293 (9th Cir. 1987); New York City Dev. Corp. v. Hart, 796 F.2d 976 (7th Cir. 1986); In re Cement Antitrust Litigation (MDL No. 296), 688 F.2d 1297 (9th Cir. 1982), *aff'd,* 459 U.S. 1191 (1983); United States v. Ravich, 421 F.2d 1196 (2d Cir. 1970); Kinnear-Weed Corp. v. Humble Oil & Refining Corp., 403 F.2d 437 (5th Cir. 1968).

Comm'n, 130 S. Ct. 876 (2010). These decisions have significantly altered the landscape of judicial disqualification in the context of judicial election campaign support and have considerably raised the stakes in those 39 states where judges face some form of election.[6]

White struck down the "announce clause" of Minnesota's Code of Judicial Conduct as violative of judges' First Amendment rights and opened the way for judges to announce during election campaigns their views on certain subjects that might come before them if elected. To the extent that announcement of such views might be perceived by the public[7] as effectively committing a judge, even implicitly, to ruling in particular ways on specific issues, the judge's impartiality might reasonably be called into question[8] within the meaning of Rule 2.11 of the

---

[6] Approximately 10 states have proposed new judicial disqualification rules since *Caperton* was handed down. Most of these have not progressed very far, as they have encountered "resistance from judges and businesses who oppose restraints on judges' ability to raise campaign funds and on voters' rights to financially support favored candidates." Nathan Koppel, *States Weigh Judicial Recusals; Some Judges, Businesses Oppose Restrictions on Cases Involving Campaign Contributors*, WALL ST. J., Jan. 26, 2010, at A8. For example, legislation in Texas and Montana proposing bright-line monetary triggers – exactly what is contemplated by Model Code Rule 2.11(A)(4) – for recusal did not pass. *Id.*

[7] "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 ASS'N, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY 10 (2003).

[8] This is the current default standard in the Model Code and has been adopted in nearly all the states. Forty-five states have actually adopted it virtually *in haec verba*. (It is also the federal standard. *See* 28 U.S.C. § 455(a)).

Several states have adopted essentially the same rule but with some variations in phraseology to address the question of *who* is reasonably questioning the judge's impartiality. California, for example, mandates disqualification if the judge "believes there is substantial doubt as to his or her capacity to be impartial." CAL. CIV. PROC. CODE § 170.1(a)(6)(A). California adds the caveat that disqualification for appearance of partiality cannot be based solely on the judge's ethnicity. *Id.* § 170.2. Mississippi employs the modification that the person reasonably questioning a judge's impartiality be "a reasonable person knowing all the circumstances." MISS. CODE OF JUDICIAL CONDUCT, Canon 3E(1) (2007). (Recently, however, Mississippi has proposed (proposal dated April 5, 2010) a revision to its Code of Judicial Conduct which, if adopted, would more closely track the language of the Model Code). Wisconsin's version, which is enshrined not in statute but by Supreme Court rule, melds the former two approaches by setting forth a standard for a judge to apply and incorporating therein the concept where "well-informed persons knowledgeable about judicial ethics standards and the

Model Code of Judicial Conduct -- potentially a harbinger of more frequent disqualifications as a palliative to policy issues emerging from the *White* decision.

In *Caperton*, the U.S. Supreme Court held, based on, limited by, and subject to its rather "extreme facts," that refusal of a West Virginia high court judge to grant a motion to disqualify in the face of financial support for his campaign in excess of $3 million from the CEO of a party created a "serious, objective risk of actual bias" that was constitutionally intolerable. 129 S. Ct. at 2265. The Court extolled the Model Code and the States' adoption thereof as maintaining the

---

justice system and aware of the facts the judge knows or reasonably should know would reasonably question the judge's ability to be impartial." WISC. SUP. CT. RULE 60.04(4) (2007). More recently, however, and in a contentious 4-3 decision that stands athwart the due process-based decision in *Caperton*, the Wisconsin Supreme Court amended Rule 60.04 to add a new paragraph (7), which provides: "A judge shall not be required to recuse himself of herself in a proceeding based solely on any endorsement or the judge's campaign committee's receipt of a lawful campaign contribution from an individual or entity involved in the proceeding." In the matter of amendment of the Code of Judicial Conduct's rules on recusal, Nos. 08-16, 08-25, 09-10, and 09-11 (Wisc. Sup. Ct., July 7, 2010).

The Supreme Court of Nevada, by order dated December 17, 2009, amended its Code of Judicial Conduct effective January 19, 2010. In re Amendment of the Nevada Code of Judicial Conduct, No. ADKT 427 (Dec. 17, 2009). This action was not prompted by the *Caperton* decision, as the Nevada high court's order was adopting the recommendation of an antecedent Commission on the Amendment of the Nevada Code of Judicial Conduct, which recommended replacement of the predecessor Code with the new one. The Court rejected, however, two alternate proposals: "A judge would have to recuse himself when he gets campaign support of $50,000, or when he receives 5% or more of his total campaign funding from a party or law firm in a case." Koppel, *supra* note 6, at A8.

Montana and Michigan, have employed different formulations. Montana's is 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 says simply that "a judge is disqualified when the judge cannot impartially hear a case." MICH. COURT RULES § 2.003(C). Michigan's Supreme Court has also reacted to the *Caperton* decision, by amending paragraph (C)(1) of this rule (which, like Model Rule 2.11(A)(4), propounds a non-exclusive list of examples where disqualification would be required) to include a new subparagraph (b), which provides: "The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v. Massey,* ___ US ___, 129 S Ct 2222, 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct." Amendment of Rule 2.003 of the Michigan Court Rules, ADM File No. 2009-04 (Mich. Sup. Ct., Nov. 25, 2009).

integrity of the judiciary and the rule of law. *Id.* at 2266.[9] Noting that "the due process clause demarks only the outer boundaries of judicial disqualifications," *id.* at 2267, the Court observed that "States may choose to 'adopt standards more rigorous than due process requires.'" *Id.*, quoting *White*, 536 U.S. at 794 (2002) (Kennedy, J., concurring) and citing *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (distinguishing the "constitutional floor" from the ceiling set "by common law, statute, or the professional standards of the bench and bar").

Caperton thus strongly signals the importance, both to the States and to public perceptions of the judiciary in general, of having rules in State judicial codes that can contain the mischief of excessive campaign support in judicial elections. That importance has increased exponentially in the wake of the Court's even more recent decision in *Citizens United*. There the Court held that statutory limitations on independent campaign expenditures by corporations and labor unions violated the First Amendment. The case did not concern judicial elections; rather it involved restrictions on the dissemination and showing, during the presidential campaign primaries leading up to the November 2008 general election, of a documentary entitled "Hillary: The Movie." Nevertheless, the consequences of this decision for contested judicial campaigns are clear: Large corporations and labor unions may make unlimited expenditures not only in general elections but in judicial elections as well. The mere possibility that a vast influx of additional campaign money might enter the latter arena, which already in the past decade has been saturated with unprecedented campaign support, virulent attack ads, and concomitant diminution in public respect for State judiciaries,[10] makes tighter controls over disqualification

---

[9] The Court quoted with approval the 1990 ABA Model Code's objective standard enjoining judges to avoid impropriety and the appearance of impropriety. *Caperton*, 129 S. Ct. at 2266 (citing Brief for American Bar Association as *Amicus Curiae* 14 & n. 29). The Court also quoted with approval the brief *amicus curiae* of the Conference of Chief Justices, which underscored that the state codes of judicial conduct are "the principal safeguard against judicial campaign abuses" that threaten to imperil "public confidence in the fairness and integrity of the nation's elected judges." *Caperton*, 129 S. Ct. at 2266 (quoting Brief for Conference of Chief Justices as *Amicus Curiae* 4, 11).

[10] *See, e.g.*, THE ANNENBERG PUBLIC POLICY CENTER OF THE UNIVERSITY OF PENNSYLVANIA, PUBLIC UNDERSTANDING OF AND SUPPORT FOR THE COURT: JUDICIAL SURVEY RESULTS (2007), *available at* http://www.annenbergpublicpolicycenter.org/Downloads/20071017_JudicialSurvey/Judicial_Findings_10-17-2007.pdf (finding that 69% of the public "thinks that raising money for elections affects a judge's rulings to a moderate or great extent."); CHRISTIAN W. PECK, ATTITUDES AND VIEWS OF AMERICAN BUSINESS LEADERS ON STATE JUDICIAL ELECTIONS AND POLITICAL CONTRIBUTIONS TO JUDGES (2007), *available at* http://www.ced.org/images/content/events/judicial/zogby07.pdf (finding that 79% of business executives believe "campaign contributions have an impact on judges' decisions, and more than 80% of African-Americans express this view, including 51% believing that judicial election contributions carry a "great deal" of influence).

imperative when parties and lawyers before the court have provided significant campaign support.

Some Fundamental Principles

In the wake of these developments, and even before the *Citizens United* decision was issued, SCJI constituted a new Working Group to take a fresh look at the JDP and to propose new recommendations. The Working Group was cognizant of the material changes to the terrain of judicial disqualification and judicial campaign finance wrought by these landmark Supreme Court decisions. That metamorphosis, especially when conjoined with the enormous additional influx of campaign support in judicial elections during the past decade, has considerably elevated the profile of disqualification for State judiciaries in terms of judicial independence and a diminution in public perception of the integrity, impartiality, fairness – and, indeed, the legitimacy – of the judicial branch of government.

SCJI approaches these issues with some fundamental principles in mind, and it is appropriate to state them here.

- First, nothing contained in this Report or the accompanying Recommendations to the House of Delegates is intended as, or should be misinterpreted as, anything other than an effort to provide the States with some ideas and suggestions for their consideration and possible future implementation. SCJI is fully aware that there are not necessarily any "one size fits all" rules in the area of judicial disqualification.

- Second, each State should have in place clearly articulated procedures for the handling of disqualification motions and review of denials of such motions. These procedures can be statutory or judicial rules-based (or a combination of both).

- Third, litigants that have filed motions to disqualify are entitled to determinations of those motions that are both prompt and meaningful.

- Fourth, it is in the interest of the States to reassess their existing policies and procedures relating to disqualification. Some federal courts have held several of the campaign and political conduct restrictions in state codes of judicial conduct unconstitutional on First Amendment grounds. If it can reasonably be anticipated that these decisions will lead to increased campaign and political activity by judges, that would tend to underscore the importance of assuring that those existing policies and procedures are adequate to address the impartiality issues that will emerge.

- Fifth, with specific reference to disqualification in the context of campaign support, *Caperton* and *Citizens United*, taken together, highlight the importance of State disclosure requirements both to litigants (from judges who are aware of facts that might

reasonably call their impartiality into question)[11] and by litigants appearing before a judge who has been the recipient[12] of such support.

Given the increased importance of judicial disqualification, as explained above, it is important for each State – and especially in the majority of jurisdictions in which judges face some form of election – to take the opportunity to review existing policies and procedures for disqualification, both judge-initiated (*sua sponte*) and on motion. Each State is in the best position to undertake a nuanced assessment based on a variety of considerations too numerous to detail comprehensively here. To mention only a few examples, different rules may be appropriate for trial courts, intermediate appellate courts (if any), and courts of last resort. Similarly, different rules may be appropriate for urban courts (where substitution of other judges in the event of disqualification, particularly at the trial level, should be relatively easy) as opposed to rural courts (which may be sufficiently isolated that substitution of another judge may be relatively expensive and time-consuming). Also, when it comes to the court of last resort,

---

[11] The mere existence of such facts does not lead inevitably to disqualification. Litigants have the option, upon learning from the judge of the basis for potential disqualification, to waive disqualification for any reason other than actual bias. Disqualification is obviously unnecessary if all parties are satisfied that the judge will be fair and impartial. Disclosure is necessary, however, for knowing and intelligent waiver of disqualification. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.11(C), which provides:

> A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

With some variations in language, the vast majority of states have provisions allowing for waiver of disqualification. A few states even permit the waiver of any disqualification (including for bias). In the federal system, waivers are permissible with respect to the default standard alone (*i.e.*, the judge's impartiality might reasonably be questioned, 28 U.S.C. § 455(a)) and not for any other statutory basis for disqualification. 28 U.S.C. § 455(e).

[12] Arguably, the same obligation of disclosure should likewise be imposed on judges whose opponents were the recipients of campaign support from one or more parties before the court. See discussion under Section 4, *infra*.

some States permit substitution of lower court judges (as West Virginia did in *Caperton*) while others do not.

Procedural Suggestions on Motions to Disqualify

In the several States, the right to disqualify a judge under appropriate circumstances may exist under the State constitution,[13] by statutory authority,[14] or pursuant to a court rule.[15] Judges are always free voluntarily to recuse themselves from cases *sua sponte* if they perceive, or are concerned, that a basis for disqualification exists.[16] Litigants may also file disqualification motions. In all situations, and independent of statutory or court-made rules, disqualification decisions require considered judgment and common sense. Apart from these truisms, however, procedures for deciding issues of judicial disqualification vary widely from State to State.

For example, States differ in their requirements on the timing of the filing of a disqualification motion. States vary as well in terms of the specificity of what must be alleged. Some jurisdictions require an affidavit of counsel for the party filing the motion, and there is even further variation with respect to the contents of such affidavits, their legal effect, and the need for ancillary documents.[17]

The discussion that follows will elaborate on some proposed procedural improvements that are consistent with the fundamental principles identified above. Lest there be any misunderstanding, it is well to clarify that this Report is not promoting any particular procedure but is merely reporting on options that some States have adopted.

---

[13] *E.g.*, ARK. CONST. art. 7, § 20.

[14] *E.g.*, ALASKA STAT. § 22.20.020; CAL. CIV. PRO. CODE § 170.1 *et seq.*

[15] *E.g.*, DEL. SUP. CT. R. 84.

[16] Indeed, the Model Code makes this mandatory. "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances . . ." MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (containing, in addition to the default standard, an enumeration of specific scenarios).

[17] Detailed consideration of these is beyond the scope of this report and would require treatise-like treatment. *See generally* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES ch. 17-19 (2d ed. 2007).

1. Prompt Determinations

A litigant filing a motion to disqualify a judge is entitled to have it decided promptly. Otherwise, particularly at the trial court level, the case can become saddled with unnecessary uncertainty and delay. Worse yet, a variety of substantive or procedural matters (*e.g.*, motions to dismiss, discovery disputes) may be decided by a judge who, it later turns out, should not be presiding over the case.

Peremptory Challenges

In 18 States,[18] disqualification can be effected by so-called "peremptory challenges." Such challenges permit disqualification without the requirement of any showing of cause. Where authorized, many believe peremptory challenges promote variously the impartiality and the appearance of impartiality of the judicial process.[19] That result, some also believe, is beneficial for the litigant, who otherwise would risk alienating the judge by make a showing of actual bias,[20] as well as for the judge, who is shielded against having his or her integrity impugned.[21]

Peremptory challenges, where authorized, are usually limited to one per party.[22] In some jurisdictions, the challenge must be accompanied by an affidavit of prejudice alleging that a fair trial cannot be had before the assigned judge.[23] In any event, once the challenge is filed, substitution of another judge follows automatically with no further proceedings required. A significant requirement for using this procedure is that the challenge must be filed fairly

---

[18] To wit: Alaska, Arizona, California, Idaho, Illinois, Indiana, Minnesota, Missouri, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Washington, Wisconsin, and Wyoming. Interestingly, these are predominantly western states along with a few midwestern states. No southern, southeastern, mid-Atlantic or New England states have yet adopted this procedure.

[19] *See, e.g.*, Turnipseed v. Truckee-Carson Irr. Dist., 116 Nev. 1024, 13 P.3d 395 (2000); State ex rel. Rondon v. Lake Super. Ct., 569 N.E.2d 635 (Ind. 1991); People v. Redisi, 188 Ill. App.3d 797, 544 N.E.2d 1136 (1989).

[20] *See, e.g.,* Roger M. Baron, *A Proposal for the Use of a Judicial Peremptory Challenge System in Texas,* 40 BAYLOR L. REV. 49 (1988).

[21] *See* State v. Cheng, 623 N.W.2d 252, 258 (Minn. 2001).

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

[23] *See* WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING, ORIN KERR, CRIMINAL PROCEDURE §22.4(d) (2007-08); *see also* ALASKA STAT. 22.20.022(a) (2005).

promptly; litigants and lawyers are not permitted to sit back and await early rulings by a judge to assess whether or not the judge is to their liking.[24]

The practice is not without its critics, of course, and typical objections posit various abuses of the procedure, including judge shopping,[25] invidious discrimination (*i.e.*, based on race, religion, gender, ethnicity) against particular judges,[26] or even attempts improperly to influence a judicial election.[27] Systemic data are not available. Some anecdotal evidence offered by lawyers and judges from jurisdictions with peremptory challenge procedures suggests that experience with them has on the whole been positive and that post-substitution disqualification issues have surfaced less frequently.

Procedural Requirements for Disqualification Motions

In jurisdictions that do not authorize so-called peremptory challenges, other, arguably more traditional standards remain in use. Thus, in the majority of States, disqualification must be for cause. In most instances a motion, petition, or similar pleading based on applicable procedures in the jurisdiction must be filed.

According to a leading treatise, not all jurisdictions have adopted procedural guidelines for filing or deciding such motions.[28] As a matter of basic fairness to litigants, it seems appropriate for States that have not yet established procedures relating to the filing of judicial disqualification motions to give serious consideration to doing so. This will redound to the benefit of the judiciary as it will enhance public perceptions that judges are dedicated to, and concerned about, both the reality and the appearance of their fairness and impartiality.

---

[24] *See, e.g.*, State v. Clemons, 56 Wash. App. 57, 61, 782 P.2d 219, 221 (1989) (foreclosing peremptory challenge not made when the case was first assigned but only after the judge had made unfavorable rulings, on the ground that this was exactly the sort of judge shopping that the timeliness requirement was designed to prevent).

[25] *See, e.g.*, Moore v. State, 895 P.2d 507 (Alaska App. 1995).

[26] *See* People v. Super. Ct., 8 Cal. App.4th 668, 708 (1992).

[27] *See* Maine v. Super. Ct., 68 Cal.2d 375, 386-387 (1968).

[28] *See* FLAMM, *supra* note 17, § 17.2 & n.1 (2d ed. 2007), citing Arnold v. State, 778 S.W.2d 172, 179 (Tex. App. 1989), *aff'd*, 853 S.W.2d 543 (Tex. 1993). *Cf. id.* n.2, citing State v. Austin, 87 S.W.3d 447, 471 (Tenn. 2002) ("Although no precise procedure is contemplated by the Canons nor established through case law, the accepted practice . . . [is filing] a motion for recusal with supporting affidavits of prejudice").

In those jurisdictions that have adopted judicial disqualification procedures, these are, not surprisingly, many and varied. Often there is a timeliness requirement, based on considerations of public policy[29] and judicial economy[30] and obviating waste of scarce judicial resources and the squandering of taxpayer dollars. Some jurisdictions require that the pleading be notarized or verified.[31] Others may require a brief or memorandum of points and authorities in support.[32] Still others may require submission of an affidavit.[33]

Several States have adopted a variant on the affidavit procedure and require the judge to accept as true any such factual allegations offered as a sworn affidavit of counsel accompanying the disqualification motion.[34] In those circumstances, assuming the affidavit is legally sufficient and the motion is timely filed and otherwise meets such procedural requirements as are imposed on such motions under applicable law, the judge must grant the motion. Assuming that the affidavit is required to be on personal knowledge, rather than based on hearsay or "on information and belief," the risk of attorney abuse is small, since if the facts alleged in the

---

[29] *See, e.g.*, City of Cleveland v. Cleveland Elec. Illuminating Co., 503 F. Supp. 368, 379 (N.D. Ohio), *mandamus denied sub nom.* City of Cleveland v. Krupansky, 619 F.2d 576 (6th Cir.), *cert. denied*, 449 U.S. 834 (1980).

[30] *See* In re IBM Corp., 45 F.3d 641, 643 (2d Cir. 1995).

[31] *Cf.* Cherry v. Coast House, Ltd., 257 Ga. 403, 359 S.E.2d 904 (1987), *cert. denied*, 484 U.S. 1060 (1988); People v. Ladd, 129 Cal. App.3d 257 (1982).

[32] *See, e.g.*, United States v. LaMorte, 940 F. Supp. 572, 575 (S.D.N.Y. 1996); Mayeaux v. Christakis, 619 So.2d 93, 98 (La. App. 1993). *Cf.* Osborn v. Kilts, 145 P.3d 1264, 1268 (Wyo. 2006) (affirming denial of disqualification motion that was "not supported by cogent argument or citation to pertinent authority").

[33] *See, e.g.*, Keating v. OTS, 45 F.3d 322, 327 (9th Cir. 1995); Greener v. Killough, 1 So.3d 93, 100 (Ala. Civ. App. 2008); Rice v. Cannon, 283 Ga. App. 438, 444, 641 S.E.2d 562, 568-69 (2007).

[34] *See, e.g.*, COLO. REV. STAT. ANN. § 16-6-2; COLO. R. CIV. P. R.97; COLO. R. CRIM. P. R.21(b); D.C. SUPER. CT. R. 63-I; FLA. STAT. ANN. § 38.10; FLA. R. JUD. ADMIN. R.2.330; GA. SUPER. CT. R. 25.3; MONT. CODE ANN. § 3-1-805. *See also* Goebel v. Benton, 830 P.2d 995 (Colo.1992); Birt v. State, 350 S.E.2d 241, 242 (Ga.1986). *Cf.* N.C. GEN. STAT. ANN. § 15A-1223; State v. Poole, 289 S.E.2d 335, 343 (N.C.1982) (trial judge presented with disqualification motion should "either recuse himself or refer a recusal motion to another judge if there is 'sufficient force in the allegations contained in [the] motion to proceed to find facts.'") (quoting North Carolina Nat'l Bank v. Gillespie, 230 S.E.2d 375, 380 (N.C.1976)).

affidavit are false, the judge, despite having had to disqualify himself or herself from the case in question, can still make a referral to bar disciplinary authorities.

Grounds for Disqualification

Substantively, a motion (or whatever alternate form of pleading is to be employed under local procedures)[35] for disqualification must be predicated on the default standard (*i.e.*, that the judge's impartiality may reasonably be questioned) or on any of several well-accepted and specific factual bases for disqualification. Those bases may include[36] the following:

- Personal bias relating to a litigant or lawyer [R. 2.11(A)(1)].
- Personal knowledge of facts in dispute in the proceeding [R. 2.11(A)(1)].
- Prior statements (as a judge or as a judicial candidate) that commit or appear to commit the judge to reaching a particular result or ruling in a particular way [R. 2.11(A)(5)].
- The judge or a relative of the judge is a party in the case (or serves as an officer, director, partner, trustee, or similar function for a party) [R. 2.11(A)(2)(a)].
- The judge or a relative of the judge is a lawyer in the case [R. 2.11(A)(2)(b)].
- The judge or a relative of the judge is a material witness in the case [R. 2.11(A)(2)(d)].

---

[35] For ease of reference, we shall refer hereinafter to all such pleadings as motions.

[36] Not all states partake of all of these bases for disqualification. There is, in fact, considerable variation from state to state on whether a particular factor is a ground for disqualification and, if so, in the details relating to particular factors. For example, a number of states that still operate under the 1972 version of the ABA's Code of Judicial Conduct do not specifically provide for disqualification where the judge has a bias concerning a party's lawyer. *See, e.g.*, COLO. CODE OF JUDICIAL CONDUCT Canon 3C; MASS. CODE OF JUDICIAL CONDUCT Canon 3C. With respect to disqualification for more than a *de minimis* interest in the proceeding, while the current Model Code defines a judge's relatives as anyone within the third degree of relationship to the judge or the judge's spouse or domestic partner (R. 2.11(A)(2)(c), Montana and Texas only apply their rules to the judge and not spouses or relatives. *See* MONT. CODE ANN. § 3-1-803(1); TEX CIV. PRO. CODE ANN. § 18(a). All factors in the following list are, however, included in Rule 2.11 under the 2007 ABA Model Code of Judicial Conduct, and the specific citation therefrom appears in brackets with each item.

- The judge or a relative of the judge has more than a *de minimis* interest that could substantially be affected by the proceeding [R. 2.11(A)(2)(c)].

- The judge or an immediate family member has an economic interest in the subject matter of the case or is a party to the proceeding [R. 2.11(A)(3)].

- Parties or their lawyers have contributed (typically above a specified level) to the judge's election campaign [R. 2.11(A)(4)].

- The judge previously

  - served as a lawyer in the matter [R. 2.11(A)(6)(a)];

  - while in government service, participated substantially in the matter as a lawyer or public official or in such capacity expressed a personal opinion about the merits of the matter [R. 2.11 (A)(6)(b)];

  - was a material witness concerning the matter [R. 2.11(A)(6)(c)]; or

  - presided over the matter in another court [R. 2.11(A)(6)(d)].

Initial Judicial Consideration of Disqualification Motions

When the disqualification motion is filed, the judge may conclude that the motion has merit or that prudential factors otherwise counsel in favor of disqualification and may simply withdraw from the case without the necessity for a hearing. If that does not happen, however, one encounters once again considerable variation in the procedures used to decide the motion. The three most common practices include (i) having the judge that is the subject of the motion decide it,[37] (ii) having a different judge decide it,[38] or (iii) taking a hybrid approach whereby the judge that is the subject of the motion reviews it preliminarily for timeliness, compliance with procedural requirements, and possibly legal sufficiency as well (the latter typically constituting an assessment of whether the allegations, if true, would necessitate disqualification) and then

---

[37] *E.g.,* Lena v. Commonwealth, 369 Mass. 571, 340 N.E.2d 884 (1976); MICH. CT. RULES, R. 2.003(C)(3). Note, however, that in Michigan, if the motion to disqualify is filed in a court having two or more judges and the judge that is the subject of the motion denies it, then, upon request of the moving party, that judge must refer the motion to the chief judge, who must then decide it *de novo*. *See* Grace v. Leitman, 474 Mich. 1081, 1082, 711 N.W.2d 38, 39 (2006).

[38] *E.g.,* ILL. COMP. STAT. 5/2-1001 (a)(3). *See, e.g.,* Jiffy Lube Int'l v. Agarwal, 277 Ill. App.3d 722, 727, 661 N.E.2d 463, 467 (1996). Note that Illinois is also a peremptory challenge jurisdiction. ILL. COMP. STAT. 5/114-5(d).

(assuming that judge does not simply elect to recuse) assigning the motion to a different judge for a decision on the merits.[39]

Again, there is no "one size fits all" approach. Whichever approach is adopted, however, should in our view be designed to lead to as *prompt* a determination of the motion as possible.[40] The reviewing judge should be able to determine fairly quickly whether the motion complies with all procedural requirements of the jurisdiction (timeliness, verification, notarization, affidavit of counsel, etc.) and, assuming compliance, whether the motion is frivolous. If so, it can be summarily denied. If not, the reviewing judge ought then to be able to determine expeditiously whether the motion sets forth objective and easily verifiable grounds for disqualification (*e.g.*, financial interest, family member as lawyer or material witness, etc.). If so, the motion can be summarily granted. If not, then the reviewing judge should, once again quickly, be able to ascertain whether the motion alleges subjective bias or prejudice or a violation of the default standard.

At this point, if the judge who is the subject of the motion is reviewing it, and assuming assignment to another judge is not mandatory in the particular jurisdiction, it seems a sensible procedure for the judge at least to *consider* voluntarily transferring the motion to another judge for a decision on the merits. "The 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."[41] Admittedly, a number of non-merits factors might bear on this decision, such as whether the court is urban or rural (with the possibility or difficulty or inordinate delay in finding a substitute judge to rule on the motion) or whether the court is a trial level or appellate court. Still, as another commentator has put it:

> 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

---

[39] *E.g.*, GA. UNIF. SUPER. CT. RULE 23.5. *See, e.g.*, Birt v. State, 256 Ga. 483, 484, 350 S.E.2d 241 (1986); Johnson v. State, 260 Ga. App. 413, 419, 579 S.E.2d 809, 816 (2003).

[40] The Florida Supreme Court has laudably ruled that a motion to disqualify must be ruled on "immediately," which in practice has been held to mean within 30 days after proper service of the motion. *See* Fuster-Escalona v. Wisotsky, 781 So.2d 1063, 1064-65 (Fla. 2000). *See also* G.C. v. Dept. of Children & Families, 804 So.2d 525 (Fla. App. 2002) (granting writ of prohibition because of seven-week delay in ruling on disqualification).

[41] Amanda Frost, *Keeping Up Appearances: A Process Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 571 (2005).

> 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.[42]

Thus, from the litigant's point of view, from the public policy point of view (promoting public perception of fair and impartial courts), and even from the individual judge's point of view, the better part of valor may be for those States that do not already do so to consider shifting responsibility for deciding disqualification motions away from the challenged judge. Alternatively, the hybrid approach, whereby the challenged judge reviews only the timeliness and facial validity of the motion before transferring it to another judge for review on the merits, is also worthy of consideration.

Appellate Review

When a disqualification motion is denied, there should be a clear avenue for prompt review of that decision. Within the not-too-distant past, disqualification rulings were considered by some jurisdictions as being effectively unreviewable on appeal.[43] Today, it is perhaps not unfair to characterize the modalities of appellate review among the States and the federal system as balkanized. In general, denials of disqualification motions are interlocutory in nature and not final, appealable orders.[44] They may, however, sometimes be considered as appealable interlocutory orders if they fit into a recognized category such as Arizona's "special action,"[45] sometimes as unappealable interlocutory orders that require certification for immediate appellate review,[46] sometimes as "collateral orders" for purposes of that exception to the doctrine

---

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

[43] *See* Surratt v. Prince George's Cty., 320 Md. 439, 465 n.8, 578 A.2d 745, 758 n.8 (1990) (citing cases).

[44] *See, e.g.*, Willis v. Kroger, 263 F.3d 163 (5th Cir. 2001) (per curiam); Lopes v. Behles (In re American Ready Mix, Inc.), 14 F.3d 1497, 1499 (10th Cir.), *cert. denied*, 513 U.S. 818 (1994); Thomassen v. United States, 835 F.2d 727, 732 n.3 (9th Cir. 1987); State v. Dahlen, 753 N.W.2d 300, 303 (Minn. 2008); Ball v. Phillips Cty. Election Comm'n, 364 Ark. 574, 579 222 S.W.3d 205, 208 (2006); Magill v. Casel, 238 N.J. Super. 57, 62, 568 A.2d 1221, 1223-24 (N.J. Super. A.D. 1990); Conservatorship of Durham, 205 Cal. App.3d 548, 553, 252 Cal. Rptr. 414 (1988).

[45] *See, e.g.*, Scarborough v. Super. Ct., 889 P.2d 641 (Ariz. App. 1995).

[46] In the federal system, the default rule is that only final orders from trial courts are appealable. 28 U.S.C. § 1291. A way around this is provided in 28 U.S.C. § 1292(b), which authorizes a district court to certify an otherwise non-appealable order for interlocutory appeal if

permitting only appellate review of final orders,[47] and sometimes as reviewable only under an extraordinary writ.[48] As far as the latter are concerned, the writ of mandamus is, according to one expert, the most frequently resorted-to mechanism for appealing denials of disqualification motions.[49] Indeed, in some jurisdictions – such as California[50] and the U.S. Court of Appeals for the Seventh Circuit[51] -- mandamus is the *only* basis for obtaining such appellate review. However, as even the Seventh Circuit candidly acknowledges, this is decidedly a minority position.[52]

---

the ruling involves a controlling question of law as to which there is a substantial ground for difference of opinion and an immediate appeal might materially advance the ultimate termination of the litigation. *See, e.g.*, Davis v. Jones, 506 F.3d 1325, 1330 (11th Cir. 2007); In re Va. Elec. & Power Co., 539 F.2d 357, 363 (4th Cir. 1976); Kelley v. Mtro Cty. Bd. of Ed., 479 F.2d 810, 811 (6th Cir. 1973). *But see* SEC v. Roxford, 2007 U.S. Dist. LEXIS 66053, *9-10 (S.D.N.Y. 2007) (declining to grant certification because § 1292(b) "controlling question of law" standard not met).

[47] *See, e.g.*, Union Carbide Corp. v. U.S. Cutting Serv., Inc., 782 F.2d 710, 712 (7th Cir. 1986). *But see* Cooper v. United States, 2007 U.S. Dist. LEXIS 40422, *2 (S.D. Ohio 2007) (holding that denial of disqualification is not an appealable order); Krieg v. Krieg, 743 A.2d 509, 511 & n.4 (Pa. Super. 1999) (holding denial of disqualification not a collateral order); State v. Forte, 150 Vt. 654, 654, 553 A.2d 564, 565 (Vt. 1988) (*simile*).

[48] *See, e.g.*, Jackson v. Bailey, 221 Conn. 498, 605 A.2d 1350, 1351 (1992) (writ of error); Reg'l Sales Agency, Inc. v. Reichert, 830 P.2d 252, 253 (Utah App. 1992) (writ of certiorari); State v. Yeagher, 399 N.W.2d 648 (Minn. App. 1987) (writ of prohibition); In re City of Detroit, 828 F.2d 1160, 1166 (6th Cir. 1987) (writ of mandamus).

[49] FLAMM, *supra* note 17, § 32.6, at 967 ("Of the many mechanisms that exist for attempting to obtain expedited appellate review of a judicial disqualification decision, the writ of mandamus is the one that has been the most frequently resorted to, and the one that has met with the greatest success.") (citing Legal Aid Soc'y v. Herlands, 399 F.2d 830, 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 922 (1969)). *See, e.g.*, Nichols v. Alley, 71 F.3d 347 (10th Cir. 1995); Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 162-63 (3d Cir. 1993).

[50] CAL. CIV. PROC. CODE §170.3(d). (determination of a question of judicial disqualification reviewable only by writ of mandate). *See, e.g.*, Swift v. Super. Ct., 172 Cal. App. 4th 878, 91 Cal. Rptr.3d 504 (2009); Roth v. Parker, 57 Cal. App.4th 542, 67 Cal. Rptr.2d 250 (1997).

[51] *See, e.g.*, United States v. Horton, 98 F.3d 313, 316-17 (7th Cir. 1996); United States v. Balastieri, 779 F.2d 1191, 1205 (7th Cir. 1985).

[52] United States v. Ruzzano, 247 F.3d 668, 694 (7th Cir. 2001).

This lack of uniformity, even among cases within a particular category, makes it evident that there can be no assurance that prompt appellate review of denials of disqualification motions is readily available. Accordingly SCJI believes that State judiciaries should consider clarifying the appealability of such denials in their respective jurisdictions.

2. Meaningful Determinations.

In most States there is no requirement that a judge issue any memorandum, opinion, or other written statement about the decision to grant or deny a disqualification motion. As a result, there is considerably less precedent available in the State system than there is in the federal. In SCJI's view, review of motions to disqualify can only be meaningful if judges explain the bases for their decisions with enough frequency. Particularly where a motion to disqualify has been denied, an explanation therefor should be provided either in a written decision or otherwise on the record; the same requirement would apply to decisions on appeals from such denials. Such written explanations would not only enrich the law of judicial disqualification but, more importantly, would over time provide firmer guidance to judges who have to apply disqualification rules to novel factual settings and to lawyers wrestling with the question of whether disqualification is warranted.

Reluctance to provide such an explanation often stems from the belief that judges might have to disclose on the record matters that are private or potentially embarrassing. While sympathetic to this concern, SCJI believes that it is outweighed by the interests of justice. SCJI also believes that in most instances the concern may be exaggerated. First, if a private or potentially embarrassing matter is the basis for the disqualification motion, it will already be set forth in the motion, which is, after all, a public document. Second, in such a situation, it would be prudent for the judge, who is in the best position to know about the private or potentially embarrassing facts, to have disqualified himself or herself voluntarily in the first instance, thereby obviating the need for the filing of a motion.

The need for an explanation is much more urgent with respect to disqualification motions that are denied. If a judge grants such a motion, or disqualifies himself or herself voluntarily, no explanation may be necessary. In such instances, it properly remains within the discretion of the judge whether to provide an explanation in a written opinion or on the record, and we anticipate that judges would do so where the explanation would be of future value to the judiciary and the bar.

For these reasons, therefore, SCJI recommends that State judiciaries consider implementing procedures or guidelines that will allow for more meaningful review of disqualification motions by encouraging the filing of written, and preferably precedential, explanations of decisions made thereon.

3. Disqualification at the Appellate Level.

With respect to intermediate appellate courts, questions may arise about the adequacy of disqualification as a remedy for actual or perceived bias or partiality where neither the parties nor their lawyers have advance notice of the makeup of the appellate panel that will hear and decide the case. If the identities of judges on the panel are not known until the day of argument, or even a week before argument, there is little time in which to evaluate whether any member of the panel ought to be disqualified for cause. State judiciaries may therefore wish to consider whether assignments to panels and disclosure of the makeup of appellate panels can be made several weeks earlier in the process.

In practice, the appellate judge being challenged by a disqualification motion is usually the person who decides that question in the first instance.[53] Consideration should also be given, therefore, to the review procedures to be followed when such a motion is denied. There are several possibilities. One is for the matter to be reviewed by the Chief Judge (or his or her designee); another is for en banc review without the participation of the challenged judge; and the third, of course, is review by the court of last resort.

Disqualification of high court judges or justices presents similar features, except that these situations tend to be even higher-profile and periodically give rise to public outcry, especially where it is perceived that the challenged judge effectively has the first and last word on the matter.[54]

To avoid such problems, State supreme courts may wish to consider adopting procedures for the review of disqualification motions that relieve the subject justice of sole authority to

---

[53] *See, e.g.*, In re Bernard, 31 F.3d 842, 843 (9th Cir. 1994), *cert. denied sub nom.* Bernard v. Coyne, 514 U.S. 1065 (1995); Schurz Communications, Inc. v. FCC, 982 F.2d 1057, 1059 (7th Cir. 1992); First W. Dev. Corp. v. Super. Ct., 212 Cal. App.3d 860, 867, 261 Cal. Rptr. 116 (1989); Goodheart v. Casey, 523 Pa. 188, 201-202, 565 A.2d 757, 763-64 (1989); Giuliano v. Wainwright, 416 So.2d 1180, 1181 (Fla. App. 1982).

[54] Prominent examples include Justice Rehnquist's refusal to disqualify himself in Laird v. Tatum, *see* Memorandum of Mr. Justice Rehnquist, Laird v. Tatum, 409 U.S. 824 (1972); Justice Scalia's refusal to disqualify himself in connection with the Cheney duck hunting trip, *see* Cheney v. U.S. Dist. Ct., 541 U.S. 913, 915-916 (2004) (mem.) (Scalia, J.) (denying recusal motion); and West Virginia Justice Brent Benjamin's refusal to disqualify himself in *Caperton*, which was only undone by the U.S. Supreme Court's unexpected review and reversal on due process grounds, *see* Caperton v. A.T. Massey Coal Co., 223 W. Va. 624, 679 S.E.2d 223 (2008), *rev'd,* 129 S. Ct. 2252 (2009). In contrast to the U.S. Supreme Court, West Virginia allows justices on its Supreme Court of Appeal to be replaced by lower court judges in cases where the former are disqualified.

decide such motions. One possibility would be to subject a decision of the challenged justice denying a disqualification motion to review by the rest of the court.[55] Another would be to assign review of the denial (or perhaps even assign the motion itself in the first instance), at least where not otherwise subject to legal or ethical proscriptions, to a special panel of retired judges or justices or, alternatively, to a special panel comprising a retired judge, a practicing lawyer, and a law professor.

The objections usually interposed against such proposals – both for intermediate appellate courts and courts of last resort – is that they impose significant costs in terms of diversion of scarce judicial resources and putting a strain on the collegiality of an appellate body. Assuming *arguendo* the validity of these objections, such costs 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 his or her self-interest is disqualifying.[56]

4. Special Considerations Relating to Judicial Elections.

Rule 2.11(A)(4) in its present form was added to the Model Code of Judicial Conduct in 1999 to address concerns about threats to the appearance of fairness and impartiality posed by campaign finance in judicial elections.[57] Today, over a decade later, not a single State has adopted this Rule, and, until recently, only two States, Alabama and Mississippi, had adopted provisions to address this particular concern.[58]

---

[55] *See, e.g.*, 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).

[56] *Id.*

[57] These threats may be of lesser significance in States where judges face only a retention election in which there is no opposing candidate and voters are periodically presented with only an up or down vote on retaining individual judges in office. This is not to suggest, however, that retention elections present no problems. Indeed, this year there are some very contentious retention elections with lots of money involved, in several states, including Iowa and Colorado. *See* A.G. Sulzberger, *Voters Moving to Oust Judges Over Decisions*, N.Y. TIMES, Sept. 25, 2010, at A1.

[58] ALA.CODE §§ 12-24-1, 12-24-2 (2006); MISS.CODE OF JUDICIAL CONDUCT, Canon 3E(2) (2008). Alabama's provision actually antedated Rule 2.11(A)(4). For examples of more recent State reconsideration of judicial disqualification issues, *see supra* notes 6, 8.

Perhaps Rule 2.11(A)(4) does not go far enough. For example, disqualification may be just as necessary when the judge's (unsuccessful) opponent received substantial campaign support from a litigant or counsel now before the judge as when it was received by the judge's own campaign. At oral argument in the *Caperton* case, the latter was referred to by several of the Justices in questioning Massey's counsel about the concept of a "debt of gratitude."[59] The former could then be, and in post-*Caperton* discussions has been, referred to as a "debt of hostility." Conceptually, due process would just as logically require disqualification for disproportionate campaign opposition just as with disproportionate campaign support.

There is, however, an antecedent question concerning how a judge would know about campaign support for an opponent unless it had been in the form of virulent attack ads with attribution, *e.g.*, "Paid for by the United Mine Workers" (to borrow the example used by Chief Justice Roberts during oral argument in *Caperton*) or State law were to require disclosures by supporters that were then made publicly available or, at a minimum, available to the candidates.[60] In the wake of *Caperton* and *Citizens United*, judges will, at a minimum, need to have access to more information in order to be able to make appropriate campaign support disclosures in the cases over which they preside, and donors who are parties or are associated or affiliated with parties before the court (including counsel) must be required to make their own disclosures on the record.

To enhance the practicality and fairness of these recommendations, States should provide administrative processes to help judges identify recusal issues. In the absence of a disqualification motion, an elected judge may not be aware that a lawyer or litigant who previously provided campaign support to the election campaign is appearing before him or her and may therefore need help in facilitating that awareness. Under the case management systems used in many States, judges may not even be aware of the identities of lawyers and litigants appearing before them until cases are actually scheduled for hearing or disposition. As the costs of judicial election campaigns have escalated, the sources and types of campaign support have expanded, and, in many cases, the number of supporters has markedly increased. As a result, there are situations in which judges may have difficulty recalling the names of specific

---

59/ *See e.g.*, Transcript of Oral Argument 38-39, 43-45, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009) (No. 08-22), *available at* http://www.supremecourtus.gov/oral_argument/argument_transcripts/08-22.pdf [hereinafter "Argument Transcript"].

60/ In West Virginia, for example, Don Blankenship, the Chairman and CEO of Massey Coal, had to fill out a financial disclosure form on which it says "Expenditures made to Support or Oppose"; Blankenship underlined the word "Support" and typed in the words "Brent Benjamin." Argument Transcript, *supra* note 59, at 8; *see also* Joint App. 188a, Caperton v. Massey, 129 S. Ct. 2252 (2009) (No. 08-22), 2008 WL 5784213.

supporters, much less the amount and types of support provided. Where States choose to elect their judges, they should provide resources to help judges promptly identify recusal issues.

Campaign support disclosures by lawyers and litigants can be accomplished in more than one way. One is by enactment of appropriate statutory provisions in State election laws. A second, which State judiciaries can do on their own initiative, is to consider effecting these disclosure requirements via adoption of rules of court. These would be similar to already existing court rules mandating disclosures of corporate affiliations,[61] support for filing of briefs *amicus curiae*,[62] etc.

A judge who knows (or learns as a result of the aforementioned disclosures or a disqualification motion) that the judge's campaign, or that of the judge's campaign opponent, received more than a specified dollar amount of support from donors associated or affiliated with a party or counsel appearing before the court, would then be in a position to advise the parties of his or her intention to withdraw from the case, subject to the ability of the parties to waive disqualification. Each State would be free to set the dollar amount at a level appropriate to its own circumstances.

Finally, in addition to the aforementioned disclosure requirements, State judiciaries might also consider incorporating into their disqualification standards a non-exclusive list of factors to be considered by a judge in determining whether disqualification is appropriate in the campaign support context. These factors are adapted from the brief *amicus curiae* of the Conference of Chief Justices in the *Caperton* case and were referred to from time to time at oral argument.[63] They include:

> (a) 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 [or opponent's] campaign and to the total amount spent by all candidates for that judgeship;

61/ *See, e.g.*, Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit (as amended through May 10, 2010), R. 26.1, *available at* http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL-RPP-CircuitRules/$FILE/rules20091201rev20091113links.pdf

62/ *See, e.g.*, Rules of the Supreme Court of the United States (effective Feb. 16, 2010), R. 37.6, *available at* http://www.supremecourt.gov/ctrules/2010RulesoftheCourt.pdf.

63/ *See* Argument Transcript, *supra* note 59, at 24 (Alito, J.), 46 (Breyer, J.), 52 (Stevens, J.).

(b) If the support is monetary, whether any distinction between direct contributions or independent expenditures bears on the disqualification question;

(c) The timing of the support in relation to the case for which disqualification is sought;

(d) 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 [or opponent], and (iv) the total support received by the judicial candidate [or opponent] and the total support received by all candidates for that judgeship.

Conclusion

The foregoing recommendations are a menu of procedural and substantive options for States to consider in reassessing judicial disqualification issues. SCJI stands ready to be of assistance to any State where that would be useful or beneficial.

Respectfully submitted,

Standing Committee on Judicial Independence
William Weisenberg, Chair
Keith R. Fisher, Reporter
SCJI Judicial Disqualification Project