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POLICY BRIEF

Judicial Recusal

Elizabeth Monkus, Staff Attorney & Policy Analyst, December 2012

Introduction

Public confidence in the judiciary arises from judicial excellence, judicial independence and judicial impartiality. [1] Ensuring impartiality and independence in a jurisdiction with elected judges can be problematic, particularly given the record amounts raised in recent elections and increased media coverage of judicial elections in the wake of *Citizens United*.[2] Where judges are elected in privately-funded contests, there are at least two types of concerns relating to recusal or disqualification: (1) the procedures by which judges are removed and (2) access to contribution information which may be relevant to seeking recusal of a judge.

This policy brief examines proposed court rules and procedures for making the recusal and disqualification process more transparent, more consistent and more trustworthy. The proposed rules, in conjunction with better access to campaign disclosures, will enhance public perception of judicial independence and impartiality.

Chicago Appleseed has previously proposed an accessible public database of donors to judicial campaigns as a means of facilitating recusal or disqualification of judges where appropriate, whether through the statutorily-provided Motion for Substitution of Judge as of Right or through recusal or disqualification. We believe that if attorneys and litigants have easy access to verified public information about campaign donations to judges, attorneys will be able to use Motion for Substitution of Judge as of Right or Motions for Disqualification for Cause more effectively, when they believe campaign donations have arguably created a conflict.

Features of Meaningful Recusal Rules

- Transparent and reasoned decision-making, including independent adjudication and meaningful review.
- Enhanced disclosure for campaign contributions.

Illinois Recusal Rules and Proposed Changes

Illinois law permits either party in a civil case to file a Motion for Substitution of Judge as of Right[3] before any substantive actions have been taken in the case. Those motions are routine and require no showing of cause

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or reason for the substitution. Illinois also allows multiple motions for substitution of judge for cause in a civil case.[4] Illinois also provides for a Motion for Substitution of Judge as of Right in a criminal case within 10 days of its assignment to a judge, and up to two motions for substitution for cause.[5]

However, Illinois does not provide specific rules for appeal where petitions for substitution for cause are denied, and motions for disqualification are not included in the Supreme Court Rule establishing interlocutory appeal rights.[6]

The appearance of campaign donors as litigants and attorneys in the courtrooms of elected judges raises significant questions about the impartiality of those judges and the general integrity of the bench. These are the realities of our current privately-funded elected judiciary and may become even more prominent as a result of unlimited outside interest group spending in elections, following *Citizens United*. Clear guidance to judges regarding disqualification will promote consistency in recusal decisions will go a long way toward raising confidence in and protecting judicial independence and impartiality.

Clear, concise and meaningful recusal standards with respect to campaign support, such as those advanced by the Brennan Center and the American Bar Association, will make the recusal process uniform and fair. This brief analyzes the work of those institutions and rules in other states, and recommends options for Illinois in reforming its recusal standards and procedures.

The Brennan Center Recusal Standards

The Brennan Center for Justice has conducted extensive research into campaign finance and judicial recusal rules. In 2011, it issued a report, *Fair Courts: Setting Recusal Standards*,[7] with 10 recommendations for robust recusal reforms. Two of those recommendations present options for immediate improvements to the recusal process in Illinois.[8]

First, *Fair Courts* suggests a mandatory disclosure scheme that would require judges to disclose "any facts, particularly those involving campaign statements and campaign contributions, that might plausibly be construed as bearing on their impartiality."[9] The Brennan Center further recommends a centralized, publicly-accessible database that shows each judge's recusal history.[10] Second, *Fair Courts* proposes that all rulings on motions for disqualification for cause be made in writing or on the record and include, at a minimum, a brief rationale for the denial of a motion.[11]

Enhanced Disclosure for Campaign Contributions

An enhanced disclosure rule would require judges to make public the names of all contributors to their election or retention campaigns. It may be argued that enhanced disclosure requirements represent a burden on the courts, but judges are already bound by ethics to disclose economic interests,

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as well as other details that may have an impact on impartiality.[12] Further, Illinois already has campaign disclosure laws.[13] In the context of existing disclosure and ethics rules, the impact of an enhanced disclosure rule would be minimal. Making the disclosures mandatory promotes effective use of Motions for Substitution of Judge as of Right and for Disqualification for Cause and increases confidence in the system. It creates consistency across courtrooms and individual judges and ensures that all judges understand the boundaries of their responsibility to disclose.

Transparent & Reasoned Decision-making & Independent Adjudication

In Illinois, a motion for disqualification—unlike a motion for substitution of judge as of right—is decided by a judge other than the judge named in the petition.[14] Such independent adjudication of recusal motions for cause is an obvious, intuitive means of making the process fair and meaningful.[15] However, it is merely a minimum requirement for transparent and reasoned decision-making. Judges rarely write opinions explaining recusal decisions, and recusal decisions are rarely closely reviewed.[16] As the Brennan Center argues, the lack of a record surrounding recusal and disqualification decisions frustrates due process, impedes review of the decisions, and prevents the development of precedent or a framework for future decisions.[17]

Judges who decide motions for substitution of judge for cause should be required to issue a written ruling with a rationale for the decision. The ruling need not be extensive—in part because Illinois law requires that the motion itself be written—but it must include sufficient information for meaningful review of the decision, if necessary.

The American Bar Association Model Code of Judicial Conduct

The American Bar Association Model Code of Judicial Conduct addresses recusal and disqualification in Rule 2.11. The Comments to Rule 2.11 states that a judge is disqualified "whenever the judge's impartiality might reasonably be questioned regardless of whether any specific provision [of the rule applies]." The Rule also includes a *per se* provision, that disqualifies a judge from hearing a case where a party, a party's lawyer or her law firm, have made aggregate contributions to the judge's campaign over a certain threshold.

At 2011 Annual Meeting, the ABA's House of Delegates adopted Resolution 107[18] which called for individual states to implement clear procedures for handling judicial disqualifications. One prominent feature of the Resolution is a call for more transparent accounting of judges who receive campaign contributions and the lawyers and law firms who give them. A second is the recommendation that a judge should not have the final say in whether he or she should be recused.

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The Resolution further notes written memoranda, opinions or other statements are required for determinations of Motions to Disqualify when the motions are denied, if those determinations are to be meaningful. Resolution 107 notes that few states have such a requirement, likely because Motions to Disqualify frequently concerns matters that are "private or potentially embarrassing."[19] The ABA Standing Committee on Judicial independence (SCJI)—the proponent of Resolution 107—has stated that these concerns are "outweighed by the interests of justice" and "may also be exaggerated".[20] In any event, a Motion to Disqualify is already a part of the public case record and will include statements setting out the alleged disqualifying facts. The Resolution notes that voluntary recusal before a formal motion heads off those concerns in any case.

Judges should render recusal decisions promptly so as to avoid unnecessary uncertainty or delay. The SCJI also suggests that states adopt written procedural requirements on how to file a motion for disqualification. "Often there is a timeliness requirement, based on considerations of public policy and judicial economy and obviating waste of scarce judicial resources and the squandering of taxpayer dollars. Some jurisdictions require that the pleading be notarized or verified. Others may require a brief or memorandum of points and authorities in support. Still others may require submission of an affidavit."[21]

While there should be written procedures stating how and when to file disqualification motions, SCJI also suggests there should be written grounds for disqualification. The grounds for disqualification should be predicated on a default standard or on any of several well-accepted and specific factual bases for disqualification. The ABA policy outlines the grounds for disqualification as stated in the ABA Model Code of Judicial Conduct.[22]

In Illinois, as in many other states, neither the parties nor their lawyers are told in advance who will serve on their appellate panel. If the panel is not made public until a few days, or even a week, before the case will be heard, there is little time to evaluate whether a disqualification motion should be filed. "State judiciaries may therefore wish to consider whether assignments to panels and disclosure of the makeup of the appellate panels can be made several weeks earlier in the process."[23]

SCJI notes that consideration should be given to the review procedures that will be followed if a disqualification motion is denied by the challenged judge. The challenged judge should not be given the first and last say on the matter. The suggestions for how to deal with a denied recusal request include subjecting the decision of the challenged justice denying disqualification to review by the rest of the court. A second suggestion is "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." [24] The SCJI recognizes that the typical objection to such review procedures is that they impose significant costs, but

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those costs must be weighed against the benefit of increased public confidence in the judiciary.

Existing State Rules

Arizona, California, and Utah have adopted judicial recusal rules based on the ABA Model Rule 2.11(A)(4), and nine state supreme courts have adopted new disqualification rules that do not specifically model after the ABA model, but do incorporate the decision in *Caperton*.[25] *Caperton* merely sets a floor, describing when a conflict created from campaign support is so manifest that a reviewing court will find a due process violation that necessitates disturbing a judgment. The *Caperton* decision itself recognizes that States have the right to adopt recusal standards that are more rigorous than due process requires because State codes of judicial conduct play a vital role in maintaining judicial integrity and fostering public confidence in the judiciary.

Michigan, New York, Tennessee, and Georgia have all drawn recognition for their recusal standards. Each of these states makes explicit references to campaign contributions and disclosure. The New York rule includes a per se disqualification provision based on a threshold contribution level. The New York rule also requires the Chief Administrator of the Courts to:

> publish periodically a listing or database of contributions and contributors to judicial candidates, as disclosed by public filings, in a manner designed to assist the identification of campaign contribution conflicts under this Part, as well as contributions which, while not causing a campaign contribution conflict under this Part, may be pertinent to a motion to recuse.[26]

In Tennessee, the rule is more flexible and does not include automatic removal when a monetary threshold is reached. Instead, the Tennessee rule calls for recusal when "a party, a party's lawyer, or the law firm of the party's lawyer has made contributions or given such support to the judge's campaign that the judge's impartiality might reasonably be questioned."[27] Comments to the Tennessee rule offer factors to be considered in the determination:

1. The level of support or contributions 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;
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 or contributions in relation to the case for which disqualification is sought; and

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4. If the supporter or contributor is not a litigant, the relationship, if any, between the supporter or contributor 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.[28]

For disqualification motions, Michigan requires a judge to publish the reasoning for their recusal decisions. In addition, in the lower courts, if the judge denies the request for recusal, it is automatically referred to the chief judge, who reviews it *de novo*.[29]

In Georgia, the challenged judge initially reviews the recusal request for facial sufficiency, timeliness, and/or compliance with other procedural requirements. If the motion meets this threshold, the challenged judge either steps aside or transfers the request to another judge for decision.

Features of Robust Recusal and Disqualification Systems

- Enhanced disclosure for campaign donation information
- Clear guidelines for when campaign donations should trigger recusal
- A written record of the rationale for the recusal or disqualification decision
- Meaningful review of recusal or disqualification decisions

Illinois law provides both for substitution of judge as of right and for disqualification of a judge for cause. A meaningful and robust recusal practice includes additional features, such as those recommended by the Brennan Center for Justice and the ABA Model Code of Judicial Conduct or such as those in use in other jurisdictions, like Tennessee, Michigan and Georgia.

Improved recusal procedures will not only counter the perception of bias created by campaign contributions, but will create uniform procedures and predictable outcomes. Recusal provisions that create a higher threshhold for conflicts arising out of campaign support are contrary to this goal. It is important that recusal rules maintain the current standard requiring recusal where a judge's impartiality may reasonably be questioned.[30]

A public, easily searchable database of campaign contributions would provide valuable information attorneys could use in exercising their statutory right to Substitution of Judge. Clear guidelines for judges regarding what level of contribution creates the appearance of conflict would further improve the recusal process and increase public confidence.

Finally, procedural safeguards would improve the adjudication of recusal and disqualification motions, making the process more transparent and reliable. In Illinois, Motions for Disqualification for Cause are assigned to an independent judge, but those judges are not required to make a record of, or explain the reasons for, their decision. Requiring the adjudicator to

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make a record of his or her reasoning enhances transparency, and allows adequate review where necessary.

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American Bar Association	Features:
	Rule 2.11(A)(4): "The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than $[insert amount] for an individual or $[insert amount] for an entity [is reasonable and appropriate for and individual or an entity]." Passed Resolution 107 in 2011 outlining four procedural suggestions: prompt determinations, meaningful determinations, disqualification at the appellate level, special considerations
States' Rules	**Features:**
Michigan	Disqualification rule specifically mentions *Caperton* A challenged justice must publish his or her reason to accept or deny recusal request The challenged judge's decision to deny request is automatically reviewed by other judges
New York	Set a threshold of $2,500 for the amount of individual contributions that will warrant recusal A database of contributions and contributors is published for the public
Tennessee	Does NOT include a monetary threshold, but provides broad rules as to when disqualification is necessary
Georgia	Does NOT include a monetary threshold, but provides a list of things that should be considered when determining impartiality If a judge denies a recusal request, the remaining justices decided on disqualification

[1] *Bush v. Gore*, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting) ("It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law.")
[2] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
[3] 735 ILCS 5/2 §1001(a)(2).
[4] 735 ILCS 5/2 §1001(a)(3)(iii).
[5] 725 ILCS 5/114-5
[6] Supreme Court Rule 307, http://www.state.il.us/court/SupremeCourt/Rules/Art_III/ArtIII.htm#307
[7] Sample, James, David Pozen & Michael Young, *Fair Courts: Setting Recusal Standards*, February 2011, available at http://www.brennancenter.org/page/-/Democracy/Recusal%20Paper_FINAL.pdf
[8] Two of the 10 recommendations in the report are already in place in Illinois at the trial level—peremptory disqualification without showing of cause and independent adjudication of motions for disqualification for cause.
[9] Brennan Center, *Promoting Far and Impartial Courts*, Executive Summary, page 6.
[10] Sample, et al., p. 28.
[11] Sample, et al., p. 32.
[12] Sample, et al., p. 28; ABA Model Code of Judicial Ethics, Canon 2, R.2.11, cmt. 5; Illinois Supreme Court Rules, CANON 3, Rule 68.
[13] 10 ILCS 5/9-1, *et seq*.
[14] 735 ILCS 5/2 §1001(a)(3)(iii).
[15] Brennan Center, *Promoting Far and Impartial Courts*, 31.
[16] Bam, Dimitry, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 B.Y.U.L. Rev. 943, 995 (2011) (recusal procedures have changed little in two hundred years), citing Richard Flamm, History of and Problems with the Federal Judicial Disqualification Framework, 58 Drake L. Rev. 751, 760 (2010)
[17] Brennan Center, *Promoting Far and Impartial Courts*, 19, 32-33.
[18] Resolution 107 is accessible via http://online.wsj.com/public/resources/documents/ABAresolution.pdf
[19] Resolution 107, p. 12
[20] *Id*.
[21] ABA Resolution 107, 7
[22] ABA Resolution 107, 7
[23] ABA Resolution 107, 11
[24] ABA Resolution 107, 12
[25] AJS, Judicial Disqualification, 5
[26] Rules of Chief Admin of Cts, NYCRR § 151.1(C)(1), available at www.nycourts.gov/rules/chiefadmin/151.shtml#section151_1
[27] Brennan Center, *Promoting Far and Impartial Courts*, 13
[28] Tenn. Sup. Ct. R. 10, RJC 2.1 Cmt. 7, accessed at http://www.tsc.state.tn.us/rules/supreme-court/10
[29] Brennan Center, *Promoting Far and Impartial Courts*, 5
[30] Ill. Sup. Ct. R. 63(C)(1).