

Memorandum

To: Chief Justice Thomas Kilbride
CC: Mr. Michael J. Tardy, Mr. Joe Tybor and Mr. Adam Vaught
From: Malcolm Rich, Chicago Appleseed Fund for Justice,
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Date: June 7, 2013
Subject: Recusal Proposal: Canon and Court Rules

Recusal Proposal: Canon and Court Rules

A robust, transparent, and meaningful recusal process empowers judges and litigants. Clear standards in the judicial canon keep judges informed of their responsibilities and the boundaries of their activities, while leaving them latitude to remain independent. Where the canon discusses disqualification of judges, it should provide clear guidance for proper recusal decisions to protect judicial integrity.

Litigants, on the other hand, are protected by motions seeking substitution of judge for cause. Procedural standards for these motions are a necessary complement to judicial canons regarding disqualification without a motion. Court rules that bring consistency and transparency to Motions for Substitution of Judge for Cause should be promulgated.

We propose that Illinois expand the language of the Judicial Canon to explicitly acknowledge campaign contributions as a potential basis for self-disqualification and propose that Illinois adopt some procedural protections with regard to Motions for Substitution of Judge for Cause at the higher court levels. The Court's adoption of a comprehensive and clear standard addressing recusal questions will demonstrate to the public that justice is not to be influenced by campaign contributions.

The Tennessee Rule Model

The Tennessee Rule has risen to national prominence in the conversation about judicial disqualification (or substitution for cause) and the Tennessee Rule includes both a clear canon with expansive commentary and a set of procedural rules that govern how to file a motion to disqualify, how to deny such a motion, and how to appeal the denial of the motion. The Tennessee Rule requires that Motions for Disqualification—the analogous motion to Illinois' Motion for Substitution of Judge for Cause—be written and that the court issue a written decision on the Motion. The Tennessee Rule also creates an interlocutory appeals process for immediate review of denials.

Illinois Code of Judicial Conduct

We propose adding the following section (f) with commentary to Rule 63(C)(1) of Canon 3 of the Illinois Code of Judicial Conduct:

A Judge Should Perform the Duties of Judicial Office Impartially and Diligently:

C. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(f) the judge knows or learns by means of a timely motion that a party or its lawyer or law firm has given monetary or non-monetary support related to the judge's election or retention such that the judge's impartiality might reasonably be questioned. Factors to be considered in determining whether disqualification is required include, but are not limited to: the amount of the monetary support; the nature of non-monetary support; the timing and impact of support; the issues involved in the proceeding; whether the proceeding was pending or likely to be pending before the judge when the support was provided; and the connection of the supporter to the judge, to the proceeding, or to the litigants or attorneys participating in the proceeding.

Comment: 63(C)(1)(f) explicitly includes campaign support in the Rule 63(C)'s expansive language guiding a judge on when to recuse from proceedings. 63(C)(1)(f) acknowledges growing public concern over the impact of campaign spending on judicial independence and helps maintain public confidence in an unbiased judiciary by addressing the relationship of campaign support to a reasonable question about impartiality. The new section (f) does not change the standard set in Rule 63, as amended in 2003 and 2007, but merely reminds judges of an additional concern while examining their own impartiality. To this end, judges are encouraged by this commentary to confer with peers when they believe their "impartiality might reasonably be questioned."

Illinois Court Rules

When a judge does not disqualify or recuse herself on her own initiative, a litigant may make a Motion for Substitution of Judge. Illinois has a simple and effective provision for a Motion for Substitution of Judge as of Right, 735 ILCS 5/2-1001(2), in civil cases for any reason. "As of Right" Motions must be filed before any substantive matters have been decided in the case or must be filed pre-trial, if the parties agree to the motion. No cause need be stated for the motion and the judge has no discretion whether to grant or deny the motion if it is timely filed. It appears that many motions for substitution for cause in the trial court are presented as motions for substitution as of right because of the ease of the process.

However, litigants may request a substitution of judge for cause at any point in the proceeding. A Motion for Substitution of Judge for Cause is filed pursuant to 735 ILCS 5/2-1001(3) in civil cases. In criminal cases, under 725 ILCS 5/114-5(a)-(b), defendants may exercise one automatic substitution of judge and the state may exercise the same right under 725 ILCS 5/114-5(c). Either side may file additional motions pursuant to 725 ILCS 5/114-5(d). In both divisions, the motions are to be made on affidavit and must be heard by a judge not named in the petition. Illinois law clearly and unambiguously requires that "For Cause" Motions be transferred for hearing before another member of the judiciary, which is a necessary protection for both the litigants and the judges.

As a complement to the proposed expanded Canon and existing statutory provisions, we propose the following new, additional, procedural rules for Motions for Substitution of Judge for Cause filed in the trial court, appellate court, and Supreme Court and in the criminal courts.

We propose that interlocutory appeal be available for denials of Motions for Substitution of Judge for Cause without special finding under Court Rule 304(b) to prevent accidental waiver of appeal and to promote the development of a robust body of common law to guide judges in recusal decisions.

We propose the following new Court Rule 188 that would affect Motions for Substitution of Judge for Cause in civil cases:

Rule 188. Special Procedures for Motion for Substitution of Judge for Cause

(a) Rulings. Upon the filing of a motion pursuant to 735 ILCS 5/2-1001(3) , the judge shall act promptly by written order and either grant or deny the motion. If the motion is denied, the judge shall state in writing the grounds upon which he or she denies the motion.

(b) Reassignment of the Case. A judge who recuses himself or herself, whether on the Court's own initiative or on motion of a party, shall not participate in selecting his or her successor, absent the agreement of all parties.

(c) Availability of Interlocutory Appeal as of Right Following Denial of Motion for Substitution of Judge.

(1) If the trial court judge enters an order denying a Motion for Substitution of Judge, an accelerated interlocutory appeal as of right lies from the order. The failure to pursue an accelerated interlocutory appeal, however, does not constitute a waiver of the right to raise any issue concerning the trial court's ruling on the motion in an appeal as of right at the conclusion of the case. The accelerated interlocutory appeal or an appeal as of right at the conclusion of the case shall be the exclusive methods for seeking appellate review of any issue concerning the trial court's denial of a motion filed pursuant to this Rule. A party who is represented by counsel is not permitted to file a pro se motion under this Rule.

(2) To effect an accelerated interlocutory appeal as of right from the denial of the motion, a petition for recusal appeal shall be filed in the appropriate appellate court within fifteen days of the trial court's entry of the order. A copy of the petition shall be promptly served on all other parties, and a copy also shall be promptly filed with the trial court clerk. For purposes of this section, "appropriate appellate court" means the appellate court to which an appeal would lie from the trial court's final judgment in the case.

(3) The petition for recusal appeal shall contain:

- (a) A statement of the issues presented for review;
- (b) A statement of the facts, setting forth the facts relevant to the issues presented for review;
- (c) An argument, setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities; and
- (d) A short conclusion, stating the precise relief sought. The petition shall be accompanied by copies of any order or opinion and any other parts of the record necessary for determination of the appeal.

(4) The filing of a petition for recusal appeal does not automatically stay the trial court proceeding. However, either the trial court or the appellate court may grant a stay on motion of a party or on the court's own initiative, pending the appellate court's determination of the appeal.

(5) If the appellate court, based upon its review of the petition and supporting documents, determines that no answer from other parties to the case is needed, the court may act summarily on the appeal. Otherwise, the appellate court shall order that an answer to the petition be filed by the other parties. The court, in its discretion, also may order further briefing by the parties within the time period set by the court.

(6) The appeal shall be decided by the appellate court on an expedited basis upon a de novo standard of review. The appellate court's decision, in the court's discretion, may be made without oral argument. Any order or opinion issued by the appellate court should state with particularity the basis for its ruling.

Commentary: Informal consultation regarding the need for recusal is encouraged. The Brennan Center Report "Promoting Fair and Impartial Courts through Recusal Reform" found that, in Vermont, when a judge was inclined to recuse out of an abundance of caution, opinion among colleagues was that recusal was unnecessary. Informal consultation promotes the same goals as the formal rule—the independent review of a disqualification question by decision maker other than the challenged judge himself or herself.

We propose the following new section (h) to Court Rule 604 that would affect motions for substitution of judge for cause in criminal cases:

Rule 604

(h) Appeal From an Order Denying a Motion for Substitution of Judge. The defendant may petition for leave to appeal to the Appellate Court from an order of the circuit court denying a motion for substitution of judge. The procedure for bringing interlocutory appeals pursuant to this subpart shall be the same as set forth in Supreme Court Rule 188(c).

We propose the following addition of sections (d) and (e) that would set rules for Motions for Substitution of Judge for Cause to Court Rule 361 that governs motions in the Appellate and Supreme Courts:

Rule 361. Motions in Reviewing Court

(d) Motion Seeking Recusal or Substitution of an Appellate Judge for Cause

(1) Any party seeking disqualification, recusal, or substitution of a judge of an appellate court shall do so by a timely filed written motion. The motion shall be supported by an affidavit under oath or a declaration under penalty of perjury on personal knowledge and by other appropriate materials; the motion shall state, with specificity, all factual and legal grounds supporting disqualification of the judge and

shall affirmatively state that it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. A party who is represented by counsel is not permitted to file a pro se motion under this Rule.

(2) Upon the filing of a motion seeking recusal or substitution for cause of an intermediate appellate judge, the judge in question shall act promptly by written order and either grant or deny the motion. If the motion is denied, the judge shall state in writing the grounds upon which he or she denies the motion. If the judge denies the motion, the movant, within fifteen days of entry of the order, may file a motion for court review to be determined promptly by the other judges in that section of the court upon a de novo standard of review. If the motion for court review is denied, an accelerated appeal as of right lies to the Illinois Supreme Court, which shall expeditiously decide the appeal based upon the petition and other papers filed in the intermediate appellate court. The appeal to the Supreme Court shall be titled “recusal appeal from denial of court review” and shall be filed within fifteen days of the intermediate appellate court’s order denying the motion for court review.

(3) Review of denial of motion to recuse or disqualify shall be decided by the remaining judge or justices of the Court. A judge may, however, voluntarily disqualify himself or herself prior to the matter being decided by the remaining justices.

(e) Motion Seeking Recusal or Substitution of Justice of the Supreme Court for Cause

(1) If a motion is filed seeking recusal or substitution for cause of a Supreme Court justice, the justice in question shall act promptly by written order and either grant or deny the motion. If the motion is denied, the justice shall state in writing the grounds upon which he or she denies the motion. If the justice denies the motion, the movant, within fifteen days of entry of the order, may file a motion for court review, which shall be determined promptly by the remaining justices upon a de novo standard of review.

(2) Review of denial of motion to recuse or disqualify shall be decided by the remaining judge or justices of the Court. A justice may, however, voluntarily disqualify himself or herself prior to the matter being decided by the remaining justices.