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

RESOLUTION

RESOLVED, That the American Bar Association urges states to establish clearly articulated procedures for judicial disqualification determinations and prompt review of denials of requests to disqualify.

FURTHER RESOLVED, That in the event a motion to disqualify a judge is denied on the merits, the denial should be promptly reviewed by another judge at the same court level as the judge who denied the motion.

FURTHER RESOLVED, That the ABA urges states in which judges are subject to elections of any kind to adopt:

A. Disclosure requirements for litigants and lawyers who have provided, directly or indirectly, campaign support in an election involving a judge before whom they are appearing. These disclosure requirements would facilitate a determination of whether the judge's impartiality might reasonably be questioned.

B. Guidelines for judges about their disclosure obligations and the circumstances in 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. Improved case management systems or other resources to help judges promptly identify recusal issues.

REPORT

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 "the judge's impartiality might reasonably be questioned."[3]

The ABA has traditionally taken a leading role in providing guidance to the States[4] on matters of judicial ethics and judicial conduct. Since 2007, SCJI has been working on its Judicial Disqualification Project (JDP). The 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. The goal has been 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. Nothing in this Report or the accompanying Resolution is intended to apply to Article III or other federal courts.[5]

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[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). 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."). 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, which shall be used interchangeably.

[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. SCJI is not proposing any amendments to the Model Code but stands ready to work cooperatively with the ABA Standing Committee on Ethics & Professional Responsibility to determine whether any revisions to the Model Code are necessary or advisable.

[4] When capitalized, the term "State" or "States" as used herein refers to the entity having regulatory authority over judicial disqualification practices and procedures within the jurisdiction, and encompasses the District of Columbia and U.S. territories. The term "state courts" includes the District of Columbia Court of Appeals and the Superior Court for the District of Columbia.

[5] The sole exceptions are the District of Columbia courts mentioned in note 4, *supra*. While the focus of the JDP has been on the State judiciaries and not the federal, this Report benefits from the guidance provided by federal case law, some of which is cited herein.

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 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 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 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

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[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)).

[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).

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.

Together, *Caperton* and *Citizens United* foreshadow an increase in the number and frequency of disqualification motions, because large corporations and labor unions may now make unlimited expenditures not only in general elections but in judicial elections as well.[10] 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, makes tighter controls over disqualification imperative. Thus there is an urgent need for States to have in place prompt, effective, and transparent disqualification procedures.

Some Fundamental Principles

Cognizant of this metamorphosis of the terrain of judicial disqualification and judicial campaign finance, SCJI is concerned about polling and anecdotal data showing significant diminution in public respect for judicial independence, integrity, impartiality, fairness -- lynchpins of the legitimacy of the judicial branch of government. What transpired during the November 2010 election cycle has only deepened these concerns. Large interest group contributions that go not to a judge's campaign but to third party entities that use the funds to conduct extensive advertising for or against a particular judicial candidate are a phenomenon that was unknown when the Model Code provisions relating to judicial elections were drafted. All of this has considerably elevated the profile of disqualification and disclosure issues for State judiciaries.

SCJI approaches these issues with some fundamental principles in mind:

- First, nothing contained in this Report or the accompanying Resolution 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

[10]/ Indeed, as the most recent election cycle has proved, even the formerly tranquil arena of retention elections has become an opportunity for well-financed attacks on judges motivated by political disagreement with their decisions. *See, e.g., A Blow to the Courts,* N.Y. TIMES, Nov. 9, 2010, at A 34; A.G. Sulzberger, *In Iowa, Voters Oust Judges Over Marriage Issue,* N.Y. TIMES, Nov. 3, 2010, at A1.

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.

- 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 that each State – and especially in the majority of jurisdictions in which judges face some form of election – expeditiously 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

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[11] The mere existence of such facts does not lead inevitably to disqualification. Disqualification is obviously unnecessary if all parties are satisfied that the judge will be fair and impartial. 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. Disclosure is necessary, however, for knowing and intelligent waiver of disqualification.

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 ground for 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). *See also* MODEL CODE OF JUDICIAL CONDUCT R. 2.11(C).

[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*.

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, 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. 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.[16]

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, we reiterate that this Report does not promote any particular procedure but merely catalogs options that some States have already adopted and that others may wish to consider.

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.

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[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] 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).

Peremptory Challenges

Disqualification can be effected in 36% of the States[17] by so-called "peremptory challenges." Such challenges permit disqualification without the requirement of any showing of cause.[18]

Peremptory challenges, where authorized, are usually limited to one per party.[19] 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.[20] 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 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.[21]

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.[22] 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.

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

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[17] The 18 States that have authorized this procedure are: Alaska, Arizona, California, Idaho, Illinois, Indiana, Minnesota, Missouri, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Washington, Wisconsin, and Wyoming.

[18] For some representative examples, *see* 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).

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

[20] *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).

[21] *See, e.g.,* State v. Clemons, 56 Wash. App. 57, 61, 782 P.2d 219, 221 (1989).

[22] *See* FLAMM, *supra* note 16, § 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").

of public policy[23] and judicial economy[24] and obviating waste of scarce judicial resources and the squandering of taxpayer dollars. Some jurisdictions require that the pleading be notarized or verified.[25] Others may require a brief or memorandum of points and authorities in support.[26] Still others may require submission of an affidavit.[27]

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.[28] 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.

Grounds for Disqualification

Substantively, a motion (by which term we subsume any alternate form of pleading employed under local procedures) 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 are well-stated in the ABA Model Code of Judicial Conduct and include[29] the following:

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[23] *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).

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

[25] *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).

[26] *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").

[27] *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).

[28] *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)).

[29] 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.

- 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)].
- 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,[30] (ii) having a different judge decide it,[31] 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

[30] *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).

[31] *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.[32]

While there is no "one size fits all" procedure that will necessarily work in all States, SCJI endorses the hybrid approach as best designed to lead to as prompt[33] and impartial (both in actuality and in public perception) a determination of the motion as possible. 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 noncompliant or frivolous, 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 to refer the motion to another judge for a decision on the merits.[34] Admittedly, a number of non-merits factors might bear on the practicality of such a referral, such as whether the court is urban or rural (with the possibility, in the latter case, of 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. SCJI is confident, however, that each State will be able to weigh such factors and craft rules or procedures best suited to the circumstances.

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, States that do not already do so should shift responsibility for deciding disqualification motions (other than review for frivolousness or for compliance with procedural requirements) away from the challenged judge.

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[32] *E.g.,* GA. UNIF. SUPER. CT. RULE 23.5. *See* 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).

[33] As an example of promptness requirements, the Florida Supreme Court has 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).

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

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.[35] 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.[36] They may, however, sometimes be considered as appealable interlocutory orders if they fit into a recognized category such as Arizona's "special action,"[37] sometimes as unappealable interlocutory orders that require certification for immediate appellate review,[38] sometimes as "collateral orders" for purposes of that exception to the doctrine permitting only appellate review of final orders,[39] and sometimes as reviewable only under an extraordinary writ.[40] 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.[41] Indeed, in some jurisdictions – such as California[42] and the U.S. Court of Appeals for

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

[36] *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).

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

[38] 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 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).

[39] *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*).

[40] *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).

[41] FLAMM, *supra* note 16, § 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).

[42] 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).

the Seventh Circuit[43] -- mandamus is the *only* basis for obtaining such appellate review. However, as even the Seventh Circuit candidly acknowledges, this is decidedly a minority position.[44]

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 clarify the appealability of such denials at the trial level 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 therefore should ordinarily be provided either in a written decision or otherwise on the record; if the motion is frivolous or facially insufficient, however, this requirement can be dispensed with, or a short form of order could be employed. The same requirement should 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 usually outweighed by the interests of justice. The concern may also 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. In contrast, 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.

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[43] *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).

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

For these reasons, therefore, SCJI recommends that State judiciaries consider implementing procedures or guidelines that will allow for more meaningful review of denied 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.[45] 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.[46]

To avoid such problems, State supreme courts may wish to consider adopting procedures for the review of disqualification motions so as to relieve the subject justice of sole authority to 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. Another would be to assign review of the denial (or perhaps even assign the motion itself in the first instance), at least where

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[45] *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).

[46] 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*, *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).

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.

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.[47] Over a decade later, states have not adopted this Rule.[48]

The dramatic escalation in campaign support through independent committees and the phenomenon widespread public perceptions about the influence of money on judicial decisions has fundamentally altered the landscape from that which existed in the 1990's when Rule 2.11(A)(4) was adopted. Accordingly, SCJI believes that rule warrants reexamination. For example, the rule speaks only to contributions made to a judge's campaign. Yet 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."[49] 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

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[47] These threats may be powerful even in States where judges face only a retention election. Indeed, the 2010 election cycle saw some very contentious retention elections with lots of money involved, in several states, including Iowa and Colorado. *See, e.g.,* A.G. Sulzberger, *Voters Moving to Oust Judges Over Decisions,* N.Y. TIMES, Sept. 25, 2010, at A1.

[48]/ Amending the Model Code would come within the jurisdiction of other ABA entities, such as the Standing Committee on Ethics & Professional Responsibility and the Standing Committee on Professional Discipline.

[49]/ *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"].

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.[50] In the wake of *Caperton* and *Citizens United*, elected 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 practicality and fairness, States should provide administrative processes to help elected 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 substantial 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 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 several ways, such as by appropriate statutory provisions in State election laws or by adoption of rules of court. The latter would be similar to already existing court rules mandating disclosures of corporate affiliations, support for filing of briefs *amicus curiae*, etc.[51] 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 amount of support (or percentage of the total campaign 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 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[52]

[50/] 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 49, at 8; *see also* Joint App. 188a, Caperton v. Massey, 129 S. Ct. 2252 (2009) (No. 08-22), 2008 WL 5784213.

[51] *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; 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.

[52] This non-exclusive list of factors does not represent ABA policy at this time but, because of its

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.[53] 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;
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> (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 Report contains 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,

William K. Weisenberg, Chair
Standing Committee on Judicial Independence
February 2011

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endorsement by the Conference of Chief Justices and a majority of the U.S. Supreme Court, merits serious consideration.

[53] *See* Argument Transcript, *supra* note 49, at 24 (Alito, J.), 46 (Breyer, J.), 52 (Stevens, J.).