

JUDICIAL DISCLOSURE AND DISQUALIFICATION: THE NEED FOR MORE GUIDANCE

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Important provisions of the newly revised American Bar Association Code of Judicial Conduct relate to whether a judge should be disqualified from presiding over a case based on an impermissible conflict of interest. Two key issues for resolving conflicts of interest relate to judicial disclosure to the parties about potentially disqualifying conditions, and the type of disqualifying conditions that can lead to the judge's disqualification or the imposition of disciplinary sanctions for the judge's failure to disqualify. In both areas, the Code standards need to provide more guidance to maintain the belief of litigants and the public in the integrity of the judicial system.

The American Bar Association House of Delegates approved an amended Code of Judicial Conduct (Code) at its February 2007 midyear meeting. Each state's highest court now may consider whether to modify its existing code and to adopt some or all of the most recent changes for its code, which forms the core of ethical standards for federal and state appellate and trial judges. Based on noncompliance with Code provisions, a judge is subject to discipline and may even be removed from office for ethical lapses.

One of the most important areas of the Code relates to whether a judge should be disqualified from presiding over a case based on an impermissible conflict of interest. Judicial disqualification for a conflict of interest may evolve as follows. First, due to the circumstances, the judge may step aside because continuing to preside in the case would violate that jurisdiction's code, as when, for example, the judge's adult child's law firm is counsel for one of the parties. Case law suggests that a judge who is aware of a disqualifying situation should assess *sua sponte* whether it is appropriate to continue to preside without waiting for a party to file a motion to disqualify. Second, even when the judge chooses not to withdraw because of a possible disqualifying condition, the judge may disclose that condition to the parties. "Nothing provides stronger evidence to the parties of [judicial] impartiality than open disclosure" (*Merck & Co. v. Superior Court*, 2005, at n. 5). Third, one or more of the parties may file a motion to disqualify the judge, based either on the judge's disclosure or upon their own independent knowledge; if the latter is the basis for the motion, the judge may have been unaware of such a potential disqualifying circumstance until the motion was filed.

This article will discuss two different aspects of judicial disqualification. The first, a process concern, is judicial disclosure of potentially disqualifying conditions to the parties. The second is substantive—the nature of the disqualifying conditions that can lead to the judge's disqualification or even imposition of disciplinary sanctions for the judge's failure to disqualify.

DEVisING A SYSTEM FOR JUDICIAL DISCLOSURE

Imagine that a new state has been admitted to the United States and one of its many tasks is to construct a judicial system that will enjoy a positive reputation among its citizens, litigants, and judges for integrity, openness, and transparency. Regardless of how the new state's judges are selected, citizens must believe that their judges are diligent, credible, fair, and ethical women and men. Officials of the new state are familiar with the current ethics standards in the other fifty states, and they must draft a code of judicial conduct that will promote both the fact and the appearance of judicial integrity. How should the new state proceed?

One set of issues concerns the circumstances, if any, under which a judge shares information with the litigants and counsel about possible disqualification. Assume that a judge knows circumstances that might lead to disqualification. How should disclosure of the information be handled? Questions abound about disclosing that information.

1. Is judicial disclosure automatic; that is, should a judge reveal the information without being asked by anyone involved with the case?
2. By what means should disclosure occur? For example, instead of reporting the information at every proceeding on his or her docket, would it be sufficient if the judge listed the information on a court Web site so that multiple parties and their counsel would know potential grounds for disqualification?
3. If disclosure is required, how much disclosure is necessary? That is, what should the judge be required to disclose? Should it be any and all possibly disqualifying information? Under a broad disclosure requirement, might the parties and counsel misunderstand that the judge thinks that all the information disclosed actually constitutes grounds for disqualification?
4. Are the fact of disclosure and the nature of the disclosure related so that both are important? For example, is the disclosure of information less significant when the potential conflict of interest is wholly unrelated to the factual and legal issues before the tribunal?
5. To whom and how should the disclosure be made? To the parties and their counsel? To anyone else?
6. Is it sufficient for a judge to offer the information, leaving to the parties and counsel the choice about whether to move for disqualification?
7. Following judicial disclosure of a disqualifying circumstance, a motion to disqualify based on that circumstance, or both, should the parties be able to waive that circumstance thereby allowing the judge to hear the case?

Issues relating to judicial disclosure of information are important to the new state's judicial system, because such issues actually do occur in the real world. For example, in 2006, national ethics experts criticized a trial judge who ruled on the constitutionality of a controversial statute without disclosing the fact of being a

trustee of and donor to a major underwriter organization of the attorney for one of the parties. While it is arguable whether the judge had a *sua sponte* duty to recuse from the case, the judge nevertheless should have disclosed the organizational connection to avoid later questions about judicial credibility, such as whether the judge's political motives influenced the decision on the merits. Without disclosure, the losing party immediately decided to appeal, which could have been avoided by earlier judicial candor about the judge's fiduciary and financial relationship with the sponsoring organization.

CURRENT JUDICIAL DISCLOSURE STANDARDS

Judicial disclosure of potentially disqualifying information currently stems from two sources: 1) statutory requirements that certain information, such as the judge's financial holdings, be disclosed annually, and 2) mandates or suggestions in several provisions in the Code.

Disclosure of Financial Information. To promote and maintain confidence in the judicial system, judges increasingly must make public disclosures of their activities, such as their financial investments or their attendance at corporate-sponsored seminars. Judges' investment information potentially is available for any lawyer's or litigant's use. For example, under the Ethics in Government Act, federal judges annually must submit financial disclosure reports showing their investments. Until recently, a litigating party's access to the reports required extra effort and time. Instead of being published online, the reports are kept in a Washington, D.C. administrative office. The effort to discover the information is chilled, however, because a judge can learn about who is asking about the reported investments.

At a minimum, required reports about a judge's financial investment or any other disqualifying circumstance should be readily available both to the support staff in the clerk's office where the judge works and to the litigants and counsel. For example, the Northern District of Iowa lists its judges' financial interests on the Internet. Most federal courts have had access to, but little use for, automated computer programs for monitoring trial and appellate judges' cases for financial and other conflicts of interest. When a lawsuit is filed, a computer program compares the names of the parties and the judge's financial holdings, or names of the judge's family members, to reveal whether a conflict will exist if the case is assigned to the judge through random assignment. Operation of the computer program alerts the court clerk about the conflict of interest, so that the clerk can reassign the case before the disqualified judge ever sees it. Until recently, however, it was left to the individual judge to run the financial information through the software program.

In September 2006, however, the Committee on Codes of Conduct of the United States Judicial Conference required federal judges to use the preexisting computer software to identify cases in which a judge may have a disqualifying financial, family relation, or other conflict of interest. As the committee's report stated, "A fair

reading of the judiciary's record shows that federal judges take their recusal obligations very seriously, and this commitment will be underscored by adoption of a mandatory automated conflict screening policy. . . . While automated screening is not foolproof, it is an efficient and effective supplement to a judicial officer's individualized review."

A second method by which judicial disclosure of financial information is likely, although not required, also occurs in the federal system. If it comes to the judge's attention "after substantial time has been devoted to the matter" that the judge or an immediate family member has a financial interest in a party, disqualification is not required if the judge or family member divests the interest that provides the basis for the disqualification. Although the federal statute specifically does not require disclosure of the financial interest to the parties or counsel, it is reasonable to assume that the judge would reveal to them the circumstance and the fact of divestment.

What the Judge Is Expected to Know. Discussions about judicial disclosure of information begin with the judge's knowledge, because a judge cannot be required to disclose information not known to the judge. Under the newly adopted Code, the only information that a judge must know relates to the judge's personal and fiduciary finances. The judge is to make a reasonable effort to be aware of the personal finances of a spouse and minor children living with the judge, but even the Code's limited mandated self-knowledge does not have to be disclosed to parties or their counsel.

Why is the Code's requirement so narrow, confined to the judge's personal and immediate family's financial information? A judge should be required to know information about all types of specific disqualifying circumstances. New judges especially should bear the burden of learning broader categories of potentially disqualifying information, with the possibility of disclosing such information to parties so that they would not have to conduct investigations into the judge's personal and financial situation. Conversely, when there is no disclosure by the judge, the parties may infer from the judge's silence that the judge has made a reasonable effort to learn about a possible conflict of interest in the case (*Horsford v. The Board of Trustees of California State University*, 2005).

Waiver of a Disqualifying Circumstance. The Code permits the parties to agree to a "remittal of disqualification" after the judge "disclose(s) on the record the basis of" the judge's disqualification to the parties and counsel. After the disclosure, the parties and counsel, without the judge's participation, consider whether to agree to a waiver of the conflict. Slightly more than half the states in effect encourage judges to disclose any disqualifying information to continue presiding in a case, unless the disqualifying facts suggest personal bias or prejudice, for which waivers of disqualification are disallowed. In fewer than a half dozen states, potential waivers are limited to disclosures of a disqualifying family relationship or financial interest, and about ten states do not address the issue of waiver.

Disclosure of Relevant, Disqualifying Information. About half the states have adopted a separate Code provision that suggests judicial disclosure of broader, poten-

tially disqualifying information than the waiver section indicates. In these provisions, a judge should disclose information that the judge believes a party or the party's lawyer might consider relevant to disqualification, a provision that depends on the judge's subjective belief about what a party or lawyer might think is relevant. Thus, despite the breadth of the potential disclosure, the judge can limit what is revealed to the participants based on his or her own perception about how they would practice their case. Here, the Code seems both to give and to take away.

Is the scope of disclosure different between information necessary for a waiver of disqualification, and information disclosed because the parties and counsel may consider it relevant? When the judge informs the parties and counsel to begin the waiver process, the judge is disclosing information that constitutes the "basis" for disqualification, that is, the judge will step aside unless the parties agree to the judge's continued participation in the case. By contrast, the scope of the disclosure of information that the judge believes might be considered relevant by the parties to the prospective issue of disqualification is implicitly broader than disclosure for the purpose of obtaining a waiver.

If the judge previously represented one of the parties in an unrelated matter, is that information that the judge should disclose because counsel would think that it useful on the question of disqualification? And would that disclosure imply the need for disqualification? Again, the Code lets the judge decide whether the prior representation would raise an issue of partiality or the appearance of partiality. "Best practices," however, suggest that when in doubt, a judge should make a record of the possibly disqualifying situation so that the parties and lawyers can decide what to do with the information.

Although the Code is deficient in providing clear guidance on disclosure, one can obtain a better idea of what should be disclosed by looking at situations in which, under the preexisting Code, judicial discipline has been imposed for the judge's failure to disclose a potentially disqualifying situation. The reasons for judicial discipline include failure to disclose that: 1) the judge is romantically involved with a court staffer in the judge's court; 2) the judge's current, personal attorney is counsel in a case before the judge; 3) the judge is a leader in a Boy Scout organization that practices invidious discrimination; 4) the judge's spouse is mayor, in cases where city police testify; 5) the judge's current health-care provider is a party; and 6) the judge had an extensive economic interest in a party (*Huffman v. Arkansas Judicial Discipline and Disability Commission*, 2001).

The preexisting Code recommended disclosure of information that the parties or counsel "might consider relevant to the question of disqualification." The 2007 Code made a slight change, with new language prescribing disclosure of information that the participants "might reasonably consider relevant to a possible motion for disqualification." The amendment appears to change the reference point for judicial disclosure. Formerly, the judge ought to have disclosed information that the judge

believed the actual parties and counsel might think to be relevant. The new language allows the judge to bypass the personal qualities of the parties and focuses the judge's belief about disclosure on information that the reasonable person would consider pertinent to a disqualification motion.

THE ABA CODE AS A RESOURCE ON THE MEANING OF THE APPEARANCE OF IMPARTIALITY

Having considered the issue of judicial disclosure, we consider some aspects of the standards our new state should adopt for determining the disqualification of a judge from presiding over a case. What specific circumstances of a judge's personal, financial, family, social, or professional life suggest that it is imperative for a judge to step aside? Should those settings include the judge's prior knowledge about or relationship to the instant case or its participants? Should there be a general, residual provision that describes when disqualification is appropriate, not because it is improper for the judge to sit in the case but because the *appearance* of the situation requires or suggests disqualification?

The Code includes both specific and general types of disqualification provisions. The specific categories effectively state that it is presumptively prejudicial for a judge to exercise impartiality by presiding over the case, unless a waiver of the conflict is available. The specific provisions address a judge's personal bias toward a party or attorney, or personal knowledge of disputed facts; economic interests in the case or the parties by the judge, the judge's spouse, children, and live-in relatives; a family relationship between the judge and a party, attorney, or witness; and election campaign contributions by a party or attorney, in excess of a specific amount.

Because the specific examples of presumed prejudice do not anticipate all potential conflict-of-interest situations, the Code also contains a general disqualification provision requiring disqualification when the "judge's impartiality might reasonably be questioned, including but not limited to" the specific categories. Unlike the specific categories of presumed partiality, courts and disciplinary bodies regard the general category as primarily concerned with the appearance of partiality, which is applied from the perspective of the reasonable person, that is, whether the situation would lead a reasonable person knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned. As a practical matter, the general provision applies in two situations: 1) when the facts do not altogether match the language of the specific examples, for instance, when the judge's relative works for a corporate victim, or 2) when the situation obviously falls outside the specific scenarios, such as when the judge presiding in a child-abuse case herself was the victim of abuse. In either instance, the general rule functions as a fall-back position for the judge, attorneys, and parties.

Increasingly, judges and judicial conduct organizations address allegations that a judge's continued participation in a case creates the appearance of partiality. Because

the specific categories are relatively few and narrow, and the ABA and the states on their own have been slow to recognize additional, specific per se grounds for disqualification, attention to the general standard of disqualification has grown. Without ABA guidance, each appearance-of-partiality case is evaluated on its own facts. Courts and disciplinary organizations have applied the appearance-of-partiality standard when specific Code provisions do not apply. Examples of appearance-of-partiality cases include a judge's improper remarks during a judicial proceeding; claims filed against or by the judge; a judge's presiding over a prior (un)related case of a party or the case of a former client; and a judge's professional relationship with attorneys and organizations, personal connection with the proceedings, and social or business relationships.

Campaign Contributions. Another circumstance, that of campaign contributors appearing before the judge, affords an opportunity to examine both whether the Code standard is appropriate and whether the ABA should publish criteria that judges could apply to comparable fact situations. In 1999 the ABA, concerned about judicial favoritism toward contributors, presumed prejudice and mandated disqualification when a judge knew that a party or the party's lawyer recently contributed at least a certain amount of money to the judge's campaign. The 1999 Code left the states to specify the amount and recency of the campaign donation, but no state added the 1999 black-letter provision to its Code. The 2007 Code specifies a time period of one year and adds lawyers in counsel's firm to the list of persons whose contribution above a threshold amount is presumptively prejudicial and requires disqualification. Under the Code, however, family members or colleagues of the specific attorney or party in the judge's court can contribute above the threshold amount without triggering the specific ethical standard.

An appearance of partiality may exist when a campaign participant appears in the judge's court, without regard to the timing or amount of a campaign contribution. For decades, attorneys have fretted about the role of opposing counsel in judicial election campaigns. Distrustful counsel may suspect a "payback" between the judge and opposing counsel or parties far beyond the one-year period. Moreover, there is a question as to what third-party conduct serves to disqualify a judge. Is it posting a yard sign for the incumbent judge or judge-candidate? Sending post cards or e-mails urging friends to vote for the preferred candidate? Being the finance chair or campaign chair? Prohibiting judges from knowing the identities of their contributors could mitigate the problem, but that may be an unrealistic solution, especially when there is public access to contributor lists (*Ex parte McLeod*, 1998).

The Code should offer the states alternatives for disqualifying situations like campaign contributions under the appearance of impartiality. For example, when a campaign participant or contributor appears in the judge's court, the Code could enumerate the variables posed by any set of unique circumstances: the significance of the person's campaign involvement; whether the campaign is underway or how recently it ended; whether there is an ongoing relationship between the person and the judge;

the significance of the person's involvement in the current case, including the closeness or remoteness of the involved individual in the case; whether the issue was promptly raised; and evidence of judicial bias (*State v. Stockert*, 2004).

CONCLUSION

Judicial disclosure and judicial disqualification are important parts of any system of judicial ethics. Because the Code serves as the primary model for state high courts to adopt, and for individual judges, judicial conduct commissions, and attorneys to use for guidance in evaluating the ethics of judicial behavior, it is the most likely source for promoting judicial ethics changes in disclosure and disqualification. Two modifications to the new Code are essential. First, the Code needs broader disclosure provisions so that litigants believe that the integrity of the judicial system and individual judges is self-evident. Second, as challenges to judicial behavior are increasingly based on a residual norm like the "appearance of impartiality," the Code must include guidance for applying that general principle. **jsj**

CASES CITED

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