Judicial Disqualification in Minnesota

"Mere bias," "joining the team," and other criteria

The right to an unbiased judge is so fundamental to American jurisprudence that criminal convictions have been reversed over its violation. In Minnesota, the majority of determinations regarding disqualifying 'partiality,' 'interest,' or 'bias' have been made in criminal appellate cases. This article assesses contemporary standards for judicial disqualification.

By William J. Wernz

The right to an unbiased judge is fundamental. It has been regarded as so fundamental that criminal convictions have been reversed for violation of that right, even when there is overwhelming evidence of guilt. "Structural errors," such as judicial bias, do not fit under the "harmless-error" standard, and therefore "require automatic reversal of a conviction."[1] Determinations regarding a judge's bias or lack of "impartiality" are based on standards adopted in the constitution, statutes, case law and the Code of Judicial Conduct. The Code's standards are incorporated into Rule 26.03, subdivision 14(3), Rules of Criminal Procedure.

The majority of determinations in Minnesota of what counts as disqualifying "partiality," or "interest," or "bias," have been made in criminal appellate cases. Thus, understanding the Judicial Code rules on impartiality, appearance of impropriety, and the like requires familiarity with the relevant Minnesota criminal appellate law. Before delving into the current law, a short look at history is interesting and illuminating.

Old cases: "Mere bias" not disqualifying

Should a judge have been disqualified from presiding in a jury trial in which the judge's son represents one of the parties? An 1878 statute forbade a judge to preside if he was "interested" in the matter.[2] However, in finding against disqualification, the Court reasoned in *Sjorberg v. Nordin* that, "A pecuniary interest in the event of the action is the cause of disqualification intended to be reached by the [statutory] section, and not a mere bias resulting from partiality or prejudice in favor or against either of the parties."[3] *Sjorberg's* reasoning had an ancient lineage:

> The biases of judges "cannot be challenged," according to Blackstone, "[f]or the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." 3 W. Blackstone, Commentaries on the Laws of England, 361 (1768) (Blackstone); *see also*, *e.g.*, *Brookes v. Earl of Rivers, Hardres*, 503, 145 Eng. Rep. 569 (Exch. 1668) (deciding that a judge's "favour shall not be presumed" merely because his brother-in-law was involved).[4]

The Minnesota disqualification statute also provided that a judge was disqualified in circumstances where a juror would be disqualified.[5] However, the grounds for juror disqualification were so numerous and broad that literal application of this statute would lead to some unreasonable disqualifications of judges.[6] In another case involving a presiding judge and a son representing a party, the Court contemplated the baneful effects of applying broad judicial disqualification standards so as to reverse judgments, stating "the statute is a snare, a menace to the constitutional rights of the citizens, the honor of families, and the legitimacy of innocent children."[7] In yet another case, the Court found little explanation needed for rejecting a challenge: "The fact that a son of the judge appeared for the respondents furnished no legal ground for... the calling for another judge to try the case... ."[8]

Today's standards, disqualification motions

What are the current standards for judicial disqualification? Since 1974 the standards have been set by the Minnesota Code of Judicial Conduct. The Code, in turn, is incorporated into the Rules of Criminal Procedure. "A judge must not preside at a trial or other proceeding if disqualified under the Code of Judicial Conduct."[9]

The Code disqualifies a judge where "the judge's impartiality might reasonably be questioned."[10] This rule identifies numerous relationships and interests which, by themselves, show lack of impartiality. More generally, lack of impartiality means "a personal bias or prejudice" or "personal knowledge of facts that are in dispute."[11] "Prejudice" is also the disqualification standard under court rules.[12] Actual impartiality is determined by a "reasonable examiner," i.e., an objective "layperson with full knowledge of the facts and circumstances."[13]

A party seeking a judge's disqualification must first make a motion for removal to the judge. If that motion is denied, the chief judge of the district or the chief judge's designee may hear the motion.[14]

What should a judge do when disqualification is demanded by a party, but the judge does not believe the reasonable examiner standard has been met? "A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law."[15] A comment explains the duty to hear and decide:

> Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.[16]

Because this comment was added in 2009, older authorities indicating that a judge should disqualify when in doubt, or even on demand, are not reliable.

Except where a judge actually has "a personal bias or prejudice" of disputed facts, the parties and their lawyers may independently agree to waive the judge's disqualification, after the judge's disclosure.[17]

Even without waivers, in certain circumstances, "the rule of necessity may override the rule of disqualification."[18] The comment offers examples of necessity, such as when all judges are conflicted, or only the conflicted judge is available "in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order."[19] A factor relevant to considering a judge's responsibility to "hear and decide matters" is "a proper concern for the burdens that may be imposed upon the judge's colleagues" by unnecessary disqualification.[20]

Disclosure, without recusal, is often prudent, because disclosure will promote the appearance of impartiality. However, there is no independent requirement of disclosure. The Code provides: "A judge *should* disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification."[21] "Should" does not mean "shall" or "must," so disclosure is discretionary, not mandatory.[22]

Modern family

Commentators on the legal profession and the judicial system frequently contrast the present with a vaguely described golden age when justice was, supposedly, done promptly and fairly. The evolution of the law of judicial disqualification contradicts the golden age belief. In contrast to the era when judges' offspring could try cases before them, the Code now requires disqualification (absent the informed consent of the parties) where a judge, or a person close to a judge, has a close family relation or other intimate relation to parties, their lawyers, material witnesses, or others.[23] The Code also prescribes disqualification in numerous other specific circumstances.[24]

In a leading case, *In re Jacobs*, family circumstances did not match the specific prohibition standards found in the Code. The Hennepin County Attorney's Office (HCAO) prosecuted criminal charges against Jacobs.[25] Jacobs learned that the HCAO also employed the wife of the presiding judge, as a lawyer. Jacobs moved to disqualify the judge.[26]

The district court denied the motion and Jacobs sought a writ of prohibition.[27] The court of appeals denied the writ and the Supreme Court affirmed. The Court summarized the factors supporting its decision:

> [T]he judge's spouse is an attorney with the Hennepin County Attorney's Office, a large organization that handles a high volume and wide variety of cases. She has had no personal involvement with the case and has no financial interest in its outcome. As an employee of the Hennepin County Attorney's Office, she does not receive any additional financial benefit based upon any district court ruling. Although Judge Moreno's spouse was once an appellate attorney in the Criminal Division of the Hennepin County Attorney's Office, it appears that she transferred out of that division and to other roles well before this case was filed.[28]

Since 1974, the standards for judicial disqualification have been set by the Minnesota Code of Judicial Conduct.

In further explaining its holding, the Court cited a Wisconsin case for the general proposition, "absent any personal involvement with the case, 'the special characteristics of government attorneys make it unlikely that a judge's relationship with one would affect his or her impartiality.'"[29]

County attorneys and judges: Two more cases

A judge presiding over a murder trial in Pennington County was negotiating with a law firm in Marshall County for employment after the trial.[30] The firm performed services as the Marshall County Attorney, but the firm was not involved in the murder trial.[31] The judge disclosed the negotiations and the defendant objected to the judge continuing to preside.[32]

By its 4-3 decision in *Troxel v. State of Minnesota*, the Supreme Court affirmed the district court finding that disqualification was not required.[33] The dissent agreed that "Troxel has not proven any actual bias."[34] However, the dissent concluded that the judge's employment negotiations "created an appearance that he lacked impartiality."[35] The dissenters reasoned that the state, not Pennington County, was a party, and, "a reasonable examiner would see that the judge was seeking to leave his position as umpire in order to join one of the teams: the State. In fact, he did just that; he joined the State's team about two months after he sentenced Troxel."[36]

Although the focus of this article is description, rather than critical analysis, the dissent's monolithic view of "state" attorneys may be questioned. The Minnesota Supreme Court, in *Humphrey ex rel. State v. McLaren*, has regarded the members of a single state government law office as *not* being on a single team for certain important purposes, e.g., those in *Jacobs* above.[37] In addition, in contrast to lawyers in a private firm, lawyers in a public law office do not have disqualification and information-sharing imputed among them.[38] One assumes the Court adopted these rules and issued *McLaren* in the belief that a "reasonable examiner" would recognize certain distinctions among state attorneys.

In another criminal case where HCAO was prosecuting, *State v. Pratt*, a unanimous Court found an appearance of the lack of impartiality because the presiding judge had a contract with HCAO for providing expert witness services in an unrelated civil matter.[39] The court reversed a conviction even though the expert contract was dormant and had not been performed.[40]

Judge's relationship to lawyers

Formal opinions of the Board on Judicial Standards address the subjects "Judge's Financial Relationship with Lawyer" (Op. 2014-1) and "Judge's Professional Relationship with Lawyer" (Op. 2013-2). These opinions are posted on the Board's website.[41] The opinions discuss circumstances in which these relationships do or do not require disqualification.

Judge's prior involvement in case

Ordinarily, a judge's prior involvement in a case is not disqualifying.[42] Obvious exceptions disqualify a judge who served as a lawyer in the case, or "was associated with a lawyer who participated substantially as a lawyer in the matter during such association," or "previously presided as a judge over the matter in another court."[43]

Less obvious exceptions are found in two cases where special features of prior involvement were disqualifying because they caused impartiality to be reasonably questioned. In both cases revocations of probations by the judges were reversed by higher courts, based on the judges' failures to recuse.

In one case, *In re Cleary*, the judge who was part of the drug court team presided at the defendant's probation revocation.[44] The court of appeals reversed the conviction.[45] The reversal in *Cleary* was based on three facts: (1) the probation revocation was based solely on Cleary's termination in drug court; (2) the revocation judge was also the drug court judge; and (3) because the role of drug court judge is "unique" and "personal," and gives the judge access to personal information, the judge's involvement in the case has the appearance of bias.[46]

Cleary relied in part on another case, *State v. Finch*, in which a prior action of a probation revocation judge should have been disqualifying.[47] When the judge imposed probation on Finch, she told Finch that she would revoke probation for any violation.[48] The judge also speculated that Finch had "duped" the court when he exercised his right to appeal.[49] These statements created a reasonable question as to whether the judge could impartially conduct the revocation proceeding.[50]

Judge's personal knowledge or interest

Disqualification is mandated where "[t]he judge has... personal knowledge of facts that are in dispute in the proceeding."[51] However, the term "personal knowledge" involves a "narrow prohibition."[52] The Court, in *State v. Dorsey*, explained that the term "pertains to knowledge that arises out of a judge's private, individual connection to particular facts. We conclude that it does not include the vast realm of general knowledge that a judge acquires in her day-to-day life as a judge and citizen."[53] The Court explained further that if "personal knowledge" is too broadly construed, "our judiciary would founder under the day-to-day weight of motions aimed at disqualifying judges who have acquired general, passing knowledge of disputed evidentiary facts in the course of their lives as judges and citizens."[54]

In *Dorsey*, however, the judge supplemented her knowledge of a person alleged to be involved in the facts at issue by research in public records.[55] The judge's investigation and report of the person's date of death, and her use of that date to question a defense witness's credibility, were bases for disqualification, as they showed the judge was not impartial.[56] The judge "introduced into the proceedings a material fact that was favorable to the state—and which the state had not yet introduced."[57]

A judge's very general interest has been found not to be disqualifying. In an eminent domain action, *State ex rel. McMullen v. District Court of Hennepin County*, a party sought to set aside determinations of commissioners on the grounds that the party discovered after the determination that one of the commissioners would receive some general benefit from the project.[58] The standards for bias were generally analogized to those for judges.[59]

> The mere fact that he was in favor of the improvement, or advocated its being made, or that he would, in common with the public generally, derive some indirect benefit from it, would not constitute any legal disqualification. To disqualify him, he must have had some direct private pecuniary interest in the result of the awards and assessments which he was required to make.[60]

Due process and disqualification

The United States Supreme Court has, until recently, declined to find due process protection for litigants who allege a risk of judicial bias. However, the Court found such risks in two cases with egregious circumstances.

In the first case, *Caperton v. Massey*, a trial court had entered a $50 million judgment against a corporation.[61] It was likely the corporation would seek judicial review in the West Virginia Supreme Court of Appeals.[62] The corporation's chief officer contributed $3 million to support the campaign of a candidate running for that court.[63] The candidate was elected and cast a decisive vote in favor of the corporation.[64] The Court found a risk of judicial bias that was "too high to be constitutionally tolerable."[65] The Court emphasized that due process protection could apply only to the most extreme violations of judicial ethics.[66]

Recently, the U.S. Supreme Court also found, in *Williams v. Pennsylvania*, a due process violation where a state Supreme Court justice, Castille, declined to recuse in post-conviction proceeding brought by Williams, although Castille had been the district attorney who specifically approved seeking the death penalty in the prosecution of Williams.[67] Castille's prior involvement created an unacceptable risk of actual bias.[68] The Court explained, "This risk so endangered the appearance of neutrality that his [Castille's] participation in the case 'must be forbidden if the guarantee of due process is to be adequately implemented.'"[69] This formulation suggests that due process protection applies even where only the "appearance of neutrality" is greatly endangered.

State v. Cleary (above), like *Williams*, also cited appearances as a basis for finding a due process violation.[70] *Cleary* explained that the probation revocation judge's failure to recuse, "creates an appearance of partiality, and implicates a violation of a probationer's due-process rights."[71]

Conclusion

This review of judicial disqualification in Minnesota is far from comprehensive. For example, no reference is made to the many unpublished Minnesota Court of Appeals cases that address Rule 26.03 claims. Judges seeking further guidance may request informal advisory opinions from the board's executive secretary, Tom Vasaly, at (651) 296-3999. ▲

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Notes

1 *State v. Kuhlmann*, 806 N.W.2d 844, 851 (Minn. 2011).
2 Minn. Stat. ch. 64, § 4 (1878) *amended by* Minn. Stat. ch. 77 §4098 (1905).
3 *Sjorberg v. Nordin*, 26 Minn. 501, 503, 5 N.W. 677, 678 (1880).
4 *Williams v. Pennsylvania*, 136 S.Ct. 1899, 1917, ?? (2016) (Thomas, J., dissenting).
5 Minn. Stat. ch. 64, §4 (1878).
6 *See Sjoberg*, 26 Minn. at 503-04, 5 N.W. at 678-79.
7 *State v. Ledbeter*, 111 Minn. 110, 115, 126 N.W. 477, 478 (1910). The standard of judicial disqualification based on juror disqualification standards survives in Minnesota Rules of Civil Procedure, Rule 63.03.
8 *In re Wunsch's Estate*, 177 Minn. 169, 170, 225 N.W. 109, 109 (1929).
9 Minn. R. Crim. Proc.Rule 26.03, subd. 14(3).
10 Rule 2.11(A).
11 Rule 2.11(A)(1).
12 Minn. R. Civ. Proc. 63.03; Minn. R. Gen. Prac. 106.
13 *In re Jacobs*, 802 N.W.2d 748, 753 (Minn. 2011).
14 Minn. R. Gen. Prac. 106.
15 Rule 2.7.
16 Rule 2.7 cmt. 1.
17 Rule 2.11(A)(1), (C).
18 Rule 2.11 cmt. 3.
19 *Id.*
20 Rule 2.7; Rule 2.7 cmt. 1.
21 Rule 2.11 cmt. 5 (emphasis added).
22 *In re Jacobs*, 802 N.W.2d 748, 754 (Minn. 2011).
23 Rule 2.11(A)(2).
24 Rule 2.11(A)(3)-(5).
25 *Jacobs*, 802 N.W.2d at 750.
26 *Id.* at 748.
27 *Id.*
28 *Id.* at 753.
29 *Id.* at 752 (citation omitted).
30 *Troxel v. State of Minnesota*, 875 N.W.2d 302, 313 (Minn. 2016).
31 *Id.* at 315.
32 *Id.* at 313.
33 *Id.* at 316.
34 *Id.* at 320.
35 *Id.* at 317.
36 *Id.* at 318.
37 *Humphrey ex rel. State v. McLaren*, 402 N.W.2d 535, 543 (Minn. 1987).
38 *Id.* (explaining that for conflicts imputation purposes, "a government legal department is not a 'firm' under Rule 1.10 (conflict of interest)."); Minn. R. Prof. Conduct 1.10(e); 1.11(d)(1)..
39 *State v. Pratt*, 813 N.W.2d 868, 878-79 (Minn. 2012).
40 *Id.*
41 Board on Judicial Standards a *www.bjs.state.mn.us*
42 *See State v. Dorsey*, 701 N.W.2d 238, 249 (Minn. 2005) ("[J]udges are presumed to have the ability to set aside 'nonpersonal' knowledge and make decisions based solely on the merits of cases before them." (citation omitted)); *State v. Kramer*, 441 N.W.2d 502, 505 (Minn. Ct. App.1989) ("A judge's prior adverse ruling in a case is not sufficient to show prejudice which would disqualify the judge."); *Olson v. Olson*, 392 N.W.2d 338, 341 (Minn. Ct. App.1986) (stating that "[p]rior adverse rulings . . . cannot constitute bias").
43 Rule 2.11(A)(5)(a), (d).
44 *In re Cleary*, No. A15-1493, slip op. at 5, 2016 WL 3582405 (Minn. Ct. App. 7/5/2016).
45 *Id.* slip op. at 16..
46 *Id.* slip op. at 5, 6, 11.
47 *Id.* slip op. at 9; *State v. Finch*, 865 N.W.2d 696 (Minn. 2015).
48 *Finch*, 865 N.W.2d at 704.
49 *Id.*
50 *Id.* at 705.
51 Rule 2.11(A)(1).
52 *State v. Dorsey*, 701 N.W.2d 238, 247 (Minn. 2005).
53 *Id.*
54 *Id.*
55 *Id.* at 250.
56 *Id.*
57 *Id.* at 251.
58 *State ex rel. McMullen v. District Court of Hennepin County*, 50 Minn. 14, 16, 52 N.W. 222, 223 (1892).
59 *Id.* at 14, 52 N.W. at 222.
60 *Id.* at 16, 52 N.W. at 223.
61 *Caperton v. Massey*, 556 U.S. 868, 872 (2009).
62 *Id.* at 873.
63 *Id.*
64 *Id.* at 873, 875.
65 *Id.* at 872.
66 *Id.* at 887.
67 *Williams v. Pennsylvania*, 136 S.Ct. 1899, ?? (2016).
68 *Id.* at ??
69 *Id.* at ?? (citation omitted.).
70 *Cleary*, slip op. at 14.
71 *Id.*