MINNESOTA BOARD ON JUDICIAL STANDARDS

Formal Advisory Opinion 2025-1

Judicial Disqualification Issues Arising from Party's or Attorney's Actions:

Should I Stay or Should I Go [1]

This opinion concerns disqualification issues where the potential grounds are created by a party or attorney rather than the judge.[2]

A judge must recuse if there is an appearance of partiality. At the same time, litigants and attorneys should not be permitted to use lawsuits against the judge, threats, or other conduct as a strategy to disrupt the proceedings or replace a judge based on dissatisfaction with the judge's rulings.

General Principles

Standards. Judicial recusal is addressed in Rule 2.11 of the Rules of Judicial Conduct. It is important to distinguish three fact situations addressed in the rule:

- The judge has a personal bias or prejudice concerning a party or a party's lawyer. Rule 2.11(A)(1). This is determined by a subjective test for actual bias and requires recusal. Such a conflict is not waivable by the parties.
- The judge's impartiality might reasonably be questioned. Rule 2.11(A). This is determined by an objective test for the appearance of bias and requires recusal unless the parties and their attorneys formally waive the conflict under Rule 2.11(C).
- The judge believes there is no basis for disqualification, but the judge has information that the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification. Rule 2.11, cmt 5. The judge should disclose this information on the record.

Recusal may also be required by the due process clause, but in most cases it is unnecessary to rely on a constitutional analysis to resolve a recusal question. "Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 890 (2009) (discussed in part 5, *infra*).

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[1] The Clash (1984).

[2] The Board on Judicial Standards has authority to issue opinions under Rule 2(a)(2) of the Rules of the Board on Judicial Standards: "The board, and as delegated by the board, the executive secretary, may issue advisory opinions on proper judicial conduct with respect to the provisions of the Code of Judicial Conduct. . . . The advisory opinion shall not be binding on the hearing panel or the Supreme Court in the exercise of their judicial-discipline responsibilities."

Distinction between waiver and failure to seek removal. Judges sometimes disclose a potential conflict and attempt to put the burden on the litigants to object or remain silent. This procedure should not be used if there are proper grounds for recusal. A litigant's failure to object or to move for disqualification following disclosure is not the equivalent of a waiver under Rule 2.11(C) and does not exempt the judge from the ethical requirement of sua sponte recusal when proper grounds exist. "A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed." Rule 2.11, cmt. 2.

At the same time, if a party knows of proper grounds for disqualification, the party should seek removal of the judge as soon as the party becomes aware of them. A party who bides their time may face a heavier burden on appeal.[3] The Judicial Code is not intended to be used by litigants to obtain tactical advantages in court proceedings. Minn. Code of Judicial Conduct, Scope.

Importance of disclosure. The use of the word "should" rather than "shall" in Comment 5 indicates that where there are not proper grounds for recusal, disclosure "is committed to the personal and professional discretion of the judge . . . in question, and no disciplinary action should be taken for action or inaction within the bounds of such discretion." Minn. Code of Judicial Conduct, Scope; *see In re Jacobs*, 802 N.W.2d 748, 754 (Minn. 2011) ("A failure to disclose is not likely to create an appearance of partiality where, as here, the fact of his spouse's employment does not require disqualification.").

Nevertheless, disclosure serves important goals. Litigants and their attorneys should not feel obligated to investigate a judge's private affairs and financial matters. *American Textile Mfrs. Institute v. The Limited*, 190 F.3d 729, 742 (6th Cir. 1999); *Ex parte Ellis*, 275 S.W.3d 109, 136 (Tex. Ct. App. 2008). Disclosure promotes the appearance of impartiality by showing that the judge is not concealing arguably relevant information.[4] Timely disclosure can avoid the waste of resources that results when the judge is disqualified after the judge and the parties have invested resources on the case. Disclosure can increase the likelihood of a correct result by allowing litigants the opportunity to present facts and argument before the judge makes a final decision as

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[3] *See Baskerville v. Baskerville*, 246 Minn. 496, 501, 75 N.W.2d 762, 766 (1956) ("[D]efendant went to trial without taking any affirmative action whatever to disqualify the substituted judge for bias, and she is now in no position to complain."); *State v. Finch*, 865 N.W. 2d 696, 705 n.3 (Minn. 2015) ("[W]e encourage litigants to use the procedure outlined in Minn. R. Crim. P. 26.03, subd. 14(3), and make motions to remove for cause at the district court. Otherwise, an appeal will be decided based on the plain-error standard."); *United States v. Kelly*, 888 F.2d 732, 746 (11th Cir. 1989) (observing that a party should not lie in wait, knowing facts supporting a recusal claim, and seek disqualification only after the court's ruling on the merits).

[4] *See Liljeberg v. Health Services Acquisition Corp*., 486 U.S. 847, 866 (1988) ("A full disclosure [when the judge learned of the conflict] would have completely removed any basis for questioning the judge's impartiality . . . ."); *Desnick v. Mast*, 249 N.W.2d 878, 882-83 (Minn. 1976) ("It would, of course, have been preferable for Judge Segell to have disclosed this relationship [with party's attorney] to all counsel . . . .").

to disqualification. If there is a non-frivolous argument in favor of recusal but the judge reasonably believes that recusal is not required, the judge should disclose the relevant information.

The extrajudicial source doctrine. Except in rare instances, a judge may not be disqualified unless the alleged partiality arises from an extrajudicial source. "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994). A contrary rule would make every judicial ruling potential evidence of bias against the losing party. The extrajudicial source doctrine applies both to claims of appearance of bias and to claims of actual bias against a party or attorney. *Greer v. State*, 673 N.W. 2d 151 (Minn. 2004); Richard E. Flamm, *Recusal and Disqualification of Judges* 195 (3d ed. 2017). This doctrine applies to knowledge the judge properly learns from court proceedings, not to knowledge the judge improperly learns from their own investigation into factual matters before the court. *State v. Dorsey*, 701 NW 2d 238 (Minn: 2005).

Actual bias. The first step in the consideration of a recusal question is for the judge to decide whether they are actually biased against a party or their attorney. (Under the extrajudicial source doctrine, "bias" usually does not mean negative opinions formed during proceedings before the judge.) If the judge decides they have actual bias, no further analysis is necessary, and the judge must recuse. If the judge decides they do not have actual bias, the judge is to consider whether their impartiality might reasonably be questioned on other grounds.[5]

The duty to recuse vs. the responsibility to decide. The duty to recuse under Rule 2.11 (requiring recusal whenever the judge's impartiality "might" reasonably be questioned) contrasts with the responsibility to decide under Rule 2.7 ("A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law."). Rule 2.7 does not create a presumption against recusal. In fact, many courts and commentators believe that close questions should be resolved in favor of recusal.[6] However, if there are not proper grounds for

[5] A peculiarity of Rule 2.11(A) is that "personal bias or prejudice," a subjective matter, is categorized as one of the circumstances "in which the judge's impartiality might reasonably be questioned," an objective matter. In contrast, in the federal disqualification statute, subjective bias and the appearance of partiality are separate categories. 28 U.S.C. §455(a) & (b)(1). The difference in categorization holds no legal significance for present purposes. Charles Gardner Geyh, Judicial Disqualification, An Analysis of Federal Law (3d ed..2020) 14-15.

[6] "[T]he better view is that for public confidence in the judicial system, the 'appearance of partiality' is more important than the judge's duty to sit and decide a specific case." Leslie W. Abramson*, What Every Judge Should Know about the Appearance of Impartiality*, 79 Alb. L. Rev. 1579, 1587 (2016). A number of federal circuit courts have stated that if disqualification is a close call, "the balance tips in favor of recusal." *See In re Reassignment of Cases*, 736 F.3d 118, 124 (2nd Cir. 2013); *U.S. v. Holland*, 519 F.3d 909, 912 (9th Cir. 2008). "The purpose of [Model Rule 2.7] and the accompanying Comment is not to resurrect a 'duty to sit' that trumps disqualification rules, but simply to emphasize that judges have a duty

recusal, the judge may not recuse. A litigant's dissatisfaction with the judge's rulings, declaration that a judge is partial, or subjective belief is not sufficient to warrant recusal. *See State v. Burrell*, 743 NW 2d 596, 601-02 (Minn. 2008). *See also United States v. Cooley*, 1 F.3d 985, 993-94 (10th Cir. 1993) (listing matters not ordinarily sufficient to require recusal).

Applicability of civil and criminal opinions to Minnesota judicial ethics proceedings. Most reported disqualification issues are discussed in civil and criminal cases rather than in disciplinary proceedings. These cases are helpful, but their applicability to matters before the Board on Judicial Standards can be limited by standards of review that differ according to the jurisdictions and the procedural posture of the disqualification issue.

Discussion

1. Party's or attorney's lawsuit or ethics complaint against judge

Whether a judge must recuse if a party or attorney files an ethics complaint or lawsuit against the judge depends on the circumstances. Several key factors are discussed below.

Timing. A judge is usually not required to recuse if a party or attorney files an ethics complaint or lawsuit against the judge after the case is assigned to the judge. Arthur Garwin et al., *Annotated Model Code of Judicial Conduct* 295-96, 307 (3d ed. 2016). Requiring recusal in that situation would create an incentive for a litigant to file a complaint strategically in order to judge-shop or disrupt the proceedings.

Likewise, if counsel seeks to appear in a case mid-litigation and their participation would require the judge to be disqualified, it may be appropriate to disqualify the lawyer rather than the judge. *See In re BellSouth Corp*., 334 F.3d 941, 944 (11th Cir. 2003) (listing factors); *McCuin v. Texas Power & Light Co.,* 714 F.2d 1255, 1265 (5th Cir. 1983).

Recusal may be appropriate where a party's complaint or lawsuit against the judge was filed before the case is assigned to the judge. *Annotated Model Code*, *supra*, 307. Such a complaint is less likely to arise from an attempt to judge-shop, and recusal at an early stage of the case is less likely to result in a significant loss of judicial resources. However, recusal may not be required if significant time has elapsed since the lawsuit against the judge. "[P]ersonal bias arising from past litigation will likely erode over time." *In re Taylor*, 417 F. 3d 649, 652-53 (7th Cir. 2005).

Judicial acts vs. personal acts. Judicial disqualification is usually unnecessary where a party in a proceeding sues the judge based on judicial acts or where the judge is only a nominal defendant. Richard E. Flamm, *Recusal and Disqualification of Judges* 335 (3d ed. 2017); *see also Azubuko v.*

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to do their jobs when they are not properly disqualified." Charles G. Geyh & W. William Hodes, *Reporters' Notes to the Model Code of Judicial Conduct* 35 (ABA 2009). Although they have not specifically addressed this issue, reported Minnesota opinions have analyzed disqualification questions without reference to a "duty to sit."

Royal, 443 F.3d 302, 304 (3d Cir. 2006) ("[T]he mere fact that Judge Hochberg may be one of the numerous federal judges that Azubuko has filed suit against is not sufficient to establish that her recusal from his case is warranted."). For example, recusal may be unnecessary if a county attorney files a mandamus action against all the judges in the judge's district. Claims based on judicial acts are often frivolous. *See In re Taylor*, 417 F. 3d 649, 652-53 (7th Cir. 2005) (holding that recusal was not required where claims against trial judge were frivolous). Judges have absolute immunity from suit for actions in the performance of their duties.

Recusal is generally required if the judge is a party to a lawsuit involving a personal matter unrelated to judicial acts and the opposing party or attorney appears in a case before the judge, particularly if the lawsuit against the judge predates the case before the judge. Arthur Garwin et al., *Annotated Model Code of Judicial Conduct* 307 (3d ed. 2016); Richard E. Flamm, *Recusal and Disqualification of Judges* 460 (3d ed. 2017); *cf. United States v. Quintanilla*, 114 F.4th 453, 469 (5th Circuit 2024) (holding that judge who had sued a company over an automobile accident and obtained an insurance settlement was not disqualified from a case in which the defendant was the owner of the company).

Action by ethics agency. If a party or attorney files an ethics complaint against a judge, recusal may be unnecessary unless and until the agency that received the complaint decides to take action on the complaint beyond initiating an inquiry. *See* Elena M. Murphy, *Disqualification Following a Complaint or Lawsuit Against a Judge,* Judicial Conduct Reporter (Summer 2008) (collecting ethics opinions), *Disqualification Following a Complaint or Lawsuit* *People v Bero*, 168 Mich. App 545, 552, 425 N.W.2d 138 (Mich. Ct. App. 1988) (mere filing of complaint with Judicial Tenure Commission against judge by party or attorney does not warrant disqualification where a complaint has not been filed by the Judicial Tenure Commission itself and the judge has not been privately censured). However, recusal is required if the judge attacks the complainant in a way that shows personal bias.

Recusal is generally unnecessary if an attorney's misconduct or impairment requires a judge under Rule 2.14 or 2.15 to report the attorney to the Office of Lawyers Professional Responsibility or take other appropriate action. "A judge should not be disqualified for faithfully performing the duties of his office." *U.S. v. Mendoza*, 468 F.3d 1256. 1261-63 (10th Cir. 2006). Recusal may be appropriate if the judge's report of the lawyer under Rule 2.14 or 2.15 occurred before the current case was assigned to the judge.

2. Attacks and threats against the judge.

Judges are sometimes subject to attacks by parties or their supporters, such as insults, physical threats, adverse publicity, criticism in social media, and political attacks. These ordinarily are not grounds for recusal, even where the judge has been physically attacked. *Annotated Model Code*, *supra*, 303-04 . For example, *U.S. v. Bayless*, 201 F.3d 116, 129 (2nd Cir. 2000), held that a judge who reversed a pre-trial ruling after being subjected to fierce political and media attacks did not commit plain error in not recusing. The court noted that a contrary holding would give politicians and the press a way to remove a judge from a case.

Courts have found several factors to be relevant in determining whether a physical threat requires recusal, including: "(1) the defendant's demeanor in making the threat and the context in which it was made; (2) the perceived purpose of the threat; (3) the defendant's capacity to carry out the threat; and (4) the court's response to the threat." *United States v. Walsh*, 47 F.4th 491, 500 (7th Cir. 2022).

The second factor, the perceived purpose, is given particular weight, as parties should not be given the power to create their own grounds for disqualification. For example, a threat that is communicated to the judge by law enforcement rather than by the defendant is more likely to be genuine. *United States v. Greenspan*, 26 F.3d 1001, 1006 (10th Cir. 1994) (holding that where the defendant had allegedly conspired to assassinate the trial judge and his family, the judge should have recused because, among other factors, he "learned of the alleged threat from the FBI, and there is nothing in the record to suggest the threat was a ruse by the defendant in an effort to obtain a different judge").

As with lawsuits against the judge, the timing of a physical threat is significant because it tends to show its purpose. If the threat occurs during the proceedings, particularly after adverse rulings or comments by the judge, the threat is likely to be viewed as motivated by a desire to obtain a new judge. If the threat occurred before the judge was assigned to the case, it is more likely to be viewed as genuine and, depending on its seriousness, to warrant disqualification.

3. Prosecutions in which the judge was a potential victim.

A judge is generally disqualified from presiding over a criminal prosecution for conduct in which the judge was a potential victim. Since such conduct necessarily occurs before the prosecution is brought, it cannot have been motivated by a desire to obtain a new judge. See *Nichols v. Alley*, 71 F.3d 347, 350-52 (10th Cir. 1995) (holding that judges who were potential victims of courthouse bombing must recuse); *In re Nettles*, 394 F.3d 1001 (7th Cir. 2005) (holding that judges who were potential victims of attempt to blow up courthouse must rescue even though the actual threat was nil because the defendant's accomplices were undercover agents); *cf. United States v. Mohamud,* 693 F. Supp. 3d 1070 (D. Ore. 2023) (holding that judge was not required to recuse where judge, a family member, and law clerk happened to be present at a public event at which the defendant attempted to set off a bomb and his accomplices were federal agents).

4. Party's attacks on other judges

An attack on a judge's colleagues ordinarily does not warrant recusal unless the judge was one of the intended victims and the attack occurred prior to the current proceeding. Disqualification of an entire court requires a showing of extraordinary circumstances, such as a direct threat of injury to all the judges of the district. *State v. Hooper* (*Hooper III)*, 838 N.W.2d 775. 790 (Minn. 2013). Thus, judges who were not members of the court at the time of the defendant's criminal actions against judges of that court are not necessarily required to recuse. *In re Moody*, 755 F.3d 891 (11th Cir. 2014) (holding that neither Eleventh Circuit judges nor the district court judge was required to recuse from proceedings involving a defendant who, before the judges had joined the bench, had sent a "Declaration of War" to the Eleventh Circuit and murdered an Eleventh Circuit judge).

By the same token, a party's or attorney's lawsuit against other judges in the judicial district is generally insufficient to warrant recusal. *United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986).

5. Judge's election opponent or supporter appears before the judge

Whether a judge must recuse if an attorney who is currently running for election against the judge appears before the judge in an unrelated case depends on the circumstances, such as the level of acrimony in the campaign. *Annotated Model Code*, *supra*, 270; Elena M. Murphy, *Judicial Campaign Opponents and Impartiality*, Judicial Conduct Reporter (Summer 2007) (collecting cases), JCR_Summer07_v9.qxp; *MacDonald v. Simon*, A24-1022 (July 15, 2024), 12 N.W.3d 445, 445 n.1 (Minn. 2024) (noting recusal of Supreme Court justices in case brought by candidate seeking to run against a current member of the Court and to be placed on election ballot). If the judge decides that they do not have actual bias against the attorney, the judge should consider seeking a waiver under Rule 2.11(C) before proceeding.

As noted in section 1 above, if an attorney's mid-litigation appearance as counsel would require that the judge recuse, it may be appropriate to disqualify the attorney rather than the judge. *In re Thacker*, 159 So.3d 77 (Ala. Civ. App. 2014) (sustaining trial judge's decision to disqualify attorney who was her election opponent where attorney knew that her appearance would create a recusal issue).

Recusal is generally unnecessary if a party or attorney was a contributor to the campaign of the judge's opponent. *Bocian v. Owners Ins. Co*., 482 P.3d 502, 511-13 (Col. Ct. App. 2020) (finding that trial judge properly denied motion to disqualify where member of attorney's law firm made a $224,000 contribution in an effort to deny judge's retention after the case had been assigned to the judge).

Generally, a judge need not recuse if an attorney who campaigned against the judge in the past appears before the judge, although some courts have required recusal if the campaign was relatively recent or acrimonious. Richard E. Flamm, *Recusal and Disqualification of Judges* 397-402 (3d ed. 2017).

A party's or lawyer's support for or contributions to the presiding judge's election campaign, without more, does not always require recusal. Factors include the extent of the party's or lawyer's participation, the size of the contribution, and the recency of the campaign. *Annotated Model Code*, *supra*, 268-270, 588-91. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 890 (2009), held that the due process clause required a state court justice to recuse where a party had made a $3 million contribution to his campaign, more than the total amount spent by all other supporters. However, the decision did not provide specific guidelines for future cases.

The ABA Model Code of Judicial Conduct calls for a judge to recuse if the judge knows or learns that a party's lawyer contributed more than a certain amount to the judge's campaign. Model Rule 2.11(A)(4). Many states, including Minnesota, have not adopted this rule. In Minnesota, judicial candidates are required to avoid learning who contributed to their campaigns. Rules 4.2(A)(5), 4.4(B).

No reported Minnesota decision has addressed disqualification based on campaign contributions. However, the Minnesota Supreme Court has implied that an appearance before the judge of an attorney who was concurrently running the judge's reelection campaign could create an appearance of impropriety. *Powell v. Anderson*, 660 NW 2d 107, 118 & n.13 (Minn. 2003).

Conclusion

Litigants and attorneys should not be able to manipulate the rules to obtain a new judge simply because they are dissatisfied with the current judge's past or anticipated future rulings. At the same time, unless there is a proper waiver, a judge must recuse if the judge's impartiality might reasonably be questioned. To conserve resources, judges should promptly disclose arguable conflicts and, if warranted, litigants should promptly move for disqualification.

Adopted March 21, 2025