

Reprint from the *National Law Journal* (November 4, 2013)

## The Delicate Balance of Booting Judges

By Michael Downey

Clients deserve impartiality, but alleging that a judge can't do the job fairly is a risky undertaking.

Most litigators will at some point face a situation in which they must decide whether to seek disqualification of a judge for cause. This can be quite a perilous predicament. Clients are entitled to a fair adjudication by an impartial judge, and may suffer undeserved harm if a biased judge decides a case. So disqualification should be sought in appropriate circumstances.

But seeking disqualification for cause generally requires a lawyer to allege a judge is doing or has done something wrong. Such allegations may upset a judge and harm the lawyer's work before the judge, even in future, unrelated cases. For this reason, lawyers discussing judicial disqualification often paraphrase Ralph Waldo Emerson: "If you are going to shoot at a king you had better kill him."

Here is some practical guidance for lawyers trying to decide whether to seek disqualification of a judge for cause.

*Judicial obligation to hear cases.* Lawyers considering disqualification of a judge should be mindful that judges ordinarily must hear assigned cases. Canon 2.7 of the American Bar Association Model Code of Judicial Conduct states, "A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law." The comment to Canon 2.7 cautions judges that improper use of recusal to avoid difficult, controversial or unpopular issues may harm the

dignity of the court and impose undue burden on the judge's colleagues.

*Exercise of this obligation to hear assigned cases varies among judges.* Some judges cling ferociously to any case assigned to them or eschew recusal because it might burden other judges. These judges may seek to continue handling cases when they should recuse, either not assessing grounds for disqualification fairly or by asking parties to waive disqualification when a waiver probably should not be sought. Lawyers trying to remove such judges should proceed with particular caution.

*Judicial obligations to recuse.* Despite the general obligation to handle assigned matters, judges must also under canons 2.2 and 2.3(A) perform all judicial duties without partiality, bias or prejudice.

Under Canon 2.11, "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Canon 2.11 lists eight circumstances when a judge should expect his or her impartiality to be reasonably questioned, such that a judge should recuse on the court's own motion. Those circumstances are when the judge: (1) has a personal bias or prejudice against a party or party's lawyer; (2) has personal knowledge of the facts in dispute; (3) is or was a lawyer, government employee, or a witness in the matter; (4) presided over the matter while judge on a different court; (5) has a family member (or

equivalent) who is a party lawyer, witness or other interested party to the proceeding; (6) has an economic interest, or has a family member (or equivalent) with an economic interest in the subject matter of the controversy; (7) received judicial contributions exceed the jurisdiction's threshold from a party or party's lawyer; or (8) previously made a public statement that appears to commit the judge to a particular result or way of ruling.

### **PUBLIC REACTION COUNTS**

These eight circumstances are not intended to be all-inclusive. Rather, in other circumstances, judges are sometimes advised to consider how they and the public would likely react if the potential grounds for recusal and the judge's refusal to step down were widely reported in the media.

The grounds for disqualification that ordinarily give rise to the most issues are when the judge has a personal bias or prejudice against a party or a party's lawyer. Courts generally require that the source of the bias or prejudice be "extrajudicial," one outside the courtroom and functioning of the courts. Even incorrect rulings rarely provide a basis for recusal or disqualification.

Some jurisdictions encourage or require a judge to disclose possible grounds for disqualification, even when the judge concludes these circumstances do not necessitate recusal. Such disclosures often relate to social relationships between the judge and a party or counsel. The disclosures are intended to protect the court's dignity and alleviate the unfairness a party might otherwise feel if the party lost the case and then learned about the relationship from a source other than the judge.

*Waiver of potential recusal.* Canon 2.11(C) permits a judge who would otherwise be disqualified under Canon 2.11 to ask the parties to consider – outside the judge's presence – whether they will waive the disqualification. Such waiver should not occur, however, when the reason for disqualification is that the judge has personal bias or prejudice against a party or party's lawyer, or personal knowledge of the

facts at issue. When the parties do waive disqualification, ordinarily the waiver will be memorialized either on the record or in a document signed by all parties and counsel. Obviously, evaluation of such a waiver can be quite tricky for litigants and counsel, because the judge has a problem but wants to continue handling the case.

*Dealing with a nonrecusing judge.* When a judge refuses to recuse, a lawyer may be faced with assessing whether to file a motion to disqualify. The proper result may depend upon whether the lawyer believes the judge is not aware of the circumstances that should cause recusal or the judge is aware but still refuses to recuse.

### **INFORM THE JUDGE**

*Providing notice of grounds for recusal.* If the lawyer believes the judge does not know that the circumstances support recusal the lawyer may wish to bring the relevant facts to the judge's attention. Often, the lawyer can alert the judge without a formal motion. A lawyer may be able to mention the circumstances orally or file a short motion or letter to alert the judge. In one local case, a lawyer prepared a motion to disqualify, and in a hearing discussed the contents of the motion with the judge. The judge then recused without the motion being filed. This process allowed the judge to save face, and allowed the lawyer to avoid filing the potentially controversial motion.

*Moving to disqualify.* Sometimes a judge knows circumstances that might justify recusal but still refuses to recuse. If the lawyer then decides to seek disqualification for cause, four principles should guide the lawyer's approach.

First, the motion to disqualify must be timely. Any mandatory deadlines should be met. Absent a mandatory deadline, the lawyer should file the motion as soon as practicable.

Second, the lawyer should develop the facts and arguments supporting disqualification thoroughly. Ordinarily motions to disqualify involve very little discovery, and they may be decided on the papers without argument. Often, by rule or common sense, a lawyer will also have

only one shot at disqualification. Further attempts may be barred or irritate the judge. Thus, the lawyer should fully develop the bases for disqualification before filing and use affidavits to set forth additional facts as appropriate.

Third, the lawyer may want to seriously consider including an expert affidavit. Some judges have only limited understanding of when to recuse. An expert affidavit can ensure the judge understands the applicable rules. Also, an expert affidavit helps underscore the seriousness of the motion and can lend credibility – and check the filing lawyer’s judgment – by offering an assessment from an experienced professional not involved in the case.

Fourth, the lawyer should try to have someone other than the targeted judge decide the motion to disqualify. Many courts have rules that provide a presiding or administrative judge can or must decide a motion to disqualify.

*Not moving to recuse.* Although moving to disqualify can be perilous, a failure to file in appropriate circumstances also involves risks. An opposing party or the judge may later learn of the circumstances. A resulting recusal or disqualification may cause expense and delay, for example, if a trial setting is lost or earlier decisions are vacated. The lawyer may also be criticized for failing to bring the issue to the judge’s attention.

Lawyers who become aware of grounds for disqualification need to tread carefully, evaluating the risks of filing a motion, taking other action, or taking no action. When done correctly, seeking disqualification can maximize the chances of success and minimize the ugliness that may result if a judge instead remains on a case.

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