

August 18, 2011

Editorial, *New York Times* (July 30, 2011):

**New York State's** 1,300 judges have not had a raise or even a cost-of-living adjustment for a dozen years. Their salaries now lag behind the pay of federal judges, senior assistant district attorneys and Legal Aid lawyers in New York City. In many instances, judges even earn less than their own law clerks whose salaries are set by union collective bargaining. . . . The salaries for New York's judges must be raised. But given the current economy, the \$190,000-to-\$220,000 range proposed by court administrators seems too high. Restoring parity with federal judges, with regular cost-of-living increases, is reasonable. That would cost the state an additional \$49 million next year. That is not a small sum, but it is a sound investment in the justice system. [http://www.nytimes.com/2011/07/30/opinion/new-york-judges-deserve-a-raise.html?\\_r=1&ref=todayspaper](http://www.nytimes.com/2011/07/30/opinion/new-york-judges-deserve-a-raise.html?_r=1&ref=todayspaper)

### **Recusal / disqualification**

The **Conference of Chief Justices** approved four "Judicial Disqualification Fundamental Principles." The first (and longest) principle addresses campaign contributions as creating an appearance of impropriety. The second principle recommends that when a judge denies a motion for disqualification, the States courts adopt a procedure for "reviewing denials of such motions by another judge or tribunal...." The fourth principle is that states should provide guidance and training to judges in applying disqualification rules.

The **ABA Standing Committee on Judicial Independence** may recommend to the **House of Delegates**, a resolution that each state adopts some mechanism for "prompt review by *another judge* or tribunal . . . of denials of requests to disqualify a judge."

The **ABA House of Delegates** adopted a resolution urging states "to establish clearly articulated procedures for: (A) Judicial disqualification determinations; and (B) Prompt review *by another judge or tribunal*, or as otherwise provided by law or rule of court, of denials of requests to disqualify a judge"  
[www.abajournal.com/files/Resolution107.pdf](http://www.abajournal.com/files/Resolution107.pdf)

**Wisconsin Supreme Court** Justices Michael Gableman, David Prosser, Patience Roggensack, and Annette Ziegler have held that determining whether to recuse is the sole responsibility of an individual justice and that a majority of the Court does not have the power to disqualify a judicial peer from performing the constitutional functions of a justice on a case-by-case basis. *State v. Henley* (July 12, 2011). The majority noted that "a motion to disqualify a justice on a case-by-case basis has become the motion du jour, as litigants attempt to manipulate the decisions of this court by disqualifying justices whom they think may decide against the position a litigant takes," stating that the 12 motions to disqualify filed between April 2009 and April 2010 were more than the total number of motions to disqualify filed in the preceding 10 years.

### **Appearance of impropriety and the 1972 ABA Code of Judicial Conduct**

"The 1924 Canons only required a judge to disqualify himself when (1) a near relative appeared as a litigant, or (2) the judge's direct "personal interests" were involved. The drafters of the 1972 Code felt compelled to significantly enlarge the grounds for disqualification due to the uproar created by the forced resignation of Supreme Court Justice Abe Fortas and the defeat of the nomination of Clement Haynsworth to fill the Fortas vacancy. Neither violated any law, rule, or disqualification guideline, but both created an improper appearance by remaining on cases in which they had an insignificant or indirect financial interest. The Fortas and Haynsworth matters dictated that the 1972 Code contain not only a list of specific disqualifying factors similar to the 1924 Canons, but also an all-purpose category of disqualification. The broad prohibition against the appearance of impropriety seemed to be the perfect catch-all standard to serve as the overarching principle of judicial disqualification."

Raymond J. McKoski, Reestablishing Actual Impartiality As the Fundamental Value of Judicial Ethics: Lessons from "Big Judge Davis", 99 Ky. L.J. 259, 285-86 (2011).

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County prosecutors filed a complaint with the **Iowa Judicial Qualifications Commission** against Judge Odell McGhee after he refused to reconsider a decision suppressing evidence in a drunken driving case. In June, prosecutors filed a motion to disqualify Judge McGhee from a domestic violence case, arguing that the complaint meant his impartiality could be reasonably questioned. At the hearing, the prosecutor questioned the judge's "impartiality based on prior conduct that's outlined in the complaint" and indicated they would file recusal motions until there is a resolution to the complaint or some administrative order. The judge responded: "I will deny them then . . . . We will be going forward until I'm otherwise removed by higher authority." The judge was re-assigned shortly after the trial at his own request and now hears only small claims cases. Courthouse employees say there has been long-standing tension between the judge and several lawyers from the prosecutor's office where he worked before he was appointed to the bench in 2002.

Based on a stipulation in which a former judge agreed never to serve as a judge again, the **Nevada Commission on Judicial Discipline** has permanently prohibited Jim EnEarl from seeking or accepting any judicial office of any kind in any location in Nevada for repeatedly engaging in extremely inappropriate and offensive comments and actions with court staff even after being advised that his conduct was unacceptable and offensive. In the Matter of EnEarl (July 1, 2011)

The **Minnesota Board on Judicial Standards** has issued its annual report for 2010. The report includes samples of conduct found to be improper that resulted in a private admonition, deferred disposition, or letter of caution. Samples included:

- Delayed decisions in submitted cases for an unreasonable time or failing to issue an order in a submitted case within the statutory 90-day period
- Failing to act with courtesy, dignity, and respect toward all participants
- Habitually failing to timely begin court proceedings
- Offering to bet a defendant that he would not prevail in a trial
- Gratuitously stating to a criminal defendant that the judge automatically disqualifies himself from all matters involving the defendant's lawyer
- Gratuitously stating to a criminal defendant that the judge had "absolutely no faith in any representations" made by his lawyer
- Without any objective basis, impugning the honesty and competence of a lawyer from whom another lawyer was considering renting an office

[www.bjs.state.mn.us/2010%20BJS%20Ann%20Rpt.pdf](http://www.bjs.state.mn.us/2010%20BJS%20Ann%20Rpt.pdf)

The **New Hampshire Judicial Conduct Committee** publicly reprimanded retired judge Michael Jones for his demeanor in three criminal cases. In one case, the judge informally asked a defendant who had appeared pro se for trial on a misdemeanor whether he had any evidence showing that his driver's license was not suspended. Following a colloquy in open court with the defendant, the judge asked whether the defendant would like to hear any more evidence. When the police prosecutor reminded the judge that the state had not yet proffered any evidence, the judge responded that the state had indirectly put forward its evidence. When the prosecutor continued to request that the trial move forward, the judge stated, "Be quiet. Be quiet. OK? Hey. When you sit up here you can decide. All right? Be quiet. Listen, one more time, be quiet. One more time, and I'm going to have these folks take you out of here. OK? There is a certain protocol -- certain protocol you have? Certain protocol that I have. And you are stepping over the line. Don't step over the line." When the prosecutor again attempted to address the court, the judge stated, "One more time, one more time, one more time, and you're out of here. You decide. You decide." Under the threat of contempt, the prosecutor said nothing further. In his response to the grievance, the judge maintained that the prosecutor had been "inconsiderate and bordering on rude

to the court staff and the court” and that he had had to use the manner and tone he had with the prosecutor to keep “some semblance of order and respect for the state and the court.”

(July 9, 2011) [www.courts.state.nh.us/committees/judconductcomm/docs/ADMNReprimand-JudgeMichaelJones.pdf](http://www.courts.state.nh.us/committees/judconductcomm/docs/ADMNReprimand-JudgeMichaelJones.pdf)

Amending an administrative order, the **Arkansas Supreme Court** prohibited the broadcasting of drug court proceedings. The Court had created an ad hoc committee on broadcasting court proceedings after the **Judicial Ethics Advisory Committee** issued an opinion (Arkansas Advisory Opinion 2010-1) stating that a judge may not allow the broadcasting of drug court proceedings and suggesting that there might be a conflict between the code of judicial conduct and the Court’s 1996 administrative order that permits a judge, except in juvenile, probate, and domestic relations matters, to authorize broadcasting, recording, or photographing during court sessions unless a party, attorney, or witness objects.

The advisory opinion had been issued at the request of then-judge Mary Gunn, who had been broadcasting drug court proceedings; Gunn recently resigned to star in a reality court TV program.

#### **Internet ‘research’**

**Arizona** Judge Timothy Ryan vacated the 5-year sentence he had imposed in 2010 on a defendant who pleaded guilty to manslaughter in the death of a former legislator in a traffic accident caused when the defendant was racing another driver on a road. The motion to vacate was based on the judge’s visit before sentencing to a web-site set up by the victim’s family. During sentencing of the defendant’s co-defendant, the judge had said that the victim was “a great man” and that he had enjoyed the stories he read on the web-site. The judge wrote that the sentence had not been affected by what he saw on the web-site; but that he should have followed his “initial instincts and refused to keep the matter for sentencing or alternatively, obtained a much more informed waiver.”

An investigative panel of the **Florida Judicial Qualifications Commission** recommended that Judge Timothy Shea be publicly reprimanded for a pattern of rude and intemperate behavior. The stipulation noted that no instances had been reported after the judge received the notice of investigation in July 2010. After reading news reports on the charges, Benjamin Saenz filed a complaint alleging that Judge Shea engaged in “a yelling and screaming tirade” in his courtroom on May 5 when Saenz, who was serving as his own lawyer, insisted that the judge should order his ex-wife to make monthly child support payments. The Commission has sent Saenz a letter acknowledging that it had opened an inquiry and asking for a transcript of the hearing. Another divorce petitioner, Shawn Benak-Mason, has filed pleadings accusing Shea of telling the parties at a hearing on May 19 “that he believed they were spoiled children who had never grown up” and advising her that, if she wanted to get more money and a house out of her ex-husband and his wealthy family, she and her son should move.

A federal jury awarded former **district court administrator** Julie Pucci \$732,361 in her suit claiming that Judge Mark Somers violated her due process rights when he eliminated her position as part of a court reorganization plan and retaliated against her after she reported him to the **Michigan Supreme Court Administrator’s Office** for preaching religion from the bench and embossing court letterhead with a biblical verse. The jury found in favor of the judge on other claims.

The **California Commission on Judicial Performance** publicly admonished Judge Nancy Pollard for in a domestic violence case, articulating stereotypes about two ethnic groups and their propensity for certain types of domestic violence. During a hearing, the judge asked Chenier where he was born. When Chenier answered “Newport Beach, California,” the judge stated:

I’m concerned about the throwing of the rocks and the spitting. I’ve been doing domestic violence now for 14 years. Usually that is the kind of behavior I see in Middle Eastern clients, but almost -- if I read a declaration where they say, “He spit on me, he threw rocks at me,” almost always it’s a Middle Eastern client. If the declaration says, “He drags me around the house by the hair,” it’s almost always a Hispanic client.