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Briefly: Behind the veil of judicial recusal

By: Eric J. Magnuson November 15, 2022

Eric J. Magnuson

I had lunch recently with my friend Alan Morrison. I was in Washington, D.C., for a meeting of the American Academy of Appellate Lawyers. Alan and I are past presidents of that group.

Alan is a giant in appellate law. He is currently the Lerner Family Associate Dean for Public Interest and Public Service Law at George Washington University. He was the co-founder of Public Citizen Litigation Group, a nonprofit consumer advocacy organization that champions the public interest. Among its many activities is the Alan Morrison Supreme Court Assistance Project which offers pro bono legal assistance in cases seeking or opposing certiorari review in the Supreme Court, as well as helping with merits briefing and oral argument preparation. Alan has argued 20 cases in the Supreme Court and is well known to the Court and its members.

I mentioned to him that I was considering writing a piece on appellate judicial recusal. He reminded me that he was the lawyer who filed the motion in *Cheney v. United States District Court*, 542 U.S. 367 (2004) requesting that Justice Antonin Scalia recuse himself because Scalia had gone duck hunting with Vice President Dick Cheney while the case was pending in the lower courts. Scalia refused to recuse and took the unusual step of filing a 20-page statement explaining why. And while Alan considered Scalia to be a personal friend, after the motion, Scalia never spoke to Alan again.

The issue has continued to be a hot topic of discussion, rising again to a boiling point with the decision in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), where the Supreme Court held that a judge of the West Virginia Supreme Court violated the Due Process Clause of the Constitution when he failed to recuse himself from a case involving a major campaign contributor. A great deal has been written more recently about judicial recusal, particularly at the appellate level. *See, e.g., Bias is Easy to Attribute to Others and Difficult to Discern in Oneself': The Problem of Recusal at the Supreme Court*, 33 Geo. J. Legal Ethics 339 (2020); *Rewriting Judicial Recusal Rules With Big Data*, 2020 Utah L. Rev. 383 (2020); *Deciding Recusal Motions: Who Judges the Judges?*, 53 Val. U. L. Rev. 1085 (2019).

Attention lately has been focused on the actions of Supreme Court Justice Clarence Thomas and his decisions to not recuse himself in some highly political matters, including those involving anticipated testimony from his wife, Ginni Thomas. *See* Colbert I. King, *Opinion: Justice Thomas should step back from the Mar-a-Lago documents case*, Washington Post, Oct. 7, 2022; Kaia Hubbard, *Pelosi Says Clarence Thomas Should Recuse Himself From Jan. 6 Cases*, U.S. News & World Report, Oct. 13, 2022; Andrew Chung, *U.S. Supreme Court's Thomas temporarily blocks Graham election case testimony,* Reuters.com, Oct. 24, 2022. (That action was quickly reversed by the entire court. *Supreme Court declines to block Lindsey Graham's testimony before Georgia grand jury*, CBSNews.com Nov. 1, 2022.) (Links to articles are embedded with this article at minnlawyer.com.)

Never one to shy away from a controversy, Alan once again weighed in on the recusal issue in the context of whether Justice Thomas should have recused himself from the Jan. 6 cases, ultimately proposing that if the U.S. Supreme Court will not change its process on refusals to recuse, then Congress should step in and provide for review of those refusals by the full court. "Congress should amend [28 U.S.C. § 455] to provide that if a justice denies a motion to recuse, the moving party has a right to appeal that decision to the full court, with the justice whose recusal is sought not being permitted to sit on that appeal." *SCOTUS Justices Should Not Get the Last Word on Impartiality*, Bloomberglaw.com, April 7, 2022.

The Minnesota Supreme Court has taken the issue of transparency head-on by adopting a specific rule on appellate recusal, Rule 141 of the Rules of Appellate Procedure. The Advisory Committee Comment nicely sums up the rule:

> Rule 141 is a new rule intended to establish a uniform and public process for considering motions for recusal or disqualification of an appellate justice or judge from participation in a pending appeal. This rule is only a rule of procedure—it is not intended to address, establish, or modify any grounds for recusal, as those issues are well outside the scope of any rule of procedure. All appellate judges are subject to the Minnesota Code of Judicial Conduct, which is a primary source of standards that may permit or require recusal.
>
> The rule creates different procedures for recusal in the supreme court and court of appeals because of the fundamental differences in how the courts hear cases—the supreme court sits en banc, so recusal generally results in argument to a court of fewer members. In the court of appeals, recusal results more readily in assignment of a replacement judge to hear the case. The rule also recognizes that it would be wasteful to require a motion to recuse to be brought in the court of appeals before it is known which judges are assigned to hear an appeal. Because this assignment occurs relatively late in the process, the recusal motion requirement is not triggered until the notice of assignment is made.
>
> The rule requires that a recusal request be decided promptly by the justice or judge receiving it, but sets an outer limit of three days after a response, if any, would be due under Rule 125. In many instances a decision on recusal could be properly rendered without any response being required, but in some cases, the court might be helped by the views of the other parties.

While helpful in that it makes more transparent the process by which recusal is addressed, as the Advisory Committee Comment notes, the rule is strictly procedural and "is not intended to address, establish or modify any grounds for recusal."

So what standards guide appellate judges in making the sometimes very personal decision on recusal?

Minnesota has adopted the provisions of the Model Code of Judicial conduct. Rule 2.11 addresses some of the grounds for judicial recusal.

> Rule 2.11. Disqualification
>
> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
>
> (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.
>
> (2) The judge knows that the judge, the judge's spouse, a person with whom the judge has an intimate relationship, a member of the judge's household, or a person within the third degree of relationship to any of them, or the spouse or person in an intimate relationship with such a person is:
>
> (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
>
> (b) acting as a lawyer in the proceeding;
>
> (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or
>
> (d) likely to be a material witness in the proceeding.

28 U.S.C. §455 similarly provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned" and contains other provisions similar to Rule 2.11.

ABA Formal Opinion 488, issued on September 5, 2019, provides some additional guidance. It addresses when a judge's social or close personal relationships with lawyers or parties are grounds for disqualification or disclosure. Its introductory summary states:

Rule 2.11 of the Model Code of Judicial Conduct identifies situations in which judges must disqualify themselves in proceedings because their impartiality might reasonably be questioned—including cases implicating some familial and personal relationships—but it is silent with respect to obligations imposed by other relationships. This opinion identifies

> three categories of relationships between judges and lawyers or parties to assist judges in evaluating ethical obligations those relationships may create under Rule 2.11: (1) acquaintanceships; (2) friendships; and (3) close personal relationships. In short, judges need not disqualify themselves if a lawyer or party is an acquaintance, nor must they disclose acquaintanceships to the other lawyers or parties. Whether judges must disqualify themselves when a party or lawyer is a friend or shares a close personal relationship with the judge or should instead take the lesser step of disclosing the friendship or close personal relationship to the other lawyers and parties, depends on the circumstances. Judges' disqualification in any of these situations may be waived in accordance and compliance with Rule 2.11(C) of the Model Code

In today's fractious and fractured political climate, public trust and confidence in our governmental institutions may be at an all-time low. The guardians of those institutions (whether they be judges, politicians, lawyers, or average citizens) need to take all steps necessary to rebuild and maintain that confidence. This is a country of laws whose founders believed wholeheartedly that the good of every one of us could only be ensured by a transparent system of government in which the actions of all three branches could be judged freely and openly. Anything that impinges on that process damages those institutions.

I fully understand the obligation that a judge has to fulfill her or his duties to hear and decide cases. Recusal should not be the automatic default any time a party raises a potential conflict. But in large measure, courts derive their authority from the confidence that the people have in them as fair and evenhanded institutions, unaffected by bias or prejudice. The rules that govern judicial recusal are designed to ensure that confidence. For me, the bottom line on judicial recusal is simple — it doesn't matter if there is actual bias, but instead, judges must act to avoid even the appearance of bias. After all, it is about the system and the people who appear before our courts, and not about any particular judge.

Eric J. Magnuson is a partner at Robins Kaplan LLP and served as Chief Justice of the Minnesota Supreme Court from 2008 to 2010. He has more than 40 years of experience practicing law and he focuses his practice almost exclusively in appellate courts.

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