MEMORANDUM

To: Supreme Court Advisory Committee for the Rules of Civil Procedure

From: Thomas Vasaly, Executive Secretary
Board on Judicial Standards

Date: February 16, 2017

Subject: Petition to Amend Rules of Civil Procedure

INTRODUCTION

The Board has petitioned the Minnesota Supreme Court to eliminate an inconsistency between the judicial disqualification standards in the Rules of Civil Procedure and the standards in the Rules of Criminal Procedure. Civil Rules 63.02 and 63.03 provide that a judge is disqualified if the judge could be excluded from acting as a juror. That standard is impractical. The criminal rules appropriately incorporate the standards in the Code of Judicial Conduct. Minn. R. Crim. P. 26.03, subd. 14(3). Similarly, the Supreme Court has adopted the Judicial Code in connection with disqualification of court of appeals judges. *Powell v. Anderson*, 660 N.W.2d 107, 114-15 (Minn. 2003); Adv. Comm. Cmt. to Minn. R. Civ. App. P. 141 (eff. July 1, 2016).

Notwithstanding Civil Rules 63.02 and 63.03, Minnesota appellate courts generally do not apply juror disqualification standards to trial judges in civil cases. The Board proposes that Civil Rules 63.02 and 63.03 be amended to better reflect the standards actually applied by the courts and to make the civil rules consistent with the standards in the criminal rules, the standards for disqualification of court of appeals judges, and the standards in the Judicial Code.

DISCUSSION

1. Due to historical accident, the civil and criminal rules have inconsistent disqualification provisions.

a. Early Minnesota statutes.

Traditional common law recognized only pecuniary interest as a ground for disqualification. Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* 5-7 (2d ed. 2007). Over the years, statutes, court rules, and case law have expanded the grounds for disqualification.

In federal courts and most state courts, judicial disqualification standards are set forth in statute. Flamm, 39-46. That was originally true in Minnesota as well. The references to the standard for excluding a juror in Civil Rules 63.02 and 63.03 can be traced back to the 1851 Territorial Legislature:

> No judge of any of the courts of record of this territory, shall sit in any cause in which he is interested, either directly or indirectly, or in which he would be excluded under the common law from sitting as a juror.

Minn. Rev. Stat. 1851, ch. 69, art. 2, sec. 5. The Board is aware of no other jurisdiction with a similar standard.[1]

The language of the 1851 statute had the potential to result in unnecessary

[1] The language in the Minnesota statute may have been partly based on an early New York statute. Importantly, however, the reference to juror disqualification in the New York statute was limited to relationship to a party: "[N]o judge of any court can sit as such in any cause to which he is a party or in which he is interested, or in which he would be disqualified from being a juror by reason of consanguinity or affinity to either of the parties." N.Y. 2 Rev. St. p. 275, § 2, quoted in *Oakley v. Aspinwall*, 3 N.Y. 547, 551 (N.Y. 1850). Similarly, the federal judicial disqualification statute was amended in 1821 to include relationship as an additional ground for disqualification, i.e., where "the judge . . . is so related to, or connected with, either party, as to render it improper for him, in his opinion, to sit on the trial of such suit." Act of Mar. 3, 1821, ch. 51, 3 Stat. 643; Flamm, *supra*, 670.

disqualification. In 1878, the Minnesota Supreme Court, adhering to common law, gave a very narrow interpretation to the version of the statute then in effect. *Sjoberg v. Nordin*, 26 Minn. 501, 503, 5 N.W. 677, 678 (1880) (holding that the disqualification statute was intended only to prohibit a judge from having a pecuniary interest in the action).

In 1895, the Legislature adopted procedures for a litigant to disqualify a judge upon filing a timely affidavit of prejudice. "The result of [the *Sjoberg* Court's] interpretation of the statute was that a party to an action who honestly believed that the judge who was to try his cause was so prejudiced that a fair trial could not be had before him had no practical remedy, and Laws 1895, c. 306, was enacted to afford him such a remedy." *State v. Gardner*, 88 Minn. 130, 134, 92 N.W. 529, 531(1902).

Following the *Sjoberg* decision, the statutory references to the standard for excluding a juror were largely ignored, and courts analyzed disqualification issues based on case law. *See, e.g.*, *State ex rel. Thompson v. Day*, 200 Minn. 77, 80, 273 N.W. 684, 685 (1937) ("The Sjoberg Case has stood too long and has been followed too many times for this court now to depart from its construction of the statute.").

As case law developed, bias and the appearance of bias were recognized as grounds for disqualification. *See Payne v. Lee*, 222 Minn. 269, 271, 24 N.W.2d 259, 262 (1946) (disqualification required where judge exchanged "sharp correspondence" with counsel and parties); *see also* William J. Wernz, Judicial Disqualification in Minnesota, Bench & Bar of Minnesota 16, 17 (November 2016); *but see McClelland v. McClelland*, 359 N.W.2d 7, 11 (Minn. 1984) ("Nevertheless, a judge who feels able to preside fairly over the proceedings should not be required to step down upon allegations of a party which

themselves may be unfair or which simply indicate dissatisfaction with the possible outcome of the litigation.").

b. Adoption of the Civil and Criminal Rules of Procedure and the Code of Judicial Conduct.

In 1952, the Rules of Civil Procedure were adopted, and inconsistent statutory provisions were superseded.[2] Although the current versions of the 1851 statute and the peremptory disqualification statute (Minn. Stat. §§ 542.13, 542.16) remain on the books, they are listed as superseded. Minn. R. Civ. P. App. B(2). Notwithstanding that the Court's opinions on disqualification had long disregarded the juror disqualification language in the statutes, the drafters of the civil rules adopted the statutory language. Civil Rule 63.02 was based on Minn. Stat. § 542.13: "No judge shall sit in any case if that judge is interested in its determination or if that judge might be excluded for bias from acting therein as a juror." Similarly, Civil Rule 63.03 was based on Minn. Stat. § 542.16.

In 1972, the ABA adopted the Model Code of Judicial Conduct, which codified disqualification standards into a single rule, Canon 3C. The Canon 3C language, with variations, was adopted by Congress in 1974 (amending 28 U.S.C. § 455), and versions of Canon 3C or its current iteration, Model Rule 2.11, have been adopted by the supreme courts in most states, including Minnesota in 1974.

[2] In general, laws in conflict with the Supreme Court's rules of procedure are of no further force and effect. Minn. Stat. §§ 480.056, 480.059, subd. 7 (2016). Although the Legislature has retained the right to enact laws governing procedures, Minn. Stat. §§ 480.058, 480.059, subd. 8, it has not passed inconsistent laws governing disqualification for cause since the adoption of the Rules of Civil Procedure. Thus, amending Civil Rules 63.02 and 63.03 to make the language inconsistent with Minn. Stat. §§ 542.13, 542.16) does not raise any separation of powers issues.

The Judicial Code embodies the modern view of judicial disqualification. Charles Gardner Geyh, et al., *Judicial Conduct and Ethics* § 4.02 (5th ed. 2015). Under the Code, a judge is subject to disqualification for "personal bias or prejudice concerning a party or a party's lawyer." Rule 2.11(A)(1). A judge is also subject to disqualification for the appearance of bias. Rule 2.11(A) broadly provides: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." In addition, Rule 2.11 lists specific circumstances in which disqualification is required, e.g., when the judge or a member of the judge's family "has more than a de minimis interest that could be substantially affected by the proceeding." Rule 2.11(A)(2)(c).

In contrast to the civil rules, the criminal rules, adopted in 1990, incorporate the disqualification standards in the Judicial Code: "A judge must not preside at a trial or other proceeding if disqualified under the Code of Judicial Conduct." Minn. R. Crim. P. 26.03, subd. 14(3).[3] (Peremptory disqualification is addressed in Minn. R. Crim. P. 26.03, subd. 14(4), (5).) That the civil rules adopted the statutory language and the criminal rules incorporated the Judicial Code is due in part to timing; the civil rules were adopted prior to the 1974 Judicial Code, and the criminal rules were adopted afterwards.

The Board believes that the disqualification standards in the Minnesota courts should be consistent and that the appropriate standards are in the Judicial Code.

[3] The criminal rules, like the civil rules, supersede conflicting statutes. *See supra* note 1; *State v. Azure*, 621 N.W.2d 721, 724 (Minn. 2001) (noting that the criminal rule governing peremptory removal of judge supersedes Minn. Stat. § 542.16).

2. Civil Rules 62.02 and 63.03 have been a source of confusion.

Since the adoption of the Judicial Code in 1974, appellate opinions have not been uniform on the standard for judicial disqualification in civil cases.

A 1987 court of appeals opinion held that the Judicial Code was not a basis for disqualifying a judge in a civil case. *Nachtsheim v. Wartnick*, 411 N.W.2d 882, 891 (Minn. Ct. App. 1987). In a step back to earlier law, the court indicated that if a litigant was attempting to remove a successor judge, the "affirmative showing of prejudice" requirement in Rule 63.03 meant that the litigant had to show actual bias; the appearance of bias was not enough. *See also State v. Yeager*, 399 N.W.2d 648 (Minn. Ct. App. 1987) (applying juror disqualification standard to criminal case prior to the criminal rules' incorporation of the Judicial Code); *Durell v. Mayo Foundation*, 429 N.W.2d 704, 705 (Minn. Ct. App. 1988) ("Having previously removed one judge as a matter of right, petitioner is required to establish the judge now assigned is actually prejudiced. Minn. R. Civ. P. 63.03.").

After *Nachtsheim* and *Durell*, the court of appeals decided *Roatch v. Puera*, 534 N.W.2d 560 (Minn. Ct. App. 1995). In that opinion, the court cited *Nachtsheim* and the juror disqualification standard in Civil Rule 63.03, but the court did not rely on them. Instead, the court applied the Judicial Code standard that disqualification is required when impartiality can reasonably be questioned. *Roatch* , 534 N.W.2d at 563.

Subsequently, the Supreme Court overruled *Nachtsheim* with regard to the standard for court of appeals judges. *Powell v. Anderson,* 660 N.W.2d 107, 114-15 (Minn. 2003) ("[A]n appellate judge should be subject to disqualification on the grounds set forth in the

Code of Judicial Conduct."). Although the Court has not overruled *Nachtsheim* with regard to the standard for trial judges, the Court has cited the Judicial Code in reviewing a challenge to a trial judge. *In re D.L.*, 486 N.W.2d 375, 382 (Minn. 1992).

While the juror disqualification language in Civil Rule 63.02 is sometimes cited, the appellate courts generally have not actually applied that language to judges. After the *Powell* and *Roatch* decisions, it is unclear whether *Nachtsheim* has any continuing validity. In recent years, notwithstanding the *Nachtsheim* opinion, the court of appeals has relied on the Judicial Code to decide disqualification issues in several unreported cases. *See, e.g.*, *Pederson v. Pederson*, No. A15-1845 *(*Minn. Ct. App. Aug. 15, 2016); *In re J.W.V.H.*, No. A10-1490 (Minn. Ct. App. Oct. 3, 2011); *Costley v. Verchota*, No. A09-1592, 2010 WL 2732449, *6 (Minn. Ct. App. July 13, 2010).

Unreported cases have also minimized the effect of the juror disqualification language. *See Bowe v. Anderson*, No. C0-98-1958, 1999 WL 314922, *2 (Minn. Ct. App. May 18, 1999) ("[E]ven if a presumption exists that the predisposition of a juror will prevent the juror from being sufficiently impartial, there exists an independent presumption that a judge presiding over a bench trial relies only on proper evidence in reaching its determination on the merits.").

In summary, although the reference to the juror disqualification standard in Civil Rules 63.02 and 63.03 has created some confusion, appellate courts in recent years do not actually apply that standard to judicial disqualification cases.

3. The Judicial Code provides the proper standard for disqualification.

The standard in the civil rules is both too broad and too narrow. To the extent it

applies the juror disqualification standards to judges, the standard is too broad because case law permits a judge to sit in cases in which a juror could not. To the extent the civil rules require proof of actual bias, the standard is too narrow because a judge should be disqualified for apparent bias.

a. A judge should be permitted to sit in cases where a juror could not.

The grounds for disqualifying a judge under Judicial Code Rule 2.11 are appropriately narrower than the grounds for excluding a juror. For example, a criminal juror must not have served as a juror in prior proceedings involving the defendant. Minn. R. Crim. P. 26.02, subd. 5(1)(10) and 5(1)(11). In contrast, "[i]t has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant." *Liteky v. United States*, 510 U.S. 540, 551 (1994); *see also, e.g.*, *Rossberg v. State*, 874 N.W.2d 786, 790 (2016) (holding that trial judge is not disqualified from hearing post-conviction petition); *Sjoberg*, 26 Minn. at 504, 5 N.W. at 679 (pointing out that applying "the principle that a juror cannot impartially hear and determine a matter a second time, after having considered it in some prior proceeding . . . . to a district judge would necessarily seriously embarrass the administration of justice in respect to the hearing and determination of motions for new trials, and like questions.").

Similarly, although a juror should not be exposed to inadmissible evidence, judges routinely review inadmissible evidence both because of practical necessity when deciding evidentiary and discovery disputes and because they can be trusted not to rely on inadmissible evidence. *See State v. Dorsey*, 701 N.W.2d 238, 239 (Minn. 2005) (noting that "it is presumed that judges will set aside collateral knowledge"); *but see State v.*

Cleary, 882 N.W.2d 899 (Minn. Ct. App. 2016) (holding that judge who learned of intimate details of a defendant's life while presiding in drug court was disqualified from presiding over the defendant's probation revocation hearing).

Another example of the overbreadth of the juror disqualification standard concerns the degree of permitted consanguinity between the judge and a participant in the proceeding. Under the civil rules, a judge is apparently disqualified for consanguinity within the ninth degree to a trial participant because that is the standard applicable to jurors.[4] In contrast, under Judicial Code Rule 2.11(A)(2), which applies in criminal cases, a judge is disqualified for consanguinity only if the judge is within the third degree of relationship to a trial participant. There is no reason to have a stricter consanguinity standard in civil cases than in criminal cases.

Unnecessary disqualification of a judge harms the efficiency of the judicial system. In counties where only one or two judges are chambered, disqualification of a judge may require a judge chambered in another county to spend considerable time traveling to a hearing or trial. *See* Judicial Code Rule 2.11 cmt. 1 (noting that disqualification imposes burdens on the judge's colleagues). While a trial judge should be free to decide a close call in favor of recusal, the judge should make the decision relying on the correct standard.

[4] One anomalous consequence of the differing provisions of the civil rules and the criminal rules is that the criminal rule governing challenges to jurors, which does not apply to challenges to judges in criminal cases, apparently applies to challenges to judges in civil cases. As discussed, Civil Rules 62.02 and 62.03 refer to the standards for disqualifying jurors. Minn. Stat. § 546.10 in turn provides that in civil proceeding, jurors may be challenged for the same causes as in criminal trials. Challenges to jurors in criminal trials are addressed in Criminal Rule 26.02, subd. 5(1). Thus, this rule, which does not apply to challenges to judges in criminal cases, would seem to apply to challenges to judges in civil cases. Subpart 5(1)(5) of the rule provides that a juror may be challenged if the juror is within the ninth degree of consanguinity to a trial participant.

At a minimum, the language in Civil Rules 63.02 and 63.03 remains a source of potential confusion.

b. A judge should be disqualified where apparent bias is shown.

If the civil rules are interpreted to require a litigant to prove actual bias, as did the court of appeals in *Nachtsheim*, the civil rules fail to take into account the need to preserve public confidence in the judicial system.

It is usually difficult for a litigant to prove actual bias. The appearance of bias should be enough to disqualify a judge. "Justice requires that the judicial process be fair and that it appear to be fair; it necessarily follows that a presiding judge must be impartial and must appear to be impartial." *State v. Pratt*, 813 N.W.2d 868, 876 (Minn. 2012). Although *Powell* concerned appellate judges rather than trial judges, its reasoning can be applied to trial judges. The Court, holding that a party should not be required to prove actual bias, commented:

> We share Powell's concerns regarding an actual bias standard. While the existence of actual bias may be relevant to one of the objectives of disqualification – to provide a fair trial to litigants – it is not necessarily relevant to the other objective – to promote confidence in the judiciary.

660 N.W.2d at 120 (footnote omitted). The Judicial Code appropriately provides for disqualification for both bias and the appearance of bias.

c. Incorporation of Judicial Code Rule 2.11 in the civil rules will not interfere with judicial discretion.

In *Powell*, the Supreme Court noted:

> [T]he grounds for disqualification in Canon 3D(1) are stated broadly, leaving considerable room for interpretation in their application to any given set of circumstances. Canon 3D(1) does not provide a precise formula that

can automatically be applied.

660 N.W.2d at 115.

The due process clause potentially applies to judicial disqualification. But "[b]ecause 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. Massey*, 556 U.S. 868, 890, 129 S. Ct. 2252, 2267 (2009) (holding that state supreme court judge whose election campaign had received a $3 million contribution from the CEO of a corporation appearing before him should have recused himself as matter of due process); *see also* Flamm, § 2.5.2. However, as in *Caperton*, if it is unclear that a judicial code or statutes provides sufficient protection, courts will apply due process standards.

Due process considerations are more likely to enter into decisions on whether to reverse a trial court judgment, especially in criminal cases. *See State v. Finch*, 865 N.W.2d 696, 705 (Minn. 2015) (noting that when a criminal defendant has been deprived of an impartial judge, automatic reversal is required, but in a case involving a judge's failure to disqualify for the appearance of partiality, the Court has not decided the precise test for reversal); *Powell*, 660 N.W.2d at 120 ("[N]ot every case involving judicial disqualification deserves vacatur.") However, the Judicial Code does not purport to address whether a violation of a disqualification standard should result in reversal.

The Board's proposal will assist courts by clarifying disqualification standards. The Board's proposal is consistent with the recommendation of the Conference of Chief Justices that "states and territories should provide guidance and training to judges in

deciding disqualification/recusal motions." Resolution 8 (Jan. 29, 2014).[5] The proposal will reduce potential confusion by making the disqualification standards clearer and more uniform in Minnesota courts. The Board's proposal is supported by the Minnesota State Bar Association.

CONCLUSION

The Board respectfully requests that the Advisory Committee recommend that the Supreme Court amend Civil Rules 62.02 and 62.03 to incorporate Rule 2.12 of the Judicial Code.[6]

Dated: February 27, 2017

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[5] Available at http://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/01292014-Urging-Adoption-Procedures-Deciding-Judicial-Disqualification-Recusal-Motions.ashx.

[6] The Board's proposed amendments would also bring the Minnesota civil rules into closer alignment with standards in federal courts and in the courts of other states. *See Powell*, 660 N.W.2d at 117 n.8 (noting similarities between federal standards and the Minnesota Judicial Code). The juvenile protection rules on disqualifying a judge also reference the standard for excluding a juror. Minn. R. Juv. Prot. P. 7.07, subd. 2 and 3(b). If the Court amends the civil rules as proposed, the Board will suggest a similar amendment to the juvenile protection rules.