COMMENTARY

Judicial Disqualification, Recusal and the Duty to Decide

By William P. Carlucci

Rule 1.2 of the Code of Judicial Conduct provides that "a judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." In order to keep faith with this rule, a judge should decline to preside over a case in which his or her impartiality could be reasonably questioned.

Throughout my entire 43-year career as a trial lawyer, I don't believe that I ever filed a motion seeking recusal of a judge. For the most part, I won the cases that I expected to win and lost the cases I expected to lose. I won a few that I should have lost and lost a few that I should have won. I don't recall ever blaming a loss on a biased judge.

During my three years on the bench, I have received a handful of motions seeking my recusal. Some have been based upon the identity of the parties, including cases where I had never heard of any of them. Some have been based upon a perception of bias. Some were clearly "forum shopping." With each such motion, I balanced the potential for an "appearance of impropriety" against my obligation to do my job. When the potential was low, I denied the motion and moved on with the case.

If an attorney has a sincere concern about the ability of a judge to preside over a case impartially, the attorney should consider the difference between disqualification and recusal. Rule 2.11 of the Code of Judicial Conduct provides that a judge "shall disqualify himself or herself from any proceeding in which the judge's impartiality might be reasonably questioned." The rule lists many (but not all) examples, such as a case where the judge has a personal bias or prejudice concerning a party, material witness or lawyer; a case where the judge or a close family member is a party or counsel to a party or a material witness; and a case where the judge or a close family member

has an economic interest in the outcome. Rule 2.11 further requires that judges disqualify themselves from a case where a party or attorney has made a significant (rebuttable presumption of over $250) contribution to the judge's election campaign. Disqualification is also required where the judge "has made a public statement, other than in a judicial proceeding, that commits the judge to reach a particular result" in a judicial proceeding. Finally, a judge must disqualify from any proceeding where the judge was a lawyer or material witness in the controversy. The rule permits the parties to waive the issue if they so choose.

Implicit in the language of Rule 2.11 is the separate concept of judicial recusal. Even where a judge is not disqualified, he or she may choose not to preside. Judges occasionally choose not to preside over cases because a party or witness is a neighbor, close friend or someone with whom the judge has regular contact. The judge may reasonably be concerned that the friendship or knowledge of the party or witness could affect his or her impartiality. Even where that impartiality is unaffected, the judge may fear that it will be questioned by others.

The recusal motions I have received have not claimed that I was disqualified. I would rarely need a written motion to recognize such a case. Instead, the motions claimed that a party or witness is "a friend of a friend" or that one of the parties was represented long ago by my former law firm in an unrelated matter. In some of those cases, I requested that one of my colleagues on the bench take over. In others, I sensed that the motion was really just forum shopping.

In a perfect world of limitless judicial resources, recusal would be a simple matter. Whenever a judge knows a party or witness, the matter would be handled by another judge. Unfortunately, we do

not live in a perfect world. First, recusal is often problematic. Many rural counties are served by only one judge. Even in larger counties, local officials and business leaders may know every member of the bench. Second, recusal by one judge may result in significant delay. Since the courts of the commonwealth are often "bursting at the seams," recusal often means that the matter must be "squeezed" into the crowded docket of another judge. In some cases, a judge from another county must be assigned. I speak from personal experience in saying that a full bench recusal may result in a simple case dragging on for years.

Enter Rule 2.7 of the Code of Judicial Conduct, which provides that "a judge shall hear and decide matters assigned to the judge, except where the judge has recused himself or herself or when disqualification is required by Rule 2.11 or other law." The Comment to Rule 2.7 is instructive.

> Unwarranted disqualification or recusal may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge should not use disqualification or recusal to avoid cases that present difficult, controversial, or unpopular issues.

In my view, Rule 2.7 should be read to mean that no judge should decline to hear and decide a matter unless Rule 2.11 or other circumstances make his or her participation problematic.

Judges often base recusal upon concerns about the appearance of impropriety. I dislike that phrase since "appearance," like beauty, is generally in the eyes of the beholder. Some judges contend that our law contains endless gray areas. I am not one of those judges. For the most part, the requirements of our law are reasonably clear, and telling right from wrong is not difficult. Norman Schwarzkopf is quoted as saying, "The truth of the matter is that you always know the right thing to do. The hard part is doing it."

In my view, recusals based upon "the appearance of impropriety" should be limited. If a judge or close family member has a material relationship with a party or witness or an interest in the outcome of the case, Rule 2.11 will usually mandate disqualification. Where disqualification is not required, the judge should carefully consider whether his or her impartiality would be questioned

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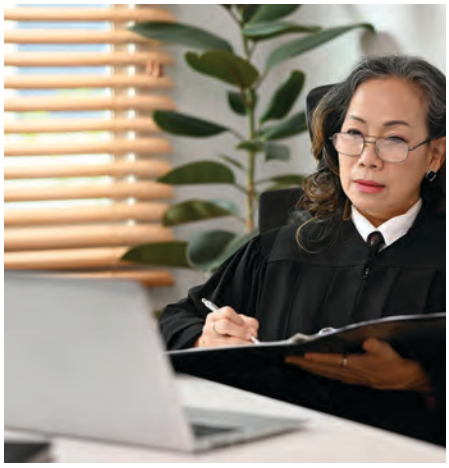

The judge should examine the case, the parties, the witnesses and the lawyers, and carefully balance the potential for an appearance of impropriety against the duty to decide.

by a disinterested third party. If no neutral observer would see any basis for recusal, it probably doesn't exist.

In the area of judicial recusal, one size does not fit all. In a one-judge county, recusal may be very problematic. In a county with a large bench, recusal of one judge will be easier to manage. Shifting a routine family law motion to a different courtroom might be simple, while reassigning a complicated medical negligence case will impose a significant burden upon another judge. Unless Rule 2.11 requires disqualification, any judge considering recusal should carefully consider the practical effect of the decision.

I do not claim any special expertise in the area of judicial recusal. I will describe my approach, however, to the extent that others might find it useful. First, I decide whether the limitations specifically set forth in Rule 2.11 mandate my disqualification. Although subsection (C) of that rule permits the parties to waive the disqualification, I have never sought such a waiver. I doubt that I ever will. Second, I consider whether my knowledge of the parties or witnesses or the issue in the case is likely to cloud my judgment. If so, disqualification is implicit in Rule 2.11(A)(1). Third, even if I believe that I can preside impartially, I sometimes grant written motions that assert a good faith basis for my recusal. Discretion is still the better part of valor. Finally, I consider whether a neutral observer is likely to question my participation. In making that decision, I occasionally seek the informal advice of the executive director of our Judicial Conduct Advisory Board. I have found his advice to be timely, legally sound and grounded in common sense. If I conclude that a neutral observer would not expect me to recuse, I proceed with the matter. I contend that Rule 2.7 requires that I do my job. The fact that I may be familiar with the parties or the witnesses or may consider the lawyers to be my friends does not deter me.

There is an old lawyer joke to the effect that lawyers answer every question from clients with, "It depends." Much the same is true about judicial recusal. If a judge is truly disqualified from a matter, the answer is simple. If not, the judge should examine the case, the parties, the witnesses and the lawyers, and carefully balance the potential for an appearance of impropriety against the duty to decide. In close cases, the counsel of the executive director of our Judicial Conduct Advisory Board is a valuable resource. Unless there is a compelling reason for recusal, I contend that judges should let Rule 2.7 and their conscience be their guide. ⚖

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