

*Arizona Supreme Court  
Judicial Ethics Advisory Committee*

ADVISORY OPINION 96-14  
(November 21, 1996)

## **Limitations on Disqualification Requirement**

### **Issues**

1. Should a judge be disqualified because a litigant brings charges against the judge concerning his or her handling of a pending case?

**Answer:** No.

2. Should a judge be disqualified because a party to litigation is an employee of the court system?

**Answer:** No, with qualifications.

### **Facts**

The presiding judge of a large metropolitan court is concerned about the number of times he has been required to seek the assistance of judges from other counties because local judges have felt obligated to disqualify themselves. Two new instances have arisen. In the first, unhappy litigants are suing judges or making claims against them as a predicate to bringing suit and then filing these documents in the pending litigation. In the second, judges have disqualified themselves when court personnel are parties.

### **Discussion**

Canon 3E(1) requires that “a judge disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” There is both a subjective and objective component to this requirement. If a judge believes that he or she cannot act fairly, disqualification is required. The more difficult assessment is the objective one, whether one external to the case might reasonably question the judge’s impartiality. Understandably, judges tend to err on the side of safety and to judge the reasonableness of questioned impartiality from the standpoint of the most darkly suspicious member of the public. That is not the test. Rather, it is “whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought [or disqualification contemplated] would entertain a significant doubt that justice would be done in the case.” *Pepsico, Inc. v. McMillan*, 764 F.2d 458, 460 (7th Cir. 1985). Judges should not act hastily in manufacturing reasons to avoid judging. It is the real, not the chimerical, appearance of bias and prejudice that disqualifies.

That a judge has been sued by the litigant would ordinarily appear a real basis for disqualification. But the “objective, disinterested observer fully informed” would know that the suit or claim was brought by the party, often self represented, either as a tactical means

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to require disqualification where real grounds for disqualification under our procedural rules could not be established or as some benighted effort to intimidate the judge. As put by Shaman, Lubet & Alfini, *Judicial Conduct and Ethics* § 4.06 (2d ed. 1995):

Where a party or the party's attorney acts toward a judge in a manner calculated to create bias or prejudice, disqualification of the judge ordinarily will not be required. A party should not be able to engage in "judge-shopping" by manufacturing bias or prejudice that previously did not exist. Accordingly, it is not improper for a judge to refuse recusal where a party or the party's lawyer has verbally abused the judge or even threatened the judge with violence. Threats and insults that occur in court are not extrajudicial, and therefore usually cannot be the basis of disqualification. This is also the rule even where the verbal abuse occurs outside of court, if it is connected to a court proceeding. In fact, if a party has caused or provoked judicial anger, he or she ordinarily will not be heard to complain about it. That a party yells at a judge, writes a judge a nasty letter, or even files a complaint against a judge will not usually require the judge to be disqualified on account of bias or prejudice.

That an employee of the court system is a litigant, standing alone, does not mandate disqualification of a judge. The judge will have to assess the closeness of the relationship between the judge and the court employee to determine whether the disinterested observer would reasonably fear injustice. But given the hundreds of employees of a large superior court, it would be a rare instance when a judge from another county would be required to assuage the disinterested observer's fears.

### **Applicable Code Sections**

Arizona Code of Judicial Conduct, Canon 3E(1) (1993).

### **Other References**

*Pepsico, Inc. v. McMillan*, 764 F.2d 458, 460 (7th Cir. 1985).

Shaman, Lubet & Alfini, *Judicial Conduct and Ethics*, § 4.06 (2d ed. 1995).