

Maine Supreme Judicial Court

Comment

Proposed Amendments to the Maine Code of Judicial Conduct--Comments of the  
Brennan Center for Justice and the Justice at Stake Campaign

Brennan Center for Justice at NYU School of Law

161 Avenue of the Americas, 12th Floor

New York, NY 10013

Phone: 646.292.8310

Fax: 212.463.7308

Justice at Stake Campaign

717 D Street, NW, Suite 203

Washington, DC 20004

Phone: 202.588.9700

Fax: 202.588.9485

BRENNAN  
CENTER  
FOR JUSTICE

*at New York University School of Law*



Justice at Stake  
c a m p a i g n

May 12, 2011

Matthew E. Pollack  
Executive Clerk  
Maine Supreme Judicial Court  
205 Newbury Street, Room 139  
Portland, Maine 04101-4125

*Re: Maine Committee on Judicial Responsibility and Disability  
Proposed New Maine Code of Judicial Conduct*

Dear Mr. Pollack,

We write on behalf of the Brennan Center for Justice at NYU School of Law<sup>1</sup> and the Justice at Stake Campaign<sup>2</sup> to comment on the new Maine Code of Judicial Conduct proposed by the Committee on Judicial Responsibility and Disability on March 14, 2011. We commend the Committee for its rigorous and meticulous study of the 2007 ABA Model Code of Judicial Conduct, and we believe the proposed new Maine Code of Judicial Conduct provides a strong foundation for the Supreme Judicial Court as it considers changes to the existing Code to reflect the 2007 ABA Model Code.

First, we would like to praise the Committee for emphasizing in Canon 2(A) the “appearance of impropriety” standard from Rule 1.2 of the 2007 ABA Model Code of Judicial Conduct. The standard is used in almost every state, and it has been an applicable

---

<sup>1</sup> The Brennan Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Brennan Center’s Fair Courts Project works to preserve fair and impartial courts and their role as the ultimate guarantor of equal justice in the country’s constitutional democracy.

<sup>2</sup> Justice at Stake is a nationwide, nonpartisan partnership of more than 50 judicial, legal, and citizen organizations. Its mission is to educate the public and work for reforms to keep politics and special interests out of the courtroom – so judges can do their job protecting the Constitution, individual rights, and the rule of law. The arguments expressed in this letter do not necessarily represent the opinion of every Justice at Stake partner or board member.

standard for almost a century. The “appearance of impropriety” standard is critical in promoting public confidence in the judiciary, and it fortifies the public’s perception of the judiciary as impartial. By including this language in Canon 2(A), Maine can underline the important role that rigorous conduct rules play in safeguarding public perceptions of the judiciary.

Second, we would urge that, in conjunction with considering the Committee’s suggested changes to disqualification under Canon 3(E), the Court adopt a rule providing for review of disqualification motions by neutral judges, so that a challenged judge does not have the last and only word on whether to recuse. There are real tensions with notions of disinterested, impartial decision-making when a judge alleged to be biased is the only one who decides whether he or she can impartially hear a case. Accordingly, to ensure wholly impartial consideration of disqualification requests, we would urge the Court to adopt a rule providing for prompt *de novo* review if a challenged judge denies a disqualification request. Such a procedure governs disqualification practice in the trial courts of numerous states, and is followed by the supreme courts of at least nine states.<sup>3</sup>

To facilitate this meaningful review of disqualification decisions, we endorse a rule requiring transparent, reasoned decision-making on recusal requests. Accordingly, we would urge the court to adopt a requirement that recusal decisions be rendered in writing or on the record (with an exception for frivolous, untimely, or facially or procedurally insufficient disqualification requests). The Michigan Supreme Court’s procedures for recusal motions supply a useful model: in that court, if a justice’s participation in a case is challenged, the justice must “publish his or her reasons about whether to participate;” if he or she denies the request, the remaining justices of the court can review the denial *de novo*.<sup>4</sup>

A rule requiring written disqualification decisions and providing prompt review of these decisions would enhance the effectiveness of Maine’s disqualification rules. Without a record as to why a disqualification decision is made, an effective review of the decision is not possible. The record of disqualification decisions and review of those decisions would set disqualification precedents that would provide substantive guidance for future questions. Finally, published decisions will provide the public with insight into the way Maine judges approach issues of impartiality. In conjunction with the adoption of such procedures, the proposed Maine Code of Judicial Conduct will be effective in protecting the impartiality, integrity, and independence of the Maine judiciary and in promoting the public confidence and respect necessary for the judiciary to carry out its constitutionally vital role.

---

<sup>3</sup> See Adam Skaggs & Andrew Silver, Brennan Center for Justice, *Promoting Fair and Impartial Courts through Recusal Reform* 4-5 (2011) (citing high court procedures in Georgia, Mississippi, Michigan, Vermont, Texas, Alaska, Louisiana, Nevada, and Oregon in which a challenged justice’s initial decision on disqualification is subject to review by other members of the court), available at [http://www.brennancenter.org/recusal\\_reform](http://www.brennancenter.org/recusal_reform).

<sup>4</sup> See Amendment of Rule 2.003 of the Michigan Court Rules, ADM File No. 2009-04 (Mich. S. Ct. 2009).

We commend the Committee for the significant accomplishment represented by the Report, and we thank the Court for the opportunity to submit this comment. We firmly believe that the proposed Maine Code of Judicial Conduct, if adopted, will make important advancements that help ensure the perception and reality of impartial justice in the state of Maine, and we believe that adoption of the further disqualification procedures described above will further ensure that Maine courts can carry out their constitutional role while enhancing the public confidence in the judiciary and protecting the public trust.

Respectfully submitted,



J. Adam Skaggs  
Senior Counsel  
Brennan Center for Justice  
161 Avenue of the Americas  
New York, NY 10013  
(646) 292-8331



Bert Brandenburg  
Executive Director  
Justice at Stake Campaign  
717 D St. NW, Ste. 203  
Washington, DC 20004  
(202) 588-9700