

## ADVISORY OPINION

### Code of Judicial Conduct Canon 3

#3-07

The issue is whether a judge should disqualify from a case involving a litigant who files a disciplinary complaint or a lawsuit against the judge or who publicly criticizes or attacks the judge through fliers, websites, blogs, or other written material.

Many judges, understandably, are concerned about the perceived fairness of their decisions in cases when a litigant publicly has criticized the judge; however, in the Commission's view, judges should recuse from those cases only if the judge has developed an actual bias against the litigant or where the litigant's allegations have some factual basis for a conclusion that the judge acted inappropriately in the litigant's case or cannot reasonably be perceived as fair. The standard is not from the perspective of the disgruntled or angry litigant. Rather, the issue is whether an objective person, knowledgeable of all the circumstances, would have a reasonable basis for doubting the judge's impartiality. Unless disqualification is required, Canon 3B(1) of the Code of Judicial Conduct requires a judge to hear and decide all assigned cases.

Canon 3E requires disqualification when a judge's impartiality reasonably is in question, including, for example when a judge, as a former prosecutor, prosecuted a defendant on a related charge, where the judge made extra-judicial statements about the merits of a case or has engaged in an improper *ex parte* contact in the case, where the judge is closely related to a party or has a financial interest in the outcome of a case, or where the judge and litigant have a history of any kind calling into question the judge's impartiality.

More and more commonly, though, judges with no valid reason to consider recusal become the subjects of unfounded or frivolous complaints, lawsuits challenging the merits of their decisions, or publicly disseminated personal attacks. A litigant *creates* the dispute with the judge, then demands recusal on the basis the judge cannot rule fairly. Sometimes, the judge automatically disqualifies without a request. Recusal in these cases not only is unnecessary, it facilitates forum shopping, is unfair to the other parties in the case, and creates a burden for the next judge, who likely will "meet the same fate." See *In the Matter of the Appointment of a Special Judge in the Wabash Circuit Court*, 500 N.E. 2d 751,753 (Ind. 1986).

In the Wabash Circuit Court case, the defendants in a civil action named the judge as a third-party defendant, invoking Trial Rule 79(1) and disqualifying the judge because he became a party to the action. The Supreme Court directed the judge to reassume jurisdiction and to determine whether there existed in the defendants' claim any reasonable basis for disqualification. Justice DeBruler wrote for the Court, "If...[the] claim is specious and a sham and intended solely to evade court jurisdiction, it should strike the claim. If the claim has no reasonable basis, the court should not disqualify." *Id.*

Similarly, a judge faced with a complaint, lawsuit, or other allegations from a litigant must determine whether the litigant's claims reasonably are based and would create in a reasonable mind a question about the judge's impartiality. Commission staff will assist judges in making this determination. The mere fact that a litigant has targeted the judge in some way is not sufficient to create a reasonable perception that the judge cannot proceed impartially. Judges are accustomed to ruling fairly in adverse situations and should not allow themselves to be manipulated or antagonized into recusal.