

LEGAL NOTES

Judges and the Rule of Necessity: Ignacio and the Ninth Circuit's Judges

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Rules of judicial ethics compel a judge's recusal when judicial impartiality is called into question. Federal law provides that a federal judge disqualify himself or herself for various reasons, such as having personal knowledge of the facts or a pecuniary interest in the case, or if the judge may be a material witness in the case. In particular, 28 U.S.C. §455(b)(5)(1) provides that a federal judge "shall . . . disqualify himself [if] . . . a party to the proceeding." State courts have analogous rules for their judges. The reasons for such rules of recusal are obvious. Yet there are specific circumstances where it is impractical for a judge to withdraw from a particular case—including the unavailability of any other judge to hear the case. This results in an exception to this norm of recusal, which is known as the "rule of necessity."

Long recognized at common law, the rule of necessity was applied as early as 1430, enabling the chancellor of Oxford to continue to preside in a case in which he was a party. "The rule, simply stated, means that a judge is not disqualified to try a case because of his personal interest in the matter at issue if there is no other judge available to hear and decide the case." *Atkins v. United States*, 214 Ct. Cl. 186 (1977). The *Atkins* case described in some detail the legal history of the rule of necessity and was cited affirmatively in *United States v. Will*, 449 U.S. 200 (1980), where the Supreme Court held that the rule of necessity is essential to the administration of justice. In *Will*, several federal district court judges brought suit in federal court on behalf of Article III judges, claiming that various congressional statutes limiting judicial pay increases violated the Constitution's compensation clause. For the Court, Chief Justice Burger said that when it enacted the rule on recusal, Congress had not intended "to alter the time-honored Rule of Necessity. And we would not casually infer that the Legislative and Executive Branches sought . . . to foreclose federal courts from exercising 'the province and duty of the judicial department to say what the law is.'" 449 U.S. at 217, quoting *Marbury v. Madison*, 1 Cranch 137 (1803).

Both federal and state courts utilize the rule of necessity, and it was recently, and appropriately, applied in *Ignacio v. Judges of U.S. Court of Appeals for Ninth Circuit*, 453 F.3d 1160 (9th Cir. 2006). The *Ignacio* case began meandering through the legal system in 1999, when a judge in a California Superior Court issued an order in a divorce proceeding suspending Ignacio's access to his son because of the father's mental disorders. The court also designated Ignacio a "vexatious litigant" under state law, thus placing limits upon his pursuit of lawsuits within the California court system.

Ignacio subsequently filed a case in federal district court in California, naming as defendants the superior court judge who issued the order, his ex-wife, opposing

counsel, other judges in the California court system, and state and county officials. The case was dismissed for lack of subject-matter jurisdiction and for presenting other baseless claims, and in an unpublished opinion the Ninth Circuit subsequently affirmed this decision. 51 Fed. Appx. 679 (2002). Soon thereafter, after moving from California to Nevada, Ignacio tried to remove his already concluded divorce case to the federal district court in Nevada. That court dismissed the action, a decision also affirmed in an unpublished opinion by the Ninth Circuit. 65 Fed. Appx. 657 (2003).

Later in 2003, Ignacio brought another suit as a pro se litigant in the federal District Court of Nevada. This time he named as defendants the “Judges of the United States Court of Appeals for the Ninth Circuit,” as well as a number of judges on the Ninth Circuit and other federal and state courts, personally and in their official capacities. In this suit he also named as defendants numerous public officials in both their personal and official capacities, including both U.S. senators from California (Boxer and Feinstein), former California governor Davis, the U.S. Department of Justice, the F.B.I., and the State Bar of California. He also sued various attorneys who presumably worked as opposing counsel on different iterations of his legal case. Ignacio claimed that these defendants conspired to ensure that his prior case would be dismissed. With respect to the Ninth Circuit judges, he specifically alleged they were “culpable for their conscious parallelism of their legal duties by the wanton negligence and ultrahazardous activities of dismissing [sic] a/or complaint(s) in a criminal conspiracy.” *Ignacio*, 453 F.3d at 1163. The district court dismissed, and in late 2003 Ignacio, again pro se, appealed to the Ninth Circuit.

Judge Trott, writing in a published opinion for a panel that included Chief Judge Schroeder and Judge Kleinfeld, said that before the court could reach the merits of Ignacio’s claims, the judges first had to discuss recusal because of Ignacio’s naming each Ninth Circuit judge as a defendant in this action. If §455 were applied literally, the Ninth Circuit simply could not hear this case, because each judge would be required to withdraw as a party to the action.

Faced with that situation, Judge Trott said that when all members of a federal court of appeals are sued indiscriminately, the rule of necessity applies. He based his ruling on recent, similar decisions in three other circuits (the Second, Tenth, and Eleventh) in which the judges were all indiscriminately named as defendants. Those courts had held that judges otherwise disqualified can hear and decide a case when, because of indiscriminate litigation, it could not be heard save for application of the rule of necessity. As the Eleventh Circuit stated, “The rule of necessity allows at least those judges on this Court who have not been involved in plaintiff’s prior appeals to hear this appeal.” *Bolin v. Story*, 225 F.3d 1234, 1239 (11th Cir. 2000).

Judge Trott then noted the “underlying legal maxim for the rule of necessity is that where all are disqualified, none are disqualified.” 453 F.3d at 1164-65, quoting *Pilla v. American Bar Ass’n.*, 542 F.2d 56, 59 (8th Cir. 1976). If the rule of necessity did not apply to this case, the plaintiff would have “eliminated the proper legal forum charged with reviewing the dismissal of his action.” 453 F.3d at 1165. Accordingly,

the rule of necessity was found to be an apt exception to the recusal rule in cases such as this one, where a plaintiff indiscriminately names all the judges of a court as defendants to an action otherwise properly before that court.

Once the Ninth Circuit found the rule of necessity to be applicable, it then reached its decision on Ignacio's substantive claims. Not surprisingly, the court held that dismissal was proper, as the court lacked subject-matter jurisdiction to decide the case.

While this case may seem almost contrived with respect to Ignacio's determination in pursuing his claims and his paranoia regarding the way the judicial system treated them, cases like this do occur. Indeed, that the Ninth Circuit had contemporary precedent from sister circuit courts on which to rely demonstrates that suits like Ignacio's are not as uncommon as they otherwise may seem. It is precisely situations like the *Ignacio* case, where a litigious plaintiff indiscriminately names all the judges on a court as defendants, in which the rule of necessity is an appropriate exception to the rule of judicial ethics that judges recuse themselves when personally a party to a lawsuit. **jsj**

Judge Lopez Torres and New York's Trial Judge Nominating Process

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As prescribed by its constitution, New York holds elections for judges to its supreme courts, the trial courts of general jurisdiction. In *Lopez Torres v. New York State Board of Elections*, 462 F.3d 161 (2d Cir. 2006), the Second Circuit held that the state's nominating process for these courts deprives potential judicial candidates and voters of their First Amendment rights. For a panel including circuit judges Sotomayor and Hall, Judge Chester Straub said, "New York's nominating process . . . does not merely deprive a candidate of a realistic chance to prevail; rather, through the use of overlapping and severe burdens, it deprives a candidate of access altogether" (at 189). This decision may be the impetus for momentous change to the state's selection methods, and perhaps to its judicial system more generally. Much, however, will depend upon what is said by the U.S. Supreme Court, which granted certiorari in the case in February 2007.

The formal methods of judicial selection in New York are "unique" (at 171). Certainly, the state's rules are archaic. An 1846 amendment to its constitution compels election of judges to the state's supreme court. Interestingly, this constitutional provision provides no other details, so over the years the state legislature has filled in details. Initially, candidates were nominated in judicial conventions. In 1911 the state then employed primary elections. However, anxiety over the influence of money and parties in "bare-knuckled" primaries and over potential lack of judicial independence persuaded the state once again to alter its nominating process (at 171-