STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State ex rel. Peter Stephenson a/k/a Peter Rickmyer, Peter Rickmyer,

v.

Tom Roy, *et al*,

Defendants.

Court File: 27-cv-11-11012

PLAINTIFF RICKMYER'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO RECUSE THE BENCH

The task of law is to maintain an ever-readjusted balance between
the needful restraint on the powers of government
and the needful exercise of the powers of government.

-- Leon Jaworski

INTRODUCTION

Plaintiff has deep respect for this Bench and believes there are numerous judges who are fair and could handle this case. However, this case presents special circumstances. One of the alleged wrongdoers in the action is Hennepin County Judge Robert A. Blaeser, who currently is the "Presiding Judge" of Civil. Plaintiff was willing to litigate this case at this Bench, hoping that all would go well. But given occurrences since filing this case, Plaintiff now respectfully moves to recuse the entire Hennepin County Bench.

Plaintiff also requests that this Court or the Supreme Court issue an order prohibiting Robert A. Blaeser from contacting any judge assigned to this case.

CASES INVOLVED

1. **27-cv-11-11012** (Rickmyer v. Tom Roy et al, pending case, currently assigned to Judge Bush). This has been dubbed the 10-case; and
2. **27-cv-10-3378** (Rickmyer v. Hodson, closed case, also assigned to Judge Bush), this has been dubbed the 11-case.

KEY

"**1/5/12 Clark Aff.**" refers to the Affidavit of Jill Clark, Esq., filed herewith.

"**Reading Copy**" refers to documents that the parties already have, and which are voluminous and would only increase the size of the paper file to file again. These Reading Copies are being provided to the Chief Judge for ease of reference.

"**Emailed pdf**" refers to scans of documents filed in other cases, which are publicly available and due to their citation herein will be part of the Record. Counsel and unrepresented parties are being emailed pdf's of these documents so that they have t hem quickly. They may print them as they please, but no hard copies will be mailed.

STATEMENT OF FACTS & PROCEDURAL HISTORY

The 10-case was assigned to Judge Porter, who was removed by Plaintiff Rickmyer. It is not known how Robert A. Blaeser became assigned to the case.

John Hoff, a defendant in the 10-case made a number of *ex parte* communications to Judge Blaeser. See the motion for default judgment against John Hoff, and Affidavit of Jill Clark filed therewith on December 12, 2011 (reading copy provided: see Exhibits B-1 and B-2; H-1 and H-2).

Plaintiff Rickmyer objected to Judge Blaeser that Hoff was filing *ex parte* communications, and asked that he order Hoff (who went to law school) to serve all parties. (Reading Copy A: Clark Aff. 12/12/11, Exhibit F). There is no record of Judge Blaeser requiring John Hoff to follow the rules. There is no record of Judge Blaeser transmitting copies of Hoff's *ex parte* communications to the parties, as he would be required to do under his Judicial Canons (see discussion below). There is a record of Judge Blaeser sending an *ex parte* letter to John Hoff – he did not copy any parties. (Reading Copy A: 12/12/11 Clark Aff. Exhibit J).

Pete Rickmyer was *pro se*, and working hard to be successful. John Hoff was clearly evading service of process (he bragged about it in his blog),[1] so Rickmyer worked to serve him by publication. This is not an easy task, even for a lawyer. But he filed all the documents. (See Reading Copy A: 12/12/11 Clark Aff. Exhibit 2). Judge Blaeser would not even review them. Instead, Judge Blaser gave John Hoff what he had asked for in his *ex parte* letter(s) – a ruling that Hoff had not been served and the Court had no jurisdiction over him. (Reading Copy B: 5/17/10 Order of Judge Blaeser in the 10-case).

---

1 See reading copy 12/12/11 Clark Aff. Exhibit D.

In March 2011, Judge Blaeser issued an Order to Show Cause in the 10-case. (Reading Copy A: 12/12/11 Clark Aff. Exhibit G). At that time, Attorney Jill Clark came on board to represent Peter Rickmyer *pro bono* for a proceeding she analyzed as criminal in nature. (See 1/5/12 Clark Aff., which is filed with this Memorandum, Exh. pages 6-9). Rickmyer's probation file was eventually obtained, and documentation in that file showed evidence that Judge Blaeser had fixed the show cause proceeding against Rickmyer. (See next paragraphs, and see Complaint for explication of this. Reading Copy C is Rickmyer's Brief and Appendix on Appeal in the bifurcated *habeas corpus* case (the fact section connects the allegations in the Complaint in this case to the documentation proving the allegations; in the Anoka matter none of the facts alleged in the Complaint were disputed). (Emailed pdf).

Recusal motion regarding Judge Blaeser in the 10-case

Quickly, incoming Plaintiff counsel filed a motion to recuse Judge Blaeser in the 10-case. (1/5/12 Clark Aff. Exh. 5). The March 22, 2011 Memorandum filed therewith is Reading Copy D. The Affidavit of Peggy Katch which attached the factual documentation, is at 1/5/12 Clark Aff. Exhibit 4. The Memorandum began with the following:

> There is evidence that the Honorable Robert A. Blaeser engaged in *ex parte* communications about this case, did not remain neutral, made pledges or promises as to the outcome of issues or proceedings in this case, and that these communications were not disclosed to Plaintiff by the Court. (See Exhibit A and B, appended to the Affidavit of Peggy Katch).

> Plaintiff contends that, accordingly, the Judicial Officer currently assigned to this "civil" file should be removed. (Plaintiff does not waive any of his other arguments or positions.)
>
> Under the circumstances, Plaintiff requests that the Honorable Robert A. Blaeser not be the one to decide whether this motion/memorandum is filed with Court Administration.
>
> Plaintiff seeks a hearing on this motion to remove (if the notice of removal is not honored), before any "show cause" hearing.

(3/22/11 Memorandum).

The Affidavit of Peggy Katch attached a portion of the Probation Officer's "Chronolgical" report. The entry for March 3, 2011 confirms that Will McDonald (defendant in the 11-case) met *ex parte* with Judge Blaeser about the civil case referred to as the 10-case, and that they discussed how Judge Blaeser could issue an order to show cause. (Katch 3/22 Aff. Exhibit A, at 1/5/12 Clark Aff. Exhibit 4, page 2).

An email from Will McDonald to John Hoff confirmed McDonald's *ex parte* communication with Judge Blaeser. (1/5/12 Clark Aff. Exh. 4, page 3-5).

Judge Blaeser did recuse. But in Plaintiff's view, he was not candid about his reasons. Instead of acknowledging that he should recuse because there was documented proof that he had had *ex parte* communications and made pledges or promises in violation of his Judicial Canons, he claimed that the reason for his recusal was because he had filed an ethics complaint against Rickmyer's Attorney, Jill Clark. Judge Blaeser said this related to an "other matter." (1/5/12 Clark Aff. Exh. 6).

Then, Judge Blaeser sent a copy of that letter to John Hoff's blog purportedly as "service" on a party, even though it was Judge Blaeser himself who had found that Hoff

and his blog had *not* been served and his Court had no jurisdiction over them. (*Id.*, which includes a copy of Judge Blaeser's 3/23/11 letter). Defendant Hoff queried in his blog to his readers (which apparently includes Judge Blaeser),

> This blog does not know what is the "other matter" or the "conduct on another matter." We do not know if this "other matter was something recent, or some long ago matter.

(*Id.*). Interestingly, as if in response, Judge Blaeser suddenly sent a second letter on the same topic, which answered Hoff's question. (Clark Aff. ¶2).

Although Hoff seemed to enjoy joking a bit about this on his blog, it is quite serious when judges fix cases and then complain about the lawyer who discovers it in order to try to protect themselves from scrutiny. There is nothing funny about that.

The "other cases" involving Judge Blaeser's "Presiding Judge" conduct

The "other matter"

Plaintiff assumes that the "other matter" that Judge Blaeser was referring to was another case where there is evidence that Judge Blaeser engaged in *ex parte* communications and behind-the-scenes conduct as "Presiding Judge."

In that case, also prosecuted by Attorney Jill Clark, Robert A. Blaeser accepted an *ex parte* email communication from Judge Zimmerman, in which Judge Zimmerman asked him to intervene as "Chief of Civil" so that Judge Zimmerman could get the case back. (1/5/12 Clark Aff. Exh. 7).

and then issued an order to show cause in a case in which neither of them were the judge. Judge Blaeser's Clerk Ana asked Judge Philip D. Bush to sign the order, and he did.

Plaintiff now knows that the "show cause" hearing in that matter was also fixed. Neither Judge Zimmerman nor Judge Blaeser were assigned to that case. Judge Zimmerman wanted a result in the case (to get the case re-assigned to him), and Judge Blaeser agreed to give it to him – and then delivered.

Disturbingly, Judge Blaeser took it upon himself to use his "Presiding Judge" role to issue a show cause order and take action in the case. He ignored the attempt to remove him and gave Judge Zimmerman the relief that Judge Zimmerman was looking for. (Reading Copy D, Chester Group writ action; Email pdf). It is Plaintiff's ardent position that these types of actions by Judge Blaeser are not proper uses of Presiding Judge Authority, and are the epitome of what it looks like to fix a case.

Almost immediately upon learning of the purported "show cause" hearing that Judge Blaeser had agreed to stage for Judge Zimmerman, Paul Stepnes, a plaintiff in that matter, filed a Judicial Standards Board (JSB) Complaint against Judge Blaeser. (1/5/12 Clark Aff. Exh. 12). It is not known when Judge Blaeser learned of this complaint, and whether there are ways of judges obtaining informal information from the JSB before it is formally available.

Plaintiffs in the "other matter" had to expend time and resources to go to the Court of Appeals to try to control Judge Blaeser's "handling" of that case.

As it turns out, Judge Bush (who now has the 10-case and the 11-case) signed the order to show cause for Judge Blaeser. Although Judge Bush is Judge Blaeser's "Buddy Judge," and signed that order, Plaintiff was willing to give him the benefit of the doubt when he was assigned to this case. Plaintiff thought perhaps Judge Bush was not aware of the reason for that order, or its lack of legal authority. At this time that benefit has evaporated, and Plaintiff is seeking from Judge Bush full disclosure about what he knew about the order to show cause issued in that case.

This Honorable Court indicated around that time that as Chief Judge, it lacked the authority to override or reverse decisions of colleagues on the bench. (1/5/12 Clark Aff. Exh. 8). That letter was welcome, and Plaintiff agrees with its analysis.

Plaintiff Rickmyer wants this Court to know that he does *not* consider the Chief Judge to be part of the problem. He considers the Chief Judge to be part of the solution. However, Plaintiff is confused, because if the authority for Judge Blaeser to act as Presiding Judge flows from a delegation of authority from the Chief Judge, why does the Chief Judge not have the authority to recall that delegation, to hold it in check, especially when it is wrongful? With due respect to this Honorable Court, this is a subject that Plaintiff believes bears discussion so that Plaintiff counsel's clients are not harmed by Judge Blaeser's actions.

There are members of the community who believe that the "management" judges are the way in which private parties are able to contact the court and "fix" cases. That these management judges serve an intermediary role, passing information

about which powerful person wants what case fixed. Judge Blaeser's conduct certainly lends credence to that theory. It is time for open discussion of this issue with a branch of government. If this is happening, it is time to set things right. The tight budget is no excuse for unethical and criminal conduct by judges. In fact, it is that conduct that is wasting precious judicial time and resources.

In this time of tight budgets, the plaintiffs in the "other matter" Judge Blaeser communicated to Hoff's blog about, had to trouble the Court of Appeals and have that Court expend its resources, for an order that would permit them to remove Judge Zimmerman, after Judge Blaeser installed him as Judge on that case following his purported "show cause" hearing. *Op. Cit.* The Court of Appeals did permit those plaintiffs to remove Judge Zimmerman if Civil Filing assigns him to the case in the future. (1/5/12 Clark Aff. Exh. 9).

Another "other" matter

Judge Blaeser was busy in winter 2011 with Plaintiff counsel's other clients. In March 2011, he told Judge McShane not to rule on one of Plaintiff counsel's cases, that he would "handle" it. (1/5/12 Clark Aff. Exh. 1, p. 9). Plaintiff does not understand how a judge not assigned to a case can "handle" it. With due respect to the rest of the Bench, that sounds like Judge Blaeser thinks he is *entitled* to fix cases. That somehow because a judge elected to one seat is given the title Presiding Judge, that he can overlook all of the civil law, Judicial Canons, and criminal law and do what he wants to

interfere with cases, promise an outcome, and make it happen.

If this is what Judge Blaeser thinks the title "Presiding Judge" gives him, then there are serious, serious problems with his thinking, and with the culture on this Bench. And there are serious, serious issues with the role of "Presiding Judge." Most aptly, there is no hope for Plaintiff Rickmyer if Judge Blaeser is behind the scenes "handling" anything about these cases.

Michelle Gross, one of the plaintiffs mistreated by Judge Blaeser, filed a Judicial Standards Board complaint against him March 19, 2011. (1/5/12 Clark Aff. Exh. 11).

Judge Blaeser eventually took himself off that case. And it was Assigned to a Judge. (Clark Aff. ¶4).

Yet another "other" case

In the case of Miller v. Waite, Jill Clark wrote to Judge Blaeser asking if he was going to recuse as she was coming onto the file. (Clark Aff. ¶5). He did recuse. (See recusal order at 1/5/12 Clark Aff. Exh. 10).

Judge Abrams refused to grant a reasonable request for extension due to medical leave, which seemed odd. But all became clear later on October 13, 2011. (See below and 1/5/12 Clark Aff. ¶6).

The 11-case and 10-case

After Judge Blaeser recused, the case was reassigned, and Judge Abrams ended up with both the 10-case and the 11-case.

With all due respect to Judge Abrams, who we are not faulting here, he began to do things which appeared to Plaintiff to be strange. With candor to this Court, it began to look like Judge Abrams was doing things in a way that would cause Plaintiff to ask him to recuse. These things are of Record, and there are a series of letters. (Example at 1/5/12 Clark Aff. Exh. 3).

Then, Judge Abrams would not schedule any hearings for Plaintiff. This went on for some time. It was culminating around the time of the sample letter at Exhibit 3. We began to wonder why this distinguished and experienced Judge was exhibiting this. And then it became clear.

The day we learned that Judge Blaeser was still "handling" things

On October 13, 2001, Plaintiff counsel went to the courtroom of Judge Abrams for the Miller v. Waite summary judgment hearing. The parties waited a while, and eventually, after ½ hour after the hearing was to commence, the Clerk for Judge Blaeser walked into the Courtroom and told the parties that Judge Blaeser had judge approved Judge Abrams recusing in that case (Miller) and in the 10-case and 11-case. (Clark 1/5/12 Aff. ¶7).

So, it appeared from that point, that:

1) Judge Blaeser, although he had purportedly "recused" from the 10-case and the 11-case, was really still active "behind the scenes" "handling" the cases; and

2) Judge Blaeser must be operating under a Bench policy E.04, which he apparently thinks grants him the authority to require judges in the civil division to

seek his approval to self-recuse. And, for purposes of this case, he apparently believes that he is entitled to force them to come to him for approval *even when he has recused from the case,* and *even when his conduct is at issue in that case.*

It is basic due process (and judicial canons) to not let a recused judge decide any issues in that case. And no Bench policy should be allowed to trump case law or the constitution.

Plaintiff Rickmyer briefed recusal *law* when he filed his March 22, 2011 motion to recuse Judge Blaeser. Judges must apply the Canons to *themselves,* without any regard for what some other judge thinks about that decision. Plaintiff counsel has heard that this policy was instituted in Hennepin County because lazy judges would self-recuse from difficult or time-intensive cases in order to get out of doing work. (Clark 1/5/12 Aff. ¶8). While it might be laudable to try to prevent that and have the work be more evenly distributed among judges, why wasn't the public consulted before this insider decision was made? What thought was given to the way this would impact the *parties,* who brief the issues based on publicly-available law? What consideration was given to a judge's ethical duty, and to the custom this would create in the Hennepin County Bench?

The reason proposed rules and regulations are promulgated, is to prevent too much insider-thinking. To allow the public to give commentary *from a different perspective.* Citizens, users of the court, have a lot to offer in a period of public promulgation. Citizen users would have been able to tell this Bench, "We don't want

lazy judges on our cases. Please, please, don't have a policy that forces lazy judge to remain on our cases. Let them recuse, and give us a real judge who is willing to apply the law to the facts."

Further, this non-public Policy has wreaked havoc for Plaintiff counsel and her clients. Plaintiff counsel has heard that one reason that "management" judges will accept for self-recusal under the policy, is if the judge has made a lawyers board complaint against the lawyer. Note how that excuse was given by Judge Blaeser disclose in his 3/23/11 letter in the 10-case. (Clark 1/5/12 Aff. ¶9). Is that one of the unpublished yet "approved" reasons for a Hennepin County Judge to recuse? (Or is that how Judge Blaeser is applying the Policy?) Did Judge Blaeser make the complaint against Clark so that he would have an excuse to recuse – under the Policy?

If so (or if there is even a possibility of this), then the Bar should have been consulted about this Policy *before* it was put in place. Frivolous lawyers board charges against lawyers *to give the recusing judge an excuse to recuse* are encouraged by this un-promulgated, unpublished policy. Lawyers cannot afford to have lawyers board complaints against them (which take time and resources, even when they are dismissed), simply to appease some internal Bench notion that judges should have equally distributed work.

Judge Bush

On December 12, 2011, Plaintiff Rickmyer filed a motion to vacate the May 17, 2010 Order in the 10-case, and for default judgment against John Hoff. That motion walks through the various *ex parte* communications between Hoff and Judge Blaeser. And, it noted that as recently as November 2011, Hoff had written an *ex parte* letter to Judge Abrams (which no one had sent to the parties, Plaintiff counsel stumbled upon it in a routine file review), which was sitting on top of the file.

Plaintiff Rickmyer's motion specifically asked Judge Bush ***not to read the November 11 letter in the file*** *because it would taint him.* Not only did he read it, he granted relief based on a letter-request, and it is obvious from his order that he took as true facts alleged in the *ex parte* letter. (*See* Judge Bush's *sua sponte* order in the 11-case, staying that case as to John Hoff). Plaintiff cannot say for sure, but what if Judge Bush did this to get Plaintiff to ask him to recuse – because Judge Blaeser was not letting him do so? Given what happened with Judge Abrams, this is a logical question.

This Honorable Court should consider whether it should relieve pressure on these good judges who appear to be being pressured by Judge Blaeser about a case *where he is a potential witness and alleged wrongdoer*!

Plaintiff objected to the *sua sponte* order in favor of John Hoff asked Judge Bush to disclose communications to/from Judge Blaeser (*see* email dated December 30, 2011). No response to date. (1/5/12 Clark Aff. ¶10).

ARGUMENT

A. The General law of recusal.

1. Neutral Judge Required.

The controlling principle is that no judge, when other judges are available, ought ever to try the cause of any citizen, *even though he be entirely free from bias in fact,* if circumstances have arisen which give a bona fide appearance of bias to litigants. *Wiedemann v. Wiedemann*, 228 Minn. 174, 36 N.W.2d 810 (1949); see also Payne v. Lee, 222 Minn. 269, 24 N.W.2d 259 (1946).

> "Because public trust and confidence in the judiciary depend on the integrity of the judicial decision-making process, we can ill afford to ignore this problem." *State v. Greer*, 635 N.W.2d 82, 93 (Minn. 2001) ("*Greer I*") (emphasis added).

Parties have a constitutional right to an impartial judge. Impartiality is the very foundation of the American judicial system. *See Greer v. State,* 673 N.W.2d 151 (Minn. 2004) ("Greer III"), citing *Payne v. Lee,* 222 Minn. 269, 277, 24 N.W.2d 259, 264 (1946).

> Although the right to a trial before an impartial judge is not specifically enumerated in the Constitution, this principle has long been recognized by the United States Supreme Court. *Rose v. Clark,* 478 U.S. 570, 577, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (citing *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927)); *see also Greer v. State,* 673 N.W.2d 151, 155 (Minn.2004) ("[I]mpartiality is the very foundation of the American judicial system."). In *Pederson v. State,* we said, "[t]o maintain public trust and confidence in the judiciary, judges should avoid the appearance of impropriety and should act to assure that parties have no reason to think their case is not being fairly judged." 649 N.W.2d 161, 164-65 (Minn.2002).

State v. Dorsey, 701 N.W.2d 238 (Minn. 2005). *Dorsey* also noted that judges must be able to "approach every aspect of each case with a neutral and objective disposition," citing *Liteky v. U.S.*, 510 U.S. 540, 561-62 (1994).

Recusal is required when a "reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits." *In re Mason*, 916 F.2d 384, 385 (7th Cir. 1990). See also *Cheney v. United States District Court*, 541 U.S. 913, 914, 124 S. Ct. 1391 (2004) (Scalia, J., in chambers).

2. Judicial Canons are not just aspirational.

Several Minnesota cases have held that the Canons of Judicial Ethics are not merely aspirational, but may require a judge to disqualify himself. *See, e.g., Powell v. Anderson*, 660 N.W.2d 107, 114 (Minn. Ct. App. 2003) and *Dorsey, supra*. Both of those cases discussed Canon 3D(1) of the Minnesota Code of Judicial Conduct and the requirement to disqualify. The Minnesota Judicial Canons were updated in December 2008, and the numbering has changed. Although these cases were decided under the prior set of Canons, the analysis is still applicable to the current set of Canons.

3. Canons Potentially at Issue in this Case.

Canons potentially at issue here include:

***

Definitions

"Impartial," "impartiality," and "impartially" mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. See Canons 1, 2, and 4, and Rules 1.2, 2.2, 2.10, 2.11, 2.13, 3.1, 3.12, 3.13, 4.1, and 4.2.

"Pending matter" is a matter that has commenced.

1. Applicability of This Code.

(A) The provisions of the Code apply to all full-time judges.

(B) A judge, within the meaning of this Code, is anyone who is employed by the judicial branch of state government to perform judicial functions....

[1] The Rules in this Code have been formulated to address the ethical obligations of any person who serves a judicial function....

CANON 1:

Rule 1.2 Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes the public confidence in the independence ... of the judiciary...

Comment

Rule 1.2[2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.

CANON 2: A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY....

Rule 2.2 Impartiality and Fairness

A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] ...a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

Comment

[1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

Rule 2.4 External Influences on Judicial Conduct

(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.

Comment

[1] An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular, with the public, the media, government officials or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

Rule 2.6 Ensuring the Right to be Heard

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.

Comment

[1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

RULE 2.9 *Ex Parte Communications*

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

...

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

Rule 2.10 Judicial Statements on Pending and Impending Cases

(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

Comment

[1] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

[6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.

Rule 2.11 Disqualification

(A) A judge shall disqualify himself [] in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a

party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

(2) The judge knows that the judge ... is ... (d) likely to be a material witness in the proceeding.

(4) The judge, while a judge or judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

Comment

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (5) apply. In many jurisdictions, the term "recusal" is used interchangeably with the term "disqualification."

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

4. Bias against counsel as reason to recuse.

Bias against a party's choice of counsel does require recusal of judicial officers. As noted in *Rosen v. Sugarman*, 357 F.2d 794 (2d Cir. 1966), a case in which a judge threatened an attorney with contempt, "even when a judge's initial adverse reaction to a lawyer may have stemmed from reasons that were legitimate or at least understandable, it is undeniable that if such an antipathy has crystallized to a point where the attorney can do no right, the judge will have acquired "a bent of mind that may prevent or impede impartiality of judgment...." (quoting *Berger v. U.S.*, 255 U.S. 22, 33-4 (1921). *See also, U.S. v. Oaks*, 606 F.3d 530, 536 (8th Cir. 2010), noting the district judge's handling of ordinary proceedings will not be evidence of bias unless they portray a "deep-seated favoritism or antagonism that would make fair judgment impossible." See *Liteky*, 510 U.S. at 555-56.

5. Failure to disclose is a separate basis to recuse.

Failure to disclose is a separate basis to disqualify a judge. *Liljeberg v. Health Services Corp.*, 486 U.S. 847, 865, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988) (district judge's failure to disclose once he became aware of his relationship to the case, was "inexcusable").

In *Hallett v. Hallett,* 153 Or. 63, 55 P.2d 1143 (1936), the [Oregon] Supreme Court reversed a child custody decision that the trial court based in part on evidence that it learned during its own investigation and that was not in the record. *Lamonts Apparel, Inc. v. Si-Lloyd Assoc.*, 956 P.2d 1024, 1026 (Or. Ct. App. 1997) (and

federal cases cited therein). "Knowledge possessed by the judge alone cannot be permitted to influence him in his judicial decisions." *Id.* As the Oregon Courts noted, ***undisclosed*** *ex parte* communications are even more harmful to the process. The Oregon Supreme Court held that *ex parte* communications with a judge deciding a civil motion, or presiding over a bench trial, are improper. That Court determined that such communications create a *presumption* of prejudice.

B. Bases to Recuse the Bench.

Plaintiff's motion is based upon the following bases to ask the Bench to recuse. These Sections include facts and argument.

A number of the cited documents were filed in other cases or for other motions in these cases. If the documents are already in the court record for the 10-case or the 11-case, only a reading copy is provided. If they are from other cases, they are marked as exhibits and filed with this memorandum.

1. Judge Blaeser's conduct is at issue in the 11-case.

Judge Robert A. Blaeser's conduct is at issue in this case. Although Plaintiff Rickmyer seeks to be as respectful as possible, for purposes of this motion he must note that Robert A. Blaeser is the 'state court judge' referred to in the complaint in the 11-case. (Reading copy of Complaint included for Court). As such, the conduct of Judge Blaeser is at issue in the lawsuit. It is unclear at this time whether he will be called as a witness by one or more parties. *See* Canon 2.11(A)(2)(d).

Plaintiff contends that it may not be possible for judges of this Bench to be

impartial in a situation in which a colleague judge is accused of wrongdoing. But further, Judge Blaeser serves as the Presiding Judge of Civil, and this is a civil case. Although Plaintiff confesses that he does not fully understand the role of "Presiding Judge," it certainly seems like a supervisor position. Or at least Judge Blaeser is treating it that way. And what judge could be expected to be impartial when the allegations are about his boss? See Canon 2.4(B).

Or, perhaps more to the point, isn't there a concern that Judge Blaeser will assert direct or indirect pressure on whatever judge is assigned, to rule in a way that benefits Judge Blaeser?

2. Parties cannot tell what Judge Blaeser is doing.

Judge Blaeser has used his position as "Presiding Judge" to make decisions about this case including who can recuse and who cannot. It is unclear what other decisions Judge Blaeser has made. Is he interfering with Civil Assignments? Is he asking Court Administration to take actions that would harm Plaintiffs?

Because Judge Blaeser is no longer the judge in the case – how can Plaintiff keep track of what he is doing? We know that he will entertain *ex parte* communications. *See* Canon 2.9. What legal vehicle would allow Plaintiff to obtain disclosures from a "Presiding Judge?" What does it mean, under the *law*, if a judge recuses but then stays involved in the case?

Plaintiff has also been unable to obtain disclosures from Judge Bush as to any communications from Judge Blaeser. What judge would report their boss?

3. Judge Blaeser appears biased against Plaintiff counsel.

Given the number of cases being prosecuted by Plaintiff counsel that Judge Blaeser has wrongfully interfered with, there is an appearance of bias toward Plaintiff counsel. This is systemic (across several cases) and it is connected to Judge Blaeser's purported role as "Presiding Judge." Although the law is clear that "appearance" of impropriety is the standard to disqualify a judge, Plaintiff is not aware of any case law that deals with management judges and their conduct across several cases.

4. Policy that Judge Blaeser is using is unconstitutional.

The Policy **E.04** is unconstitutional.[2] First, secret laws are not allowed in a democracy. The policy was not publicly promulgated, and it was not publicly published. It took Plaintiff counsel about 5 years to obtain the policy. Only if the rules are published, can a party challenge their scope or constitutionality. *Cf.*, 12 Fed. Prac. & Proc. Civ.2d §3153, gathering federal cases challenging the scope of published local rules. *See, e.g., U.S. v. Wecht*, 484 F.3d 194 (3d Cir. 1007) (criminal defendant challenged local court rule that "gagged" attorneys, and the rule was stricken as unconstitutional under First Amendment). The Policy is unconstitutional because it denies basic due process: to know who the decision-maker is, and to have the *law of the land* applied to the case.

---

2 We don't know if this is current. It took Plaintiff counsel about 5 years to get this one. The Court Administrator has not responded to a recent request for Policies.

Policy **E.04** prevents the parties from knowing: a) when a second judge is being approached; b) what the first judge is telling the second judge about whether s/he should recuse; c) what the criteria are for permitting recusal (these are clearly not law, but "custom" at the Fourth Judicial District, one of which is likely this 'if you made a lawyers board complaint' custom); and d) what the second judge considered when making the decision.[3]

---

[3] *See, e.g., Swank v. Smart,* 898 F.2d 1247, 1256 (Ex parte presentation of evidence denies due process ····"); *see also Greene v. McElroy,* 360 U.S. 474, 496, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) ("[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."); *U.S. v. Abuhamra,* 389 F.3d 309 (2d Cir. 2004) (district court's reliance on *ex parte* and *in camera* information to deny defendant's post-trial, statutory bail application violated due process; This right to notice and a fair hearing obtains regardless of whether the "case against" a defendant is presented on an issue on which the government bears the burden of proof or in opposition to a position on which the defendant bears the burden. *Cf.* The underlying point is the same: "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. at 171, 71 S.Ct. 624 (Frankfurter, J., concurring); *see also United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537, 551, 70 S.Ct. 309, 94 L.Ed. 317 (1950) (Jackson, J., dissenting) ("The plea that evidence of guilt must be secret is abhorrent to free men."). That, of course, is the due process concern raised when a court relies on *ex parte* submissions in resolving an issue that is the subject of an adversarial proceeding. Particularly where liberty is at stake, due process demands that the individual and the government each be afforded the opportunity not only to advance their respective positions but to correct or contradict arguments or evidence offered by the other. *See generally Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. at 171 n. 17, 71 S.Ct. 624 (Frankfurter, J., concurring) (citing *Board of Educ. v. Rice* [1911] A.C. 179, 182 (noting the "duty lying upon everyone who decides anything" to "act in good faith and fairly listen to both sides ··· always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view")).

See e, g., Spangler v. Atchison, T. & S.F.R. Co., 42 Fed. 305, 306 (C.C.D. Mo. 1890) ("A 'rule of court' means uniformity—a regulation in practice applying to all suitors, established and fixed, as much so as a statute itself, and known to all litigants and suitors.") Further, the Minnesota Supreme Court has ruled that it is an abuse of discretion to rule on the basis of a "blanket policy," rather than on the assessment of particular facts presented by the case. *State v. Martin*, 743 N.W.2d 261 (Minn. 2008).

As noted above, the Policy also has the impact of fostering lawyers board complaints against members of the Bar, which surely was never the intent, but is the fallout. These policies must see the light of day, be challenged by the bar on behalf of their clients (and themselves), and in that way we create the best law. We also create appellate case that that either interprets a particular policy, or helps us understand the role of policies, in general, in the courts.

It is all well and good for some judges to say that these Policies don't trump any statute or other statewide law. But the Judicial Bench Policy Manual Maintenance Protocol says otherwise. That document (1/5/12 Clark Aff. Exh. 15) defines "policy" as, "Approved by the Executive Committee, a policy is a governing principle that mandates or constrains action."

And it is clear that Judge Blaeser is using the Policy in a *mandatory* way. There is other evidence from around the Courthouse that judges in Family Court must also request *permission* to recuse.

Stated another way, if the Policy is not public, and not litigated, then no one really knows whether it trumps statewide law (it may or may not be designed to trump it, but it might *de facto* trump it, even if not designed that way). Democracies abhor secret laws for this very reason: because they can always be changed by those with raw power. What gives us the chance of being a democracy is that each and every man, woman and child who wants to *can read the law*, and cite it. And each and every man and woman is subject to the *same law*.

5. Ex parte communications of two judges unethical.

Plaintiff's position is that the *ex parte* communication between the first judge (who wants to recuse) and the second judge (who is deciding whether s/he can) are unethical and violate:

- 1.2 - failing to promote confidence in the Judiciary;
- 2.2[2] – failing to interpret the law without regard to whether the judge(s) approve or disapprove of it;
- 2.4(B) – Permitting other interests or relationships to influence the judge's conduct or judgment (see Comment [1], "[1] An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular, with the public, the media, government officials or the judge's friends or family. **Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.**");

- 2.9(A) – engaging in ex parte communications, "A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge **outside the presence of the parties or their lawyers**, concerning a pending or impending matter...."

These discussions about whether a judge should recuse from a case are *ex parte* communications about the case, relaying facts about the case, and they *build in* outside influence. Plaintiff is here to say that they erode confidence in the judiciary.

6. Judge Blaeser's unethical conduct is spilling over.

It is easy to spot Judge Blaeser's unethical conduct. He had *ex parte* communications (2.9), he made "pledges and promises" about how he would rule (that is the essence of "fixing a case") (2.10(B)) and failed to make required disclosures (2.11, Comment [5]). She should not be allowed to *touch* these cases. He has proven himself unworthy to do so.

But more importantly for this motion, Judge Blaeser's conduct appears to be causing good judges (Judge Abrams and Judge Bush) to do strange things, to allow them to be able to obtain recusal permission from Judge Blaeser.

Plaintiff is disappointed that judges don't come forward to disclose what pressure they feels under. Plaintiff does not know what other de facto powers Judge Blaeser wields. Can he stop a paycheck of a judge? Plaintiff thanks Judge Abrams for having his Clerk disclose that Judge Blaeser was wielding some power in the recusal process.

Plaintiff makes this motion to recuse the entire Bench due to the unique circumstances of this case. Plaintiff counsel is *not* in any way saying this entire Bench has problems. Far from it. But because Judge Blaeser is both colleague and "supervisor" at this Bench, and likely a witness, recusal may well be appropriate.

Plaintiff does not lightly place yet another burden on this Chief Judge. However, only this Chief Judge will know whether this Bench can provide due process in this civil case, with Judge Blaeser in the position of Presiding Judge or in the Courthouse at all. We leave it to Your Honor's wise discretion.

C. Decisions of Judge Abrams and Judge Bush should be Vacated.

Given all that is discussed above, to give the out-of-district judge a clean slate on which to decide these cases (to prevent voluminous litigation over whether Judge Abrams said something once in a letter that would bind the new judge), Plaintiff seeks *vacatur* of all orders of Judge Abrams and Judge Bush in the 11-case. *Vacatur* is appropriate when a judge should have disqualified but did not. *See Powell v. Anderson*, 660 N.W.2d 107, 114 (Minn. Ct. App. 2003); *State v. Dorsey*, 701 N.W.2d 238 (Minn. 2005); *Liljeberg v. Health Services Corp.*, 486 U.S. 847, 862-4 (1988). Judge Blaeser should have *actually* disqualified from the 11-case. Under these circumstances, *vacatur* is appropriate.

Plaintiff is not at this time requesting *vacatur* of the May 17, 2011 Order of Judge Blaeser in the 10-case, but he reserves the right to move the new judge for such relief. Plaintiff has already filed a motion to vacate that order. Plaintiff

requests that all of his motions be heard by the out-of-district judge.

CONCLUSION

Plaintiff respectfully requests that the Chief Judge:

1. Recuse the entire Hennepin County Bench, and request that the Supreme Court appoint an out-of-district judge.

2. If that occurs, then Plaintiff additionally requests that the Supreme Court be advised that Plaintiff Rickmyer requests a judicial order of that Court that Robert A. Blaeser not be allowed to have contact *in any way* (direct or indirect) with the out-of-district judge or his staff.

3. If the motion to recuse the entire Bench is denied, Plaintiff requests a judge that does not "report" to Judge Blaeser, and that Judge Blaeser be ordered not to have any contact with any judge or staff about these cases, in addition to the no-contact order requested in #2.

4. Plaintiff requests *vacatur* of all orders of Judge Abrams and Judge Bush in the 11-case, as a remedy for the interference of Judge Blaeser.

Dated: January 5, 2011

ATTORNEY FOR PLAINTIFF

s/jillclark

Jill Clark, Esq. (#196988)[4]
Jill Clark, LLC
2005 Aquila Avenue North
Golden Valley, MN 55427
Phone: (763) 417-9102

[4] to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.