

## COMMENTS ON RECOMMENDATION ON RECUSAL RULES FOR ADMINISTRATIVE ADJUDICATORS

Andrew N. Vollmer  
Public Member of the Assembly

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The Recommendation on Recusal Rules for Administrative Adjudicators addresses an important area and balances the need for general principles with the potential differences among agencies.

During the discussion, the Assembly should consider whether the Recommendation should take a more definitive position on whether it applies to agency heads. The current draft is ambiguous on application to agency heads. Page 2 lines 19-21 state “This Recommendation does not, however, necessarily apply to adjudications conducted by agency heads, as there are additional considerations associated with their role as chief policy makers for their agencies.” Page 4 line 68 states that recusal rules should not necessarily apply to agency heads.

The Recommendation is correct that special disqualification considerations apply to agency heads because at many agencies they perform a combination of legislative, law enforcement, and adjudicative functions. A 2016 Supreme Court decision creates a particular due process concern with agency heads making a decision to charge a person with a violation of law and then participating in an adjudication to determine whether the violation occurred. See *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. Mich. J.L. Reform 101 (2018) (forthcoming).

Many parts of the Recommendation would be useful when determining rules for the disqualification of agency heads, but the Recommendation does not identify and discuss the special issues associated with the recusal of agency heads and does not explain how recusal rules should resolve the special issues. For example, has an agency head adjudicating a case prejudged facts or created an improper personal interest when he or she voted earlier to charge a defendant with a breach of the agency’s rules? Do agency heads have an improper incentive to skew legal interpretations in an adjudication to favor the agency’s enforcement program and future appropriation requests? What should an agency do when recusals result in a lack of a quorum? These questions generally do not arise for an adjudicator who is not the head of an agency.

My proposal is that the Recommendation explicitly state that it does not apply to agency heads because some different considerations bear on their recusal. The Recommendation should also say that many of its provisions nonetheless would be useful when determining rules for the disqualification of agency heads:

Page 2 lines 19-21 could be revised to say: “This Recommendation does not apply to adjudications conducted by agency heads, because additional considerations are associated with their roles, but many of the provisions in the Recommendation should be taken into account when determining rules for the recusal of agency heads.”

Page 4 line 68 could be revised to say: "... from those hearings but not to agency heads."