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Committee on Judiciary

REVIEW THE PROCEDURES AND STANDARDS GOVERNING JUDICIAL DISQUALIFICATION

Issue Description

Judicial impartiality is a core principle of the administration of justice in civil and criminal matters in the United States. Thus, state judicial systems provide mechanisms for a judge to be disqualified from a matter if a legally sufficient argument can be made that the judge's continued participation would prevent a party from receiving a fair hearing.

In Florida, disqualification of a trial judge is governed by statutory provisions and by rules of court, as well as by the Code of Judicial Conduct. A judge may disqualify himself or herself, or a party may formally move for disqualification. Under the Florida Rules of Judicial Administration, a motion to disqualify a trial judge must be in writing and specifically allege the facts and reasons that are the basis for disqualification. In addition, the motion must be sworn to by the moving party by signing the motion under oath or by a separate affidavit. Further, the attorney for the moving party must separately certify that the motion and the client's statements are made in good faith. Grounds for granting a motion to disqualify a judge include: (1) that the party fears he or she will not receive a fair trial or hearing due to judicial prejudice or bias; or (2) that the judge has an interest in the outcome of the matter, is related to one of the attorneys, or is a material witness.

This interim report examines the statutory, court rule, and case law framework governing disqualification of judges in civil and criminal matters in Florida. The report identifies any procedural or substantive elements of judicial disqualification that may merit revision by the Legislature through changes to statute or by the Supreme Court through changes to court rules, and it examines other jurisdictions' practices relating to judicial disqualification.

Background

Origins of Judicial Disqualification

The concept that judges should be fair and impartial dates back to the inception of the courts, and edicts designed to facilitate judicial impartiality have existed since ancient times.¹ Judicial disqualification² is "[r]ooted in the ancient maxim that judges should stand apart from the matter before them."³ Early Jewish law and the Roman Code of Justinian contemplated the removal of judges on the suspicion of bias.⁴ Litigants in early times enjoyed an expansive power to disqualify or recuse judges that "formed the basis for the broad disqualification statutes which generally still prevail in civil-law countries."⁵

¹ Richard C. Flamm, *Judicial Disqualification in Florida*, 70 FLA. B.J. 58, 58 (Feb. 1996).

² The terms "disqualification" and "recusal" are used interchangeably throughout this report. Typically, "recusal" refers to a judge's decision to withdraw from presiding over a case on his or her own volition. "Disqualification" usually refers to a judge's withdrawal from a case at the request of one or more parties. However, in Florida, as well as in other jurisdictions, the terms "disqualification" and "recusal" are sometimes used interchangeably in practice, case law, statutes, rules, and ethical canons.

³ John A. Meiser, *The (Non)Problem of a Limited Due Process Right to Judicial Disqualification*, 84 NOTRE DAME L. REV. 1799, 1803 (Apr. 2009).

⁴ Flamm, *supra* note 1, at 58.

⁵ *Id.*

Development of Judicial Disqualification in the United States

Judicial disqualification law in the United States is derived from the English common law, and the rule that “no man shall be a judge in his own case” was accepted in English law as early as the 17th century.⁶ However, this concept was often limited in its application – resulting in the disqualification of judges in only those cases in which the judge had a direct pecuniary interest.⁷ As a result of this strict application, English courts initially rejected disqualification premised upon a familial relationship to one of the parties in the case.⁸

Congress enacted the first recusal statute within three years following the ratification of the United States Constitution.⁹ This law (the Act of May 8, 1792) “allowed federal district court judges to be disqualified if they had a financial interest in the litigation or had served as counsel to either party.”¹⁰ Over time, federal and state courts broadened application of disqualification and recusal standards, and by the turn of the 19th century “both federal and state governments began attempts to restrain judicial bias through statutory control.”¹¹

Current federal law – a derivative of the 1792 statute – provides specific and general grounds for recusal and disqualification by building upon the pecuniary-interest standard by adding “bias-based restrictions” on a federal judge’s ability to preside over certain cases.¹² One statute includes a waivable catch-all provision, which mandates that a federal justice, judge, or magistrate remove himself from any litigation “in which ‘his impartiality might reasonably be questioned.’”¹³ The statute also delineates particular, unwaivable scenarios in which “perceived conflicts of interest require a judge to step down from a case,” notwithstanding the judge’s assessment of whether an actual conflict exists.¹⁴

Most states have enacted judicial disqualification statutes akin to the federal laws.¹⁵ However, state disqualification laws may be difficult to characterize “because, within a given state, constitutional provisions, statutes, court rules, judge-made doctrine, codes of judicial conduct . . . , ethics board rulings, and administrative directives may all provide legal authority for removing a judge.”¹⁶ In every state, a judge is subject to removal for at least a demonstration of good cause.¹⁷ In a minority of states, a judge may be removed on a peremptory basis without any demonstration of bias or other cause. Specific judicial disqualification procedures and standards from particular states are presented throughout the “Findings” section of this report.

ABA Model Code of Judicial Conduct

In 1972, the American Bar Association (ABA) drafted its Model Code of Judicial Conduct (Model Code), which has been adopted in some form in almost every state and by Congress.¹⁸ The Model Code recognizes that an “independent, fair and impartial judiciary is indispensable to our system of justice.”¹⁹ Rule 2.11 of the Model

⁶ Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 538-39 (Apr. 2005).

⁷ *Id.* at 539.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Meiser, *supra* note 3, at 1804. These provisions prohibited judges from hearing the appeal of cases in which the judge actually tried the lower case and allowed disqualification for bias or prejudice upon a party’s demonstration of bias or prejudice in an affidavit. See Act of Mar. 3, 1911, ch. 231, s. 22, 36 Stat. 1087, 1090.

¹² *Id.* at 1805. See 28 U.S.C. s. 455.

¹³ *Id.* (quoting 28 U.S.C. s 455(a)).

¹⁴ *Id.* at 1806 (citing 28 U.S.C. s. 455(b)).

¹⁵ At the federal level, judicial disqualification is governed by the following statutes: 28 U.S.C. s. 144, 28 U.S.C. s. 455, and 28 U.S.C. s 47.

¹⁶ Deborah Goldberg et al., *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 516 (2010), available at <http://www.washburnlaw.edu/wlj/46-3/articles/goldberg-deborah.pdf> (last visited Sept. 30, 2010).

¹⁷ Meiser, *supra* note 3, at 1806.

¹⁸ Goldberg, *supra* note 16, at 513.

¹⁹ MODEL CODE OF JUDICIAL CONDUCT (2007), pmbl.

Code's Canon 2 provides that a "judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned."²⁰ Specific grounds for disqualification include scenarios in which:

- The judge has a personal bias or prejudice concerning a party or party's lawyer;
- The judge has personal knowledge of disputed evidentiary facts;
- The judge has served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning the matter;
- The judge knows that he or she or the judge's spouse, domestic partner, parent, or child has an economic interest in the subject matter in controversy;
- The judge, the judge's spouse, domestic partner, or family member within the third degree of relationship is:
 - A party to the proceeding;
 - A lawyer in the proceeding;
 - Known by the judge to have any interest affected by the proceeding; or
 - Likely to be a material witness in the proceeding;
- The judge learns that a party, a party's lawyer, or the law firm of a party's lawyer has made contributions to the judge's campaign in a delineated amount; or
- The judge, while a judge or candidate for public office, has made a public statement that commits, or appears to commit, the judge with respect to an issue or controversy in the proceeding.²¹

Under this rule, a judge is disqualified if the judge's impartiality might reasonably be questioned, regardless of whether any of the specific criteria for disqualification apply.²² Canon 2 (formerly Canon 3E) of the Model Code is the cornerstone of the current disqualification laws in the United States.²³

Judicial Disqualification in Florida

Judicial disqualification in Florida is governed by statute, court rule, and ethical canons modeled after the Model Code of Judicial Conduct. Some of these provisions overlap, while some provisions provide independent bases for disqualification of a judge.

Statutory Provisions

There are two primary statutory provisions governing judicial disqualification.²⁴ The first statutory provision provides that a party may pursue disqualification of a judge by a "suggestion" that the judge, or someone related to the judge, is a party or is interested in the result of the case, the judge is related to one of the attorneys, or the judge is a material witness in the case.²⁵ If the judge determines that the truth of the suggestion appears from the record, he or she must enter an order of disqualification. If the truth of the suggestion is not readily apparent from the record, the judge may request affidavits to assist in the determination of the need for disqualification.²⁶

The second statutory provision is more commonly utilized for disqualification in Florida.²⁷ Under this provision, litigants have a substantive right to seek disqualification of a judge for perceived prejudice or bias.²⁸ A party must file a motion with an affidavit stating "fear that he or she will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse

²⁰ MODEL CODE OF JUDICIAL CONDUCT (2007), Rule 2.11.

²¹ *Id.*

²² *Id.*, Comment.

²³ Goldberg, *supra* note 16, at 514.

²⁴ Sections 38.02 and 38.10, F.S.

²⁵ Section 38.02, F.S. Under the statute, the judge must be related to the party or attorney by "consanguinity or affinity within the third degree." *Id.* The "suggestion" must be filed within 30 days after the party or the party's attorney learned of the grounds for disqualification. *Id.* In practice, the "suggestion" is a written motion filed by the party.

²⁶ *Id.*

²⁷ Flamm, *supra* note 1, at 59.

²⁸ Section 38.10, F.S.

party.”²⁹ The statute specifies that, upon the filing of the motion, the judge can proceed no further, and another judge will be immediately substituted. Despite the wording of the statute, the Florida Rules of Judicial Administration require the judge to make an initial determination of the legal sufficiency of the motion. The rule is discussed in greater detail below. Two other statutes related to judicial disqualification are less frequently used and relate to disqualification when a judge is a party to the suit and disqualification on the judge’s own initiative if the judge discovers any ground for recusal.³⁰

Florida Rules of Judicial Administration

Florida Rule of Judicial Administration 2.330 prescribes the procedures for disqualification of county and circuit judges in all divisions of court, which are similar to the procedures contemplated by statute.³¹ Under the rule, any party, including the state, may move to disqualify a judge on grounds provided by rule, by statute, or by the Code of Judicial Conduct.³² The motion must be in writing, allege specific facts and rationale for the disqualification, be sworn to under oath or by separate affidavit, and include the dates of all previously granted motions to disqualify filed under the rule.³³ In addition, the party’s attorney must also separately certify that the motion and the client’s statements are made in good faith.

The rule also sets forth the following grounds for disqualification, which differ only slightly from those provided in statute:

- The party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge;
- The judge has an interest in the matter or is related to a party or the party’s attorney, or to someone who has an interest in the outcome of the matter; or
- The judge is a material witness in the matter.³⁴

Under the rule, the party must file the motion to disqualify within 10 days after the discovery of the facts constituting the grounds for disqualification.³⁵ After the filing of the motion, the judge must determine if the motion is legally sufficient and is not allowed to comment on the truth of the facts alleged in the motion. If the motion is legally sufficient, the judge must immediately enter an order granting disqualification. Conversely, if the motion is legally insufficient, the judge must immediately enter an order denying the motion.³⁶ The standard for review of a motion to disqualify is whether the facts alleged, which must be assumed to be true, would cause the movant to have a well-grounded fear that he or she will not receive a fair trial at the hands of the judge.³⁷ The rationale for the movant’s fear of judicial prejudice or bias must be “objectively reasonable.”³⁸

Additional motions to disqualify a successor judge by the same party in the same case or proceeding are treated differently. Under the rule, if a judge has been previously disqualified, a successor judge may not be disqualified

²⁹ *Id.* The statute requires that the affidavit contain the facts and the reasons for the belief that the bias or prejudice exists and must be accompanied by a certificate of counsel of record that the affidavit and application are made in good faith.

³⁰ Sections 38.01 and 38.05, F.S.

³¹ Fla. R. Jud. Admin. 2.330(a).

³² Fla. R. Jud. Admin. 2.330(b).

³³ Fla. R. Jud. Admin. 2.330(c).

³⁴ Fla. R. Jud. Admin. 2.330(d). The rule also states that the judge must be related to the party or attorney by “consanguinity or affinity within the third degree.”

³⁵ Fla. R. Jud. Admin. 2.330(e).

³⁶ Fla. R. Jud. Admin. 2.330(f). The judge may not otherwise comment on the merits of the motion upon the entry of the order denying the motion. Even when the allegations are untrue, outrageous, or scandalous, judges should not try to defend their honor or reputation when reviewing and ruling upon motions for disqualification. *Hill v. Feder*, 564 So. 2d 609 (Fla. 3d DCA 1990). The judge must rule on the motion to disqualify within 30 days of service. Fla. R. Jud. Admin. 2.330(j).

³⁷ *Livingston v. State*, 441 So. 2d 1083 (Fla. 1983).

³⁸ *State v. Shaw*, 643 So. 2d 1163, 1164 (Fla. 4th DCA 1994).

by the same party unless the successor judge rules that he or she is in fact not fair or impartial.³⁹ The successor judge is allowed to rule on the truth of the facts alleged in support of the motion to disqualify.⁴⁰

Code of Judicial Conduct

The Florida Code of Judicial Conduct (Code), which regulates conduct of Florida trial and appellate judges, also provides an independent basis for disqualification.⁴¹ Florida Canon 3E requires a judge to disqualify himself or herself from a proceeding if “the judge’s impartiality might reasonably be questioned.” This canon delineates specific criteria requiring disqualification that are similar to the criteria contained in the Florida Statutes and the Florida Rules of Judicial Administration. However, Canon 3E contains an additional ground for disqualification including scenarios in which a judge, while a candidate for office, has made a public statement that commits, or appears to commit, the judge with respect to parties or classes of parties in the proceeding, or to an issue or controversy in the proceeding.⁴² The canon also imposes a duty on a judge to keep informed about his or her personal and fiduciary economic interests, and make a reasonable effort to keep abreast of the economic interests of the judge’s spouse and minor children.

In addition to setting forth certain standards for recusal, the Code provides that a judge should “disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.”⁴³ The fact that the judge discloses information related to disqualification does not automatically require the judge to be disqualified, but the issue should be determined on a case-by-case basis.⁴⁴ After the judge’s disclosure on the record, the judge may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification.⁴⁵

Disqualification of Appellate Judges

With regard to Supreme Court justices and district court of appeal judges in Florida, the Rules of Appellate Procedure do not explicitly address disqualification. A distinct standard for disqualification has developed in case law. Under this standard, each justice or judge must determine for himself or herself both the legal sufficiency of a request seeking his or her disqualification and the propriety of withdrawing in any particular circumstances.⁴⁶ In addition to this standard, appellate judges are also subject to the disqualification standards prescribed in the Florida Code of Judicial Conduct.⁴⁷

Judicial Disqualification Reforms

Nationally, concerns about some high-profile disqualification cases have served as the catalyst for judicial disqualification reform. For example, in *Cheney v. United States District Court for the District of Columbia*, Justice Antonin Scalia chose to remain on this case although he had vacationed with Vice President Cheney shortly after the U.S. Supreme Court chose to hear the matter.⁴⁸ This debate focused not only on “whether Justice Scalia would in fact be biased in Cheney’s favor as a result of their social contact, but also whether the trip would create the appearance that he might be.”⁴⁹ Justice Scalia delivered a 21-page opinion defending his decision to remain on the case, relying primarily upon his assurances that the case was never discussed and that he was never alone with Vice President Cheney.

³⁹ Fla. R. Jud. Admin. 2.330(g).

⁴⁰ *Id.*

⁴¹ Flamm, *supra* note 1, at 58.

⁴² FLORIDA CODE OF JUDICIAL CONDUCT, Canon 3E(1)(f).

⁴³ FLORIDA CODE OF JUDICIAL CONDUCT, Canon 3E(1) comment.

⁴⁴ *Id.*

⁴⁵ FLORIDA CODE OF JUDICIAL CONDUCT, Canon 3F.

⁴⁶ *Clarendon Nat’l Ins. Co. v. Shogreen*, 990 So. 2d 1231, 1233 (Fla. 3d DCA 2008).

⁴⁷ See FLORIDA CODE OF JUDICIAL CONDUCT, *Application of the Code of Judicial Conduct* (stating that the Code “applies to justices of the Supreme Court and judges of the District Courts of Appeal, Circuit Courts, and County Courts”).

⁴⁸ *Cheney v. U.S. Dist. Ct. for the District of Columbia*, 541 U.S. 913 (2004).

⁴⁹ Frost, *supra* note 6, at 532.

In West Virginia, despite several motions to disqualify him, state Supreme Court Justice Brent D. Benjamin cast a deciding vote to overturn a \$50 million dollar verdict against a coal company whose chief executive officer had donated more than \$3 million dollars to Justice Benjamin's election bid.⁵⁰ The U.S. Supreme Court determined that Justice Benjamin should have been disqualified and stated that "more stringent state judicial conduct rules are '[t]he principal safeguard against judicial campaign abuses' that threaten to imperil 'public confidence in the fairness and integrity of the nation's elected judges.'"⁵¹ Both this case and the *Cheney* decision have prompted national movements to develop additional safeguards to enhance impartiality in the judiciary by modifying current statutes, rules, and judicial canons to achieve this result.

Findings and/or Conclusions

To gauge how the judicial disqualification and recusal framework is functioning in Florida and to identify possible enhancements to the process, Senate professional staff consulted with trial, appellate, and retired judges; practitioners; academicians; clerks of court; and pertinent committees of The Florida Bar. Although research and interviews revealed that judicial disqualification in trial courts functions fairly well in Florida under the current framework, many of those interviewed identified some potential enhancements to the judicial disqualification process to strengthen the public's faith in the impartiality of the judiciary, and to improve the process for the overall benefit of judges, attorneys, and litigants. Although standards of judicial disqualification and recusal at the appellate level are similar to those for trial judges, there were no reports of problems with or necessary enhancements to judicial disqualification at the appellate level. As a result, this report focuses on the framework for judicial disqualification of county and circuit judges at the trial level.

Florida Bar Task Force on Judicial Disqualification

In 2008, The Florida Bar's Committee on Judicial Administration and Evaluation, in conjunction with the Rules of Judicial Administration Committee, formed a Joint Task Force to evaluate Florida's current judicial disqualification and recusal process. The Joint Task Force expressed concerns regarding the perceived unfairness related to asking a judge who is subject to a motion to disqualify to rule on the motion. The Joint Task Force also expressed concern regarding the public's unfavorable perception of a judge making such a ruling. Further, the Joint Task Force noted that the system can be abused by judges and litigants to complicate and create unnecessary expenses in litigation. The Joint Task Force also expressed concern that the various provisions in Florida governing judicial disqualification appear to overlap.⁵² The Florida Bar's Committee on Judicial Administration and Evaluation reports that it remains interested in judicial disqualification reforms and will continue to explore potential enhancements to the disqualification framework. However, it does not anticipate that recommendations for revisions to the process will be made prior to the 2011 Regular Session of the Legislature.

Consolidation of Statutes and Rules

One of the issues the Joint Task Force of The Florida Bar examined was the relationship between the rules and statutes governing disqualification. The Joint Task Force observed that "[o]n the substantive side, a major concern was identified regarding nebulous substantive grounds and standards for disqualification, and inconsistent application of the multiple provisions of various statutes and rules on judicial disqualification."⁵³ In Florida, the statutes provide the substantive right for the disqualification of a judge, while the Florida Rules of Judicial Administration govern the procedures related to the disqualification of a judge.⁵⁴ In the Joint Task Force's draft changes to the Florida statutes governing disqualification, the existing statutes were repealed in their entirety, with a proposed new statute drafted consolidating the various substantive standards for disqualification of a judge (e.g., prejudice or bias, kinship to a party or attorney, serving as a lawyer in the lower tribunal, etc.). To complement

⁵⁰ Meiser, *supra* note 3, at 1799-1800.

⁵¹ James Sample, *Court Reform Enters the Post-Caperton Era*, 58 DRAKE L. REV. 787, 789 (Spring 2010) (quoting *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2266 (2009)).

⁵² Joint Task Force of The Florida Bar Judicial Administration and Evaluation Committee and Florida Rules of Judicial Administration Committee, *Disqualification Proposal – Introduction and Explanation* (2009) (on file with the Senate Committee on Judiciary).

⁵³ *Id.*

⁵⁴ *Cave v. State*, 660 So. 2d 705, 707 (Fla. 1995).

the proposed new statute, the Joint Task Force revised Rule 2.330 of the Florida Rules of Judicial Administration to prescribe the procedures related to filing of a motion to disqualify a judge (e.g., timing of the motion, contents of the motion, affidavit requirement, etc.).

The statutes related to judicial disqualification were enacted in the early 1900s and have retained much of the original, antiquated language that is initially difficult to digest. Moreover, some of the provisions in statute and rule overlap, with both covering procedural and substantive aspects of disqualification. In some instances, there may be minor conflicts between the statutes and the rule. For example, s. 38.02, F.S., governing disqualification because of kinship to a party or attorney, provides that a “suggestion” to disqualify must be filed within 30 days after the party filing the suggestion, or the party’s attorney, learns of the kinship. In contrast, the rule governing disqualification provides that the disqualification motion must be filed “within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion.”⁵⁵ Additionally, s. 38.10, F.S., appears to require “automatic” disqualification once the motion is filed, while the rule requires a determination of the legal sufficiency of the motion by the judge.

To aid litigants, attorneys, and judges in navigating the provisions governing judicial disqualification, the Legislature could consider repealing the current statutes governing judicial disqualification and consolidating all of the substantive grounds for disqualification into one, modernized statute. In conjunction with this change, the Legislature could encourage the Florida Supreme Court to evaluate the current rule governing judicial disqualification and make any changes to remove any substantive provisions in the statute and to otherwise harmonize the existing rule with the new statute.

Specificity in Motions to Disqualify

Because there is no independent evaluation of the veracity of the facts alleged regarding judicial disqualification, the motion itself is the central component of the judicial disqualification process in Florida. Although the current rule governing disqualification requires that the motion “allege specifically the facts and reasons upon which the movant relies as the grounds for disqualification,” many judges reported that, in practice, motions to disqualify are often very brief, containing only general allegations with no specificity as to the basis for disqualification.⁵⁶ Senate professional staff reviewed several disqualification motions filed in Florida courts and also noted that many of the motions contained very general allegations. Some judges reported that they often rule that these general motions are legally sufficient even though it is difficult to discern whether there is an actual basis for disqualification due to the bare pleadings.

To remedy concerns with ruling on motions containing only general allegations, some judges have suggested that the rules or statutes should be amended to provide that a motion to disqualify may be dismissed if the motion does not contain specific allegations demonstrating bias or prejudice. Sometimes motions to disqualify are premised upon statements by judges outside of the courtroom or during a hearing or other proceeding before the court. Some judges have suggested that movants should be required to allege when the statements occurred, where the statements were made, the substance of those statements, and who was present when the statements were made. With regard to statements made by the judge in court, some have suggested that the movant should be required to attach a transcript of that proceeding with the motion and identify within the transcript those statements supporting the assertion that the judge is prejudiced or biased. However, some judges did point out that the specificity requirement may facilitate inclusion of more outrageous allegations in motions, which the judge cannot deny or address under the current disqualification framework. The Legislature may wish to consider encouraging the Florida Supreme Court to evaluate the need to require more specificity in pleadings or to require movants to attach relevant portions of transcripts to the motions.

Judges’ Comments on Allegations

Senate professional staff reviewed comments provided to the Joint Task Force of The Florida Bar by judges regarding draft changes to the statutes and rules governing judicial disqualification in Florida. The chief complaint in those comments was the current prohibition against a judge commenting on or refuting, in any

⁵⁵ Fla. R. Jud. Admin. 2.330(e).

⁵⁶ See Fla. R. Jud. Admin. 2.330(c)(2).

manner, an allegation or assertion in a motion to disqualify. Some judges expressed concern that this prohibition facilitates harm to the reputation of the judge and may also facilitate harm to a judge's future political pursuits if there is no record of the judge refuting an outrageous or unsubstantiated allegation. Conversely, some judges assert that this prohibition is in place to ensure that an adversarial relationship between the judge and a party is not created by a judge's statement refuting allegations in a motion.

In one comment, a judge suggested that allowing judges to make a general denial of the allegations in the complaint could alleviate some of the reputational harm associated with outrageous and unfounded allegations. For example, an order granting a motion to disqualify could read:

Although the undersigned judge denies the allegations supporting the motion, under the appropriate standard of review, the allegations are legally sufficient and, therefore, the motion for disqualification is granted.

However, if the judge denies the motion on the grounds that it is legally insufficient, a similar general denial of the facts could result in the formation of an adversarial relationship between the judge and a party because the judge has expressly denied assertions of a party but will continue to preside over the case.

In Nevada, upon the filing of a motion to disqualify, a judge has two options: (1) he or she can immediately transfer the case to another judge; or (2) he or she can file a written answer with the clerk within two days after the motion is filed, admitting or denying the allegations and setting forth any additional facts that bear on the question of the judge's disqualification.⁵⁷ The question of the judge's disqualification is then heard by another judge. This affords the judge who is the subject of the motion the opportunity to respond to allegations that he or she deems to be outrageous or unfounded. Otherwise, the judge is allowed to transfer the case without the need for a response to the allegations contained in the motion.

If the Legislature wishes to afford a judge the opportunity to deny outrageous or unfounded allegations contained in motions to disqualify, it could consider authorizing judges to include a general denial of the allegations in an order granting disqualification. Alternatively, the Legislature could consider enacting a statute such as Nevada's by allowing a judge to file a written answer denying or admitting certain allegations and providing additional details, and then allowing another judge to decide the motion to disqualify. Arguably, an adversarial relationship could be created between the judge and the party if the judge is allowed to file a written response to the motion, another judge hears arguments pertinent to the party's motion, and the motion to disqualify is denied.

Judicial Disqualification Determinations

One of the paramount concerns related to judicial disqualification is the public's perception that it is inequitable for a judge subject to a motion to disqualify to rule on the motion. As some authors noted, in essence, "[t]he fact that judges in many jurisdictions decide on their own recusal challenges, with little to no prospect of immediate review, is one of the most heavily criticized features of United States disqualification law."⁵⁸ Some jurists have asserted that because the question of impartiality or bias is an objective question, a judge whose impartiality is the subject of a disqualification motion should not be in a position to determine whether his or her disqualification is warranted.⁵⁹ Counter to this argument, others assert that the judge subject to the disqualification motion is the person with the best knowledge of the facts and circumstances supporting disqualification and that the "single-judge procedure" aids in judicial efficiency by eliminating the need for prolonged hearings and further delays.⁶⁰ To address perceived inequities with the single-judge procedure, some states have adopted alternative methods for determining disqualification, such as peremptory challenges and independent adjudication of disqualification motions.

⁵⁷ NEV. REV. STAT. ANN. s. 1.235.

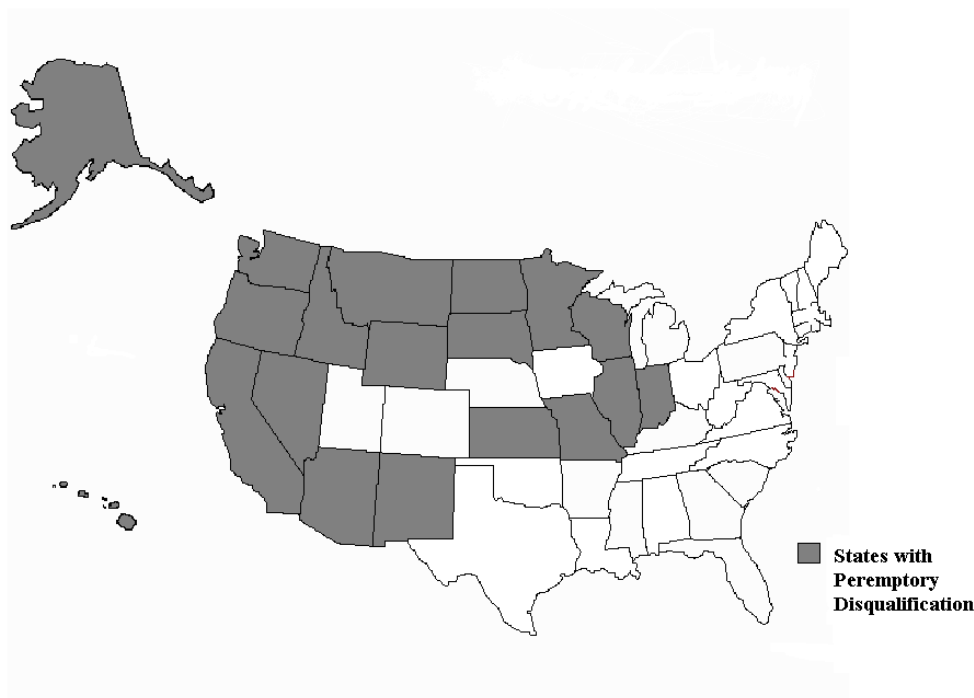
⁵⁸ James Sample et al., Brennan Center for Justice, *Fair Courts: Setting Recusal Standards*, 31 (2008) (citing Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges*, s. 6.4.1, at ch. 12 (1996)), available at <http://www.ajs.org/ethics/pdfs/Brennancenterrecusalreport.pdf> (last visited Oct. 1, 2010).

⁵⁹ *Id.* (citations omitted).

⁶⁰ *Id.* at 32.

Peremptory Disqualification

Some states have adopted laws allowing litigants to exercise peremptory challenges to disqualify judges. These laws authorize litigants to obtain disqualification without demonstrating any grounds for disqualification such as prejudice or bias. The party simply requests that a new judge be assigned to the case, and the case is reassigned without any legal determination or further inquiry. To date, 19 states have adopted laws allowing peremptory disqualification of judges.⁶¹ The following figure illustrates those states with peremptory disqualification procedures.⁶²



Of those states adopting peremptory challenges, most limit the challenge to one per party, with a maximum of two challenges per case. For example, Nevada allows one peremptory challenge for each “side” in any civil action pending in the district court, with each action having only two “sides.”⁶³ The Nevada rules provide that the party filing the peremptory strike must pay a \$300 filing fee with the motion to cover some of the costs associated with the transfer of the case to a new district judge. In Wyoming, the rules allow a party to peremptorily disqualify a judge from acting in a case in which a felony is charged by simply filing a motion.⁶⁴ The rule limits the party to filing only one time and against only one judge. After a judge has been peremptorily disqualified upon the motion of a party, the opposing party may file a motion for peremptory disqualification of the new judge within five days of assignment of the new judge.

Proponents of peremptory disqualification argue that this disqualification method alleviates concern with judges ruling on their own qualifications to hear cases, as well as allows parties to “secure an unbiased judge without the expense, unseemliness, and retribution risk of a disqualification challenge.”⁶⁵ However, of those judges providing comments on potential disqualification changes to The Florida Bar, the majority of those responding were opposed to the adoption of peremptory challenges in Florida. Similarly, in professional staff interviews with trial and appellate judges and practitioners, most believed that use of the peremptory challenge model would promote judge shopping and would increase the frequency of disqualification. In addition, judges also opined that the peremptory challenge method would create hardships on small judicial circuits with few judges available for reassignment of cases. Professor Charles Geyh, a national expert on judicial disqualification, asserted that those

⁶¹ Charles Geyh, *Report of the Judicial Disqualification Project*, 29 (Draft, Sept. 2008), available at <http://www.ajs.org/ethics/pdfs/ABAJudicialdisqualificationprojectreport.pdf> (last visited Oct. 1, 2010).

⁶² Sample, *supra* note 58, at 26.

⁶³ Nev. S. Ct. R. 48.1.

⁶⁴ Wyo. R. Crim. P. 21.1.

⁶⁵ Sample, *supra* note 58, at 26.

states employing the peremptory disqualification method typically report that it is working favorably, while many jurisdictions not employing this method are opposed to enacting it.⁶⁶

Independent Adjudication of Disqualification Motions

As an alternative to the peremptory challenge model, some jurisdictions have adopted a method in which an independent judge rules on a motion to disqualify rather than the judge subject to the motion. Under this model, the movant retains the duty to include factual allegations of impartiality or bias. Several states require someone other than the target judge to decide all aspects of the motion to disqualify.⁶⁷ In some states, the target judge may initially review the motion for legal sufficiency, but then transfer the motion to another judge if the motion satisfies the legal-sufficiency inquiry.

In California, a judge who refuses to recuse himself or herself “shall not pass upon his or her own disqualification.”⁶⁸ The California statute provides that the question of disqualification must be heard by another judge agreed upon by all of the parties, or, if agreement cannot be reached, the chairperson of the Judicial Council will select a judge. In adjudicating the motion, a judge will:

decide the question on the basis of the statement of disqualification and answer and any written arguments as the judge requests, or the judge may set the matter for hearing as promptly as practicable. If a hearing is ordered, the judge shall permit the parties and the judge alleged to be disqualified to argue the question of disqualification and shall for good cause shown hear evidence on any disputed issue of fact.⁶⁹

The rule governing judicial disqualification in Texas allows a judge subject to the motion to make an initial determination of whether to grant the motion.⁷⁰ If the judge declines to recuse himself or herself, the judge must forward the motion to the presiding judge of the judicial district, who, in turn, will set the motion for hearing before himself or herself or another appointed judge.⁷¹

Some of the advantages and disadvantages of the independent adjudication model mirror those relating to the peremptory challenge model. This method alleviates concern with judges determining their own fitness to hear a matter, but could encourage the filing of disqualification motions and may create staffing issues for smaller circuits with few judges. Unlike the peremptory challenge model, the judge is afforded an opportunity to address the allegations presented in the motion and refute any outrageous or unfounded assertions. However, many judges and practitioners pointed out in interviews that these hearings by independent judges would continue to foster an adversarial relationship between the judge and the party and would contravene a judge’s duty to be perceived as independent, fair, and impartial.

Of those judges interviewed by Senate professional staff, approximately half believed that independent evaluation would be an enhancement to the judicial disqualification process, while the other half asserted that this method would cause undue delays and other logistical problems for trial judges. Some judges also pointed out that this model would place judges in the precarious position of ruling on the fitness of their colleagues. Those judges commenting to the Joint Task Force of The Florida Bar expressed that this approach could remedy some problems associated with disqualification, but could also create additional delay and expense in litigation.

If the Legislature determines that judges subject to disqualification motions should not adjudicate the motions, the Legislature could adopt the peremptory challenge model by creating a right for litigants to strike a judge without cause. The Legislature could limit this right to one time per party, or determine to utilize this method in criminal cases only or civil cases only. Alternatively, the Legislature could enact an approach in which an independent judge rules on the motion to disqualify with or without an evidentiary hearing. The Legislature also could employ

⁶⁶ Telephone interview with Professor Charles Geyh, Indiana University School of Law (Aug. 4, 2010).

⁶⁷ Some of these states include: Alaska, Arizona, North Dakota, Ohio, Oregon, Utah, Vermont, and Virginia.

⁶⁸ CALIF. CODE OF CIV. P. s. 170.3(c)(5).

⁶⁹ CALIF. CODE OF CIV. P. s. 170.3(c)(6).

⁷⁰ Tex. R. Civ. P. 18a.

⁷¹ Tex. R. Civ. P. 18a(c).

a blended approach in which the judge subject to the motion initially determines the legal sufficiency of the motion, and then transfers the case to another judge if he or she wishes to deny the disqualification. As discussed above, there are advantages and disadvantages associated with these approaches. Because there currently is no filing fee associated with the filing of a motion to disqualify in Florida, the Legislature may also wish to consider requiring the payment of a filing fee with the filing of a motion to disqualify if it chooses to adopt one of these alternative models in order to offset costs associated with transferring the case to another judge.

Sanctions for Abuse of Judicial Disqualification

In addition to perceived inherent inequities associated with judicial disqualification, abuse of the judicial disqualification process may be occurring in limited contexts. Although the majority of judges interviewed reported that they have not experienced significant abuse of the process, some judges did report that litigants utilize disqualification motions for certain tactical advantages such as delay of the litigation, as well as to retaliate against a judge after an adverse ruling. For example, one judge recalled a case in which litigants engaged in discovery and other trial preparation for approximately two years, and then, on the eve of trial, one party filed a motion to disqualify the judge. The judge perceived that the motion was filed because the party was not adequately prepared to proceed to trial. The motion was legally sufficient, and the judge had no choice but to grant the motion.

To address frivolous motions to disqualify, some states have enacted legislation to provide sanctions for frivolous motions designed to delay or hinder the judicial process. For example, a Texas law provides that a judge may award sanctions, in the interest of justice, for any motion to disqualify that “is brought solely for the purpose of delay and without sufficient cause.”⁷² In Vermont, a motion for disqualification must be filed as soon as practicable after the cause or ground for disqualification becomes known to the movant.⁷³ If a party fails to satisfy this requirement, the court may, in its discretion, sanction the attorney or the party filing the motion.⁷⁴

Comparable to Texas and Vermont, Montana allows the court to award sanctions against a party who brings an improper motion for disqualification.⁷⁵ The Montana statute provides:

The judge appointed to preside at a disqualification proceeding may assess attorneys fees, costs and damages against any party or his attorney who files such disqualification without reasonable cause and thereby hinders, delays or takes unconscionable advantage of any other party, or the court.⁷⁶

However, one state, Nevada, expressly precludes an award of sanctions associated with the filing of a motion to disqualify a judge.⁷⁷

Some judges asserted that sanctions or the threat of sanctions may prove to be a valuable tool in curbing frivolous disqualification motions. However, some of these judges noted that sanctions should not be awarded automatically, and should be awarded at the discretion of the court to enable the court to evaluate the motives for the filing of a motion on a case-by-case basis. Conversely, other judges argued that a sanctions provision in the context of judicial disqualification would only serve to chill disqualification filings because parties and attorneys may fear being subject to sanctions. To buttress this assertion, some of these judges also argued that ensuring the impartiality of the judiciary trumps punishing litigants who abuse the judicial disqualification framework. Moreover, others asserted that the court currently has the authority to award sanctions when a party asserts unsupported claims or files pleadings “taken primarily for the purpose of unreasonable delay.”⁷⁸

⁷² Tex. R. Civ. P. 18a. The rule expressly provides that sanctions may be awarded as authorized by Tex. R. Civ. P. 215.2(b). Those sanctions include charging all or any portion of the taxable court costs and attorney’s fees associated with the motion to the party seeking disqualification.

⁷³ Vt. R. Civ. P. 40(e)(1).

⁷⁴ *Id.*

⁷⁵ MONT. CODE ANN. s. 3-1-805(1.) (d).

⁷⁶ *Id.*

⁷⁷ NEV. REV. STAT. s. 1.225(6.).

⁷⁸ Section 57.105, F.S.

To alleviate concerns associated with disqualification motions filed after unfavorable rulings by a judge and other timing issues, some states have adopted rules or enacted statutes designed to discourage such abuse. For instance, Oregon law provides that a motion to disqualify a judge may not be filed after the judge has ruled on any petition, demurrer, or motion, other than a motion to extend time in the proceeding.⁷⁹ Such an approach may have the unintended consequence of barring legitimate disqualification motions when sufficient grounds for the motion were discovered by a party after a judge ruled on an initial motion in the case. The Legislature could consider precluding the filing of a motion to disqualify within a prescribed number of days after an adverse ruling on a motion in the case. However, such an approach may also unintentionally bar legitimate motions to disqualify.

Disqualification for Campaign Contributions

Following West Virginia Supreme Court Justice Brent Benjamin's refusal to recuse himself from a matter in which the chief executive officer of a party donated significant amounts of money to the Justice's campaign, many opined that "[t]he improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today."⁸⁰ One article noted that "[a] line needs to be drawn somewhere to prevent a judge from hearing cases involving a person who has made massive campaign contributions to benefit the judge."⁸¹ The rationale supporting and undermining the need for such a provision creates a conundrum for judges. On one hand, the press and the public are critical of judges who rule in cases involving campaign contributors. However, judges are reluctant to withdraw from cases because of fear that such a decision will validate the "public suspicion that judges are beholden to their benefactors."⁸²

The American Bar Association includes a provision in the Model Code of Judicial Conduct requiring automatic disqualification if:

[t]he judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than \$[insert amount] for an individual or \$[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].⁸³

Only a few states have adopted a comparable disqualification provision related to campaign finance. Consequently, if a motion to disqualify is premised upon the fact that a party has contributed to a judge's campaign, the ruling on the motion will likely turn on a general inquiry into whether the judge's impartiality might reasonably be questioned.⁸⁴ In 2010, the California Legislature passed a bill requiring California trial judges to recuse automatically if one of the parties or attorneys in a case contributed \$1,500 or more to the judge's previous election campaign, if the campaign took place within the previous six years, or if the contribution was received prior to an upcoming election.⁸⁵ Governor Schwarzenegger signed this bill into law on September 30, 2010.

Of those judges interviewed by professional staff of the committee, the majority did not believe that adoption of this provision in Florida is necessary. Most cited the fact that these provisions most notably affect bias and prejudice associated with appellate judges and that Florida's appellate judges are not elected. Furthermore, some judges asserted that Florida campaign finance disclosure laws and campaign contribution limitations alleviate any concern with prejudice and bias in the trial court judiciary.⁸⁶ However, some judges did opine that law firm

⁷⁹ ORE. REV. STAT. s. 14.260(3).

⁸⁰ James Sample, *Caperton: Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. 293, 293 (2010) (citation omitted).

⁸¹ *Id.*

⁸² Geyh, *supra* note 61, at 40.

⁸³ MODEL CODE OF JUDICIAL CONDUCT (2007), Rule 2.11.

⁸⁴ Geyh, *supra* note 61, at 39.

⁸⁵ California Assembly Bill No. 2487 (2010).

⁸⁶ Pursuant to Florida law, each campaign treasurer must file a report of all campaign contributions received, and all expenditures made, by or on behalf of a candidate or political committee. Section 106.07(1), F.S. These reports are open to public inspection. Section 106.07(2)(a)1., F.S. With regard to campaign contribution limitations, except for political parties, no person, political committee, or committee of continuous existence may, in any election, make contributions in excess of

contributions collectively could be viewed critically by the public when lawyers from the firm appear before a judge. If the Legislature determines that it is concerned with judicial bias in trial courts associated with campaign contributions, it could enact a provision requiring automatic disqualification if a party or a party's attorney has donated a specified amount to the judge's campaign. Determining a benchmark contribution amount may pose some challenges. It may be difficult to determine a threshold contribution amount that directly correlates with the possibility of influencing a judge's rulings in a case in which a campaign contributor is a party.

Options and/or Recommendations

This report illustrates a number of potential enhancements to the judicial disqualification process in Florida. Some of these options are substantive in nature and could be enacted by the Legislature, while other options are procedural and fall within the ambit of the Florida Supreme Court.⁸⁷ Among the options available to the Legislature and the Supreme Court are:

- Delaying any action until The Florida Bar completes its study of judicial disqualification and recommends changes to the process;
- Repealing the current statutes governing judicial disqualification and consolidating all of the substantive grounds for disqualification into one, modernized statute;
- Revising the Florida Rules of Judicial Administration to delineate the procedures associated with disqualification and to eliminate substantive grounds for disqualification;
- Heightening the pleading requirements for motions to disqualify by requiring more specific factual allegations and attachment of transcripts or other documents to the motion when necessary;
- Authorizing judges to include a general denial of the allegations in an order granting disqualification;
- Allowing judges to file a written answer denying or admitting certain allegations and providing additional details, and then allowing another judge to decide the motion to disqualify;
- Enacting a provision requiring automatic disqualification if a party or a party's attorney has donated a specified amount to the judge's campaign; or
- Creating sanctions for frivolous disqualification motions designed to delay proceedings.

If the Legislature determines that judges subject to motions to disqualify should not adjudicate those motions, policy options include:

- Creating a right for litigants to exercise a peremptory strike of a judge without cause;
- Allowing a motion to disqualify to be assigned to a third-party judge;
- Allowing the judge subject to the motion to make an initial determination as to legal sufficiency and then refer the motion to another judge; or
- Requiring a filing fee with motions to disqualify to cover costs associated with transferring the matter to a different judge.

As addressed in the "Findings and/or Conclusions" section of this report, each option presents issues that the Legislature and the Supreme Court may wish to consider carefully in their evaluation.

\$500 to any candidate for election to or retention in office or to any political committee supporting or opposing one or more candidates. Section 106.08(1), F.S. *See also* ss. 105.071 and 105.08, F.S., governing candidates for judicial office and campaign contributions.

⁸⁷ *See* text accompanying note 54.