

# JUDICIAL RECUSAL PROCEDURES

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A REPORT ON THE  
IAALS CONVENING





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## IAALS—Institute for the Advancement of the American Legal System

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*Quality Judges* is an initiative of IAALS dedicated to advancing empirically informed models for choosing, evaluating, and retaining judges that preserve impartiality and accountability. Through comprehensive analysis of existing practices and the collaborative development of recommended models, the *Quality Judges Initiative* empowers, encourages, and enables continuous improvement in processes for choosing, evaluating, and retaining judges.

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# INTRODUCTION

In November 2016, with the financial assistance of Colorado’s El Pomar Foundation, IAALS hosted a Convening of 20 judges, lawyers, court administrators, and scholars from around the country to consider best practices for judicial recusal procedures. The participants (see Appendix A) were in general agreement about the goals of and principles for recusal procedures and reached consensus on eight broad recommendations, albeit with disagreements about some particular components.

This report draws substantially on the Convening’s discussions, and IAALS thanks the Convening participants for their contributions to this report. To be clear, all participants may not be in agreement as to all points. This report represents IAALS’ views, as well as having the full endorsement of both the Brennan Center for Justice and Pennsylvanians for Modern Courts. We also thank them for their support.

“Recusal” (or “disqualification”) is the removal of a judge (voluntarily or otherwise) from a case because the judge has—or may appear to have—an interest or involvement in, or special knowledge, beliefs, or opinions about the case that conflict with or could otherwise frustrate the judge’s unbiased fact finding and legal conclusions.<sup>1</sup>

Recusal in the state courts is governed by the Fourteenth Amendment’s due process clause and, state-by-state, by constitutional provisions, statutes, rules, codes of conduct, case law, and tradition. This report identifies the main areas of debate about proposed changes in recusal procedures and points to “best practice” provisions in place in particular states. In addition to the Convening’s discussions, this report draws on proposals of several national organizations and specific provisions adopted in various states.

Recusal has received increased attention in recent years because of three closely divided U.S. Supreme Court decisions. The first decision invalidated state provisions prohibiting judicial candidates from announcing their views on disputed legal or political issues,<sup>2</sup> and a concurring opinion advised states to deal with potential conflicts created by campaign commitments in part by “adopt[ing] recusal standards more rigorous than due process requires.”<sup>3</sup> Another decision held that a state supreme court justice, whether or not he exhibited actual bias, should have recused himself in a case involving a party who spent substantial funds to secure the justice’s election.<sup>4</sup> The third decision said a state supreme court justice’s recusal was necessary in an appeal where the justice had been involved in the capital case some years before as a prosecutor.<sup>5</sup>

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1 “Recusal” traditionally refers to a judge’s removing himself or herself *sua sponte*, while “disqualification” traditionally refers to removal at the request or directive of a party to the case. This report uses “recusal” for both processes, although others use the terms interchangeably.

2 *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002).

3 *Id.* at 794 (Kennedy, J., concurring).

4 *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009).

5 *Williams v. Pa.*, 136 S. Ct. 1899, 1903 (2016).

Despite these high-visibility cases, we have not seen evidence—and do not suggest—that failure to recuse is a systemic or system-wide problem. (Such evidence might be widespread reports of controversial recusal motions or dismissals of meritorious motions.) There is, however, clearly concern that judicial elections and money spent by and on behalf of candidates are creating recusal quagmires amid worries that heavy spending by outside elements in support of particular judicial candidates can threaten judges’ impartiality or the appearance of impartiality. This report does not take aim at judicial elections or how they are financed but simply recognizes that these developments are drawing increased attention to recusal procedures. Even without this increased attention, however, revising and strengthening recusal procedures—to ensure that they are fair, transparent, and efficient—serves the interests of litigants, judges, and the courts as a whole. In this same vein, while failure to recuse may not be a systemic problem—and substantial numbers of recusal motions may be unmeritorious—even a handful of cases that required recusal but in which judges denied recusal motions or failed to recuse *sua sponte* can cast a cloud over all judges.

Over the years, states have developed fairly consistent substantive legal requirements for recusal. Most states apply the American Bar Association’s (ABA) Model Code of Judicial Conduct requirement that “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.”<sup>6</sup> Most states have also adopted the Model Code’s provisions for mandatory recusal, including when a judge is biased against one of the parties, previously served as a lawyer in the matter, has more than a *de minimis* economic interest in the subject matter, is related to a proceeding’s party or lawyer within the third degree of kinship, has personal knowledge of disputed evidentiary facts, or has engaged in improper *ex parte* communications during the course of the proceedings.<sup>7</sup>

While grounds for recusal are fairly consistent across states, recusal procedures vary greatly in their:

- Transparency—recusal procedures and specific recusal decisions are not always accessible and understandable, and few states provide aggregate information about recusal behavior;
- Coverage—for example, recusal procedures for trial judges are more prevalent than for appellate judges;
- Guidance—sources of advice for judges about their recusal obligations vary widely; and
- Requirements—procedures vary, among such aspects as a) who decides whether a judge should step aside, under what time limits, and with what opportunities to seek some type of separate review of refusals to recuse; b) whether appellate courts should consider appeals from denied recusal motions *de novo* or with a more deferential standard; and c) who fills the temporary vacancies that recusals create and, as to appellate courts, even whether to fill the vacancy.

Variations in recusal procedures reflect, and for some aspects should reflect, local cultures, traditions, and the difficulty of changing rules embedded in constitutions and statutes. Furthermore, because only a handful of states keep aggregate data on recusal activity, it is hard to determine actual recusal behavior, including whether states’ written recusal procedures describe what actually happens. Precise numbers are elusive as to some recusal provisions and practices.

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6 ABA Model Code of Judicial Conduct, Rule 2.11(a).

7 *Id.*



Recusal procedures that are understandable, transparent, accessible, and procedurally fair in fact and appearance, and compliance with which can be monitored, can enhance litigants' (and, for cases that receive media attention, the public's) trust and confidence in the judiciary when concerns over conflicts arise. At the same time, those responsible for establishing recusal procedures must accommodate sometimes competing values. Those responsible for establishing recusal procedures must:

- Balance fairness to both litigants and judges;
- Provide procedures that are fair but that do not consume undue amounts of scarce judicial and administrative staff time;
- Achieve efficiency and economy in reaching and reviewing recusal decisions while avoiding rushed judgments and impressions of self-serving behavior when the subject judge decides the motion;
- Provide transparency of process consistent with the privacy needs of judges, their families, and associates;
- Protect collegiality on both trial and appellate courts while guarding against the appearance that the judiciary is overly protective of its own;
- Establish clear and unambiguous recusal procedures that nevertheless accommodate variations within the state as to the number of judges and thus comparative ease or difficulty in assigning replacement judges;
- Seek ways to protect the integrity of the state high court's law-declaring function while recognizing the value of recruiting one or more replacement judges to substitute for one or more recused justices; and
- Communicate information about recusal procedures without creating an unwarranted inference of widespread judicial bias.

This report offers basic recommendations and a range of options in eight areas:

- Written, clearly articulated, and accessible recusal procedures;
- Who decides recusal motions, and with what opportunities for review;
- Time limits for deciding recusal motions and freezing the litigation;
- Recusal motion denials in writing or orally on the record;
- Effective appellate review of recusal decisions and standards of review;
- Replacing recused judges;
- Making advice about recusal available to judges; and
- Collecting aggregate data on recusal activity.

Adopting and implementing these recommendations may, in some states, require changes in court rules, statutes, or even constitutional provisions, and may conflict with existing state law. For example, a legislative requirement that a chief judge assign a separate judge to decide recusal motions may violate a state's separation-of-powers principles. A supreme court rule that allows retired justices to replace justices who have recused themselves or been disqualified from hearing a case may violate the state constitution. Governing authorities in each state should be aware of such potential limitations and take them into account in proposing improvements in recusal procedures.

The report also cites examples of policies in place in various states, with commentary on why some procedures appear preferable. Appendix B contains additional examples.



# SECTION I

## WRITTEN, CLEARLY ARTICULATED JUDICIAL RECUSAL PROCEDURES

### A. BASIC REQUIREMENTS

All states should have written rules of procedure that explain how to file a recusal motion and how the courts will process the motion. According to the Conference of Chief Justices, however, as of 2014, 36 states had specific recusal procedures for trial judges, 12 had them for intermediate appellate courts, and 16 had them for state courts of last resort.<sup>8</sup> Clear procedural rules benefit not only litigants who believe the judge may have a conflict of interest but also judges and court staff by ensuring efficiency and consistency.

### B. TRANSPARENT AND READILY AVAILABLE INFORMATION

Having written procedures, however, is the minimum requirement. The Conference of Chief Justices notes that posting draft procedural rules for comment by the public, bench, and bar might enhance transparency and confidence in the final product. The procedures should be understandable to non-lawyers.

A Convening participant commented that “a key component of procedural fairness is communicating that recusal procedures are in place.” State judiciaries should post recusal standards and procedures on their websites and direct each court with a website to do so as well.<sup>9</sup> Recusal standards and procedures should include a layperson-oriented statement of impermissible bases for seeking a judge’s recusal. In particular, potential filers should know that a recusal motion based on disagreement with a judge’s ruling will be denied absent an explanation of how the ruling meets one of the state’s standards for recusal. States should also post a standard-form recusal motion, especially to assist self-represented litigants (see Appendix C for templates for a layperson-oriented statement of recusal grounds and procedures and for a standard-form recusal motion).

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8 Conference of Chief Justices, *Considerations in Developing State Recusal Rules* – Resolution 8 (October 2014), [hereinafter *CCJ Resolution 8*]. On file with IAALS.

9 NAT’L CTR. FOR ST. CTS., ANALYSIS OF NATIONAL SURVEY OF REGISTERED VOTERS (December 2014) <http://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/2014-State-of-State-Courts-Survey-12042014.ashx> (discussing the importance of online availability and noting that approximately three-fourths of respondents wanted courts to make more information and resources available online, an attitude that was almost universal among those under age 40).

## SECTION II

# RECUSAL MOTIONS DECIDED BY ANOTHER JUDGE, OR PROMPT REVIEW BY OTHER JUDGE(S) OF THE SUBJECT JUDGE'S MOTION DENIAL

## A. GENERAL CONCERNS

Allowing the judge who is the subject of the recusal motion to make a dispositive decision denying that motion flies in the face of the oft-invoked, age-old proposition that no person should be a judge in his own case. It also likely breeds cynicism among the parties and potentially among segments of the public should the matter receive media attention. A judge's denial of his own recusal motion has built-in hazards beyond stoking public cynicism. Substantial social science research on unconscious judicial bias establishes that judges, like most people, are overly confident in their ability to be impartial in potential conflict situations.<sup>10</sup> Furthermore, when a judge is faced with a recusal motion that presents information already in the judge's ken, but about which the judge did not recuse *sua sponte*, "[the judge] is being asked to admit that she has already failed in her ethical obligation to recuse herself."<sup>11</sup> Removing the judge from the motion denial process avoids that tension.

Nevertheless, according to a recent Brennan Center report, 29 states generally allow trial judges to deny motions seeking their recusal, and 35 states allow supreme court justices to do so.<sup>12</sup> Federal judges also decide whether to deny their own recusal motions, subject to review through the normal appellate process.<sup>13</sup>

Proponents of allowing a judge to deny a motion seeking her recusal say the practice is more efficient than referring the matter to another judge or judges, especially trial judges in small or single-judgeship jurisdictions where a different judge may not be readily available to decide the motion. We explain below why this is less problematic than it may seem. In addition, in any court the different judge who would decide the motion must spend time to become familiar with the case and motion. Proponents also argue that procedures that suggest the subject judge cannot be trusted to rule impartially cast judicial integrity into doubt.

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10 Charles G. Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. OF LITIG. 671, 708 (2011) (discussing judges' psychological ability to assess their own bias); Debra Lyn Bassett, *Three Reasons Why The Challenged Judge Should Not Rule On A Judicial Recusal Motion*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 659, 611–662 (2015); Matthew Menendez & Dorothy Samuels, *Judicial Recusal Reform: Toward Independent Consideration of Disqualification*, BRENNAN CTR. FOR JUST. 1, 4 (2016), [https://www.brennancenter.org/sites/default/files/publications/Judicial\\_Recusal\\_Reform.pdf](https://www.brennancenter.org/sites/default/files/publications/Judicial_Recusal_Reform.pdf) [hereinafter *Brennan Center Report*].

11 *Brennan Center Report*, *supra* note 10, at 4.

12 *Brennan Center Report*, *supra* note 10, at 4–5.

13 28 U.S.C.A § 455 (2017); *See e.g.*, CHARLES GARDNER GEYH, FEDERAL JUDICIAL CENTER, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 1, 11 (2d ed. 2010).

The 2011 ABA Resolution that “urge[d] states to establish clearly articulated procedures for . . . [j]udicial disqualification” did not recommend that judges be barred from denying recusal motions but rather called for “[p]rompt review by another judge or tribunal, or as otherwise provided . . . of denials of requests to disqualify a judge.”<sup>14</sup> The underlying report said that the main criterion states should consider in determining who may decide or deny a motion is one “best designed to lead to as prompt and impartial (both in actuality and in public perception) a determination of the motion as possible,” noting as well, however, that “if the judge who is the subject of the motion is reviewing it, and assuming that assignment to another judge is not mandatory . . . one option may be for the judge voluntarily to refer the motion to another judge on the merits”—if practical.<sup>15</sup>

All told, we agree with a Convening participant who said that “judges shouldn’t grade their own homework.” We recommend, as a general rule, that states not grant judges the authority to deny motions seeking their recusal, even denials based on timeliness, non-conformity with procedural rules, or facial insufficiency. Within that general rule, though, we recognize that some see the need for flexibility based on resources and jurisdictional considerations. In any event, unless a judge grants a motion, there should be a prompt ruling on the motion by another judge, and not one designated by the subject judge. Implementing such a procedure will necessarily be different for trial judges and appellate judges.

## B. TRIAL COURTS

We recommend that states direct a subject judge who does not grant a recusal motion to refer it to a previously designated judge who will transfer the non-granted motion to a replacement judge to decide the motion’s procedural sufficiency and substantive merits. Except as provided in section III.B, *infra*, the subject judge should take no further action in the case until the replacement judge decides the motion.

States may seek to balance the desirability of excluding the subject judge from any role in denying recusal motions with the need to contain the administrative demands facing courts with few judges. They might allow the subject judge to weed out untimely or facially deficient motions before referring those not so eliminated for decision by another judge. Such balancing, however, provides an opportunity for a judge to toss a valid motion citing technical reasons,<sup>16</sup> and thus states that allow the subject judge to rule on the motion should provide for prompt review of any denied motion by another judge or panel of judges, depending on the level of court.

Moreover, if another judge or panel of judges is readily available to review the subject judge’s initial decision, query whether that other decision maker should not simply decide the motion in the first place. Electronic submissions and telephone hearings can enable a prompt decision on such motions, including in remote, single-judge jurisdictions where another judge is not readily available. Remote courts that find telephone hearings awkward can put recusal motions on hold for visiting judges who may be on, or scheduled to visit, the site anyway to preside over cases in which judges have recused themselves. Depending on how often visiting judges are on site, however, that practice could frustrate the timely resolution of recusal motions called for in section III.A.

States that take the recusal denial decision from the subject judge need to decide whether and how the subject judge may dispute claims in the motion. The Brennan Center report says some states do not provide for the subject judge’s participation, while others allow or require it, citing a California procedure in which a judge who does not grant a motion must provide the replacement judge with a document “admitting or denying all the allegations in the moving party’s statement and setting forth any additional relevant facts.”<sup>17</sup>

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14 AMERICAN BAR ASSOCIATION, RESOLUTION 107 ADOPTED BY HOUSE OF DELEGATES (August 8–9, 2011) [http://www.americanbar.org/content/dam/aba/directories/policy/2011\\_am\\_107.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2011_am_107.authcheckdam.pdf) [hereinafter *Resolution 107*].

15 *Id.* at 9.

16 *Brennan Center Report*, *supra* note 10, at 8.

17 *Brennan Center Report*, *supra* note 10, at 9.

Finally, states should consider subjecting lawyers to sanctions for filing recusal motions for improper purposes.<sup>18</sup> Rule 18a of the Texas Rules of Civil Procedure offers one example: “After notice and hearing, the judge who hears the motion may order the party or attorney who filed the motion, or both, to pay the reasonable attorney fees and expenses incurred by other parties if the judge determines that the motion was: (1) groundless and filed in bad faith or for the purpose of harassment, or (2) clearly brought for unnecessary delay and without sufficient cause.”<sup>19</sup>

The Convening discussed, but reached no consensus, on allowing parties, in limited circumstances, to remove trial judges as a matter of right rather than at the discretion of the challenged judge or another judge, and without any showing or even allegation of cause. Eighteen states apparently permit some form of these peremptory challenges.<sup>20</sup> Proponents argue that such challenges may be the only option for avoiding a biased judge because parties are reluctant to allege a lack of impartiality. They also cite their simplicity and efficiency but acknowledge that their effective use depends on allegiance to shared social norms, or the threat of sanctions,<sup>21</sup> to protect against abuse.

Opponents of peremptory challenges question the analogy to peremptory challenges of jurors because judges receive greater selection scrutiny than do jurors and have well-established role expectations that they are to be impartial. Opponents also argue that peremptory challenges undermine the traditional presumption of judicial impartiality, risk litigants’ gaming the system, and may tax scarce judicial resources particularly in smaller jurisdictions where a replacement judge may not be readily available. And if the U.S. Supreme Court rules peremptory challenges of jurors unconstitutional because of the impossibility of policing their abuse,<sup>22</sup> maintaining the practice as to judges will seem anomalous.<sup>23</sup>

To reiterate, however, there was no Convening consensus on this matter. Some participants favor peremptory challenges; others do not. IAALS does not take a broad position on peremptory challenges, given the various conditions and restrictions on their use imposed by the states that allow them in one form or another. At a minimum, though, we recommend that they not be allowed in appellate courts where they could provide an opportunity to tinker with those courts’ law declaring function. And we recommend that states that permit peremptory challenges not require the movant to allege that the challenged judge is biased. Not imposing such a requirement avoids the negative implications of an unverified claim of bias, and allows an assumption that the movant may have sought recusal for reasons particular to the movant rather than any concerns about the judge.

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18 *Brennan Center Report*, *supra* note 10, at 6.

19 TEX. R. CIV. PROC. Rule 18a(h).

20 RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 789–822 (2d ed. 2011).

21 ARIZ. R. PROF. CONDUCT RULE 42, ETHICAL RULE 8.4(g) (making it “professional misconduct for a lawyer to . . . file a notice of change of judge under Rule 10.2, Arizona Rules of Criminal Procedure, for an improper purpose, such as obtaining a trial delay or other circumstances enumerated in Rule 10.2(b)”).

22 *Batson v. Kentucky*, 476 U.S. 79 (1986) (involving prosecutors’ systematic elimination of African Americans from a jury through peremptory challenges); *Foster v. Chatman*, 136 S. Ct. 1737 (2016) (involving prosecutors’ systematic elimination of African Americans from a jury through peremptory challenges).

23 To be clear, we are unaware of any systematic data indicating associations between peremptorily removed judges and demographic factors such as race or gender.

## C. APPELLATE COURTS

We believe the problems with judges denying their own recusal motions described above are as compelling for intermediate appellate and supreme court judges as for trial courts.

### 1. Courts of Last Resort

As already noted, most states (35) permit individual supreme court justices to deny motions seeking their recusal. That permission may reflect the absence of a higher court to which to refer the motion and perhaps concern that allowing justices to review a colleague's ethics could impair collegiality or, alternatively, encourage strategic justices to use a motion requesting recusal of a colleague in an important case to effect a temporary change in the composition of the court and thus manipulate the court's law-declaring function.

Nevertheless, we endorse a Texas rule that directs supreme court justices either to grant a recusal motion or refer it to the entire court to decide *en banc*, albeit with no participation by the challenged justice (see Appendix B, Section IIA).<sup>24</sup> That latter provision is consistent with the U.S. Supreme Court's observation that an appellate judge should not join colleagues in deciding a case involving the judge's potential conflict of interest even if that judge's vote did not determine the outcome: "[T]he fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position."<sup>25</sup>

That said, however, we also encourage states to consider establishing an independent panel of retired justices and judges, and perhaps non-judges and non-attorneys, to decide or to review the denial of supreme court justices' recusal motions. The ABA Standing Committee on Judicial Independence also suggested referring the "review of the denial (or perhaps even assign the motion itself in the first instance) . . . to a special panel of retired judges or justices."<sup>26</sup> According to the Brennan Center report, no state has created such a panel, but states have created commissions that include judges and non-judges to decide other matters relevant to the judiciary, including judicial performance evaluation commissions to provide voters with information about judges' on-the-bench performance (which IAALS has long championed<sup>27</sup>), judicial nominating commissions to screen and recommend well-qualified judicial applicants for appointment, and judicial conduct/discipline commissions to investigate complaints of judicial misconduct and disability. As with *en banc* review of a colleague's recusal motion, recusal commissions also may provide opportunities for ill-motivated strategic voting, but we think the risk is minimal.

### 2. Intermediate Appellate Courts

Generally, intermediate appellate courts should have recusal rules similar to those of a court of last resort: review of the denial of a motion to recuse may be conducted by the chief judge or her designee, by an *en banc* court without the challenged judge, or by the court of last resort. As a practical matter, unlike courts of last resort, most intermediate appellate courts sit in panels, and thus a challenged judge can be replaced fairly easily by assigning a different judge to the panel.

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24 TEX. R. APP. PROC. RULE 16.3(b).

25 *Williams*, 136 S. Ct. at 1902.

26 *Resolution 107*, *supra* note 14, at 12.

27 See IAALS, *TRANSPARENT COURTHOUSE REVISITED: AN UPDATED BLUEPRINT FOR JUDICIAL PERFORMANCE EVALUATION* (2016) [http://iaals.du.edu/sites/default/files/documents/publications/transparent\\_courthouse\\_revisited.pdf](http://iaals.du.edu/sites/default/files/documents/publications/transparent_courthouse_revisited.pdf).

## SECTION III

# SPECIFIED AND EXPEDITIOUS TIME LIMITS FOR DECIDING RECUSAL MOTIONS; FREEZING THE LITIGATION

## A. TIME LIMITS

Recusal procedures should specify the number of days for ruling on a recusal motion before the motion is deemed granted and the case is transferred to another judge. This timeframe could include time for review by another judge if the subject judge does not grant the motion. Such a rule can limit uncertainty and delay for both the litigants and the court because until a recusal motion is dispositively resolved the underlying litigation is typically frozen. Except in emergencies, the judge should not rule on other aspects of the underlying litigation. The Conference of Chief Justices cited a Florida rule requiring a decision no later than 30 days after service of the motion; after 30 days, the motion is considered as granted.<sup>28</sup> A corollary of having a clock run on a pending recusal motion is requiring a party to notify the subject judge when it files a recusal motion.

## B. FREEZING THE LITIGATION

Most jurisdictions with rules on the subject provide that, once filed, a recusal motion freezes the litigation until the motion's disposition, thereby forbidding the subject judge to rule on any other motions in the case until the recusal motion is decided. While such a rule makes sense in general and can serve to encourage prompt decisions, there should be exceptions for emergency situations. One Convening participant cited as an example the need for action in a family law dispute when one parent is preparing to board a plane to take a child out of the country. Arizona's Rules of Civil Procedure include such an allowance, providing that, until the motion is decided or the case transferred, the subject judge should take no further action in the case "except to make such temporary orders as are absolutely necessary to prevent immediate and irreparable harm."<sup>29</sup>

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28 *CCJ Resolution 8, supra* note 8, at 3.

29 16 A.R.S. R. CIV. PRO. RULE 42.2(e)(3).



## SECTION IV

### RECUSAL MOTION DENIALS EXPLAINED IN WRITING OR ORALLY ON THE RECORD

Judges should explain denied recusal motions in writing or orally on the record, even when the denial is because the motion is untimely or clearly frivolous or insufficient. Written explanations can be as brief as a few sentences—whatever is necessary to state the applicable standard and explain why the motion does not meet it—or in appropriate cases, why the standard requires a *sua sponte* recusal. Even a granted motion might include a one- or two-sentence clarification of the reason for the grant. While the explanation can be brief, it is not enough simply to invoke a technical legal term that a layperson would likely not understand.

Some jurisdictions have prepared forms or checklists with common reasons for the action taken on a recusal motion, which the judge can complete, annotate as necessary, and file as an explanation. A Convening participant suggested we prepare a template for such a form (see Appendix D).

There are several reasons why the rules should favor written explanations. They can help ensure individual judges' accountability to their oath of impartiality. Requiring a judge to write an opinion explaining a recusal denial may cause her to reconsider the denial if the opinion turns out to be what judges call "an opinion that won't write"; what a judge may regard initially as an obvious conclusion may become less obvious when the judge cannot explain it in a reasoned opinion. In the same vein, formal explanations promote due process by demonstrating that judicial decisions are well reasoned rather than arbitrary. They promote transparency in the recusal process as a whole, and they provide guidance to other judges by establishing common law interpretations of vague or ambiguous recusal requirements. Such provisions might call for a written explanation even of a *sua sponte* recusal, although convening participants worried that requiring such explanations might discourage judges from recusing on their own initiative if the reason for the recusal could be embarrassing. If such information is in a motion, however, it is already in the open. The best way for judges to avoid having potentially dirty laundry exposed to public review is to recuse *sua sponte*; putting reasons on the record is valuable if only to refute the often factually strained allegations in the motion.

Explaining recusal rulings in writing facilitates appellate review of denied recusal motions. Written explanations also facilitate aggregate data collection on recusal activity. Finally, if a party (or anyone) files a disciplinary complaint regarding a failure to recuse (alleging, for example, that the denial stemmed from an improper motive), the subject judge's explanation for the denial as offered at the time can facilitate resolution of the complaint.

The ABA Judicial Disqualification Project's draft report notes the concern that such a requirement could cause judges to recuse unnecessarily out of an abundance of caution, leading to recusals based on the "lowest common denominator" and "setting 'precedent' that other judges will be pressured to follow." The report called the concerns "understandable" but "overstated" and argued they "do not counsel against *encouraging*" judges to explain their rulings.<sup>30</sup> States may thus prefer to encourage—rather than require—such explanations. If so, the encouragement should be strong and forceful.

One other consideration affecting written explanations is this: recusal motions that are lengthy diatribes full of fanciful and frivolous allegations may be impossible to summarize and refute in a denial order without investing substantially more judicial time than the motion merits and that will not satisfy the movant in any case.

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30 AMERICAN BAR ASSOCIATION, DRAFT REPORT OF THE JUDICIAL DISQUALIFICATION PROJECT 77 (September 2008) [http://www.americanbar.org/content/dam/aba/administrative/judicial\\_independence/jdp\\_geyh\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/judicial_independence/jdp_geyh_report.authcheckdam.pdf) [hereinafter *ABA Draft Report*]. Disclaimer: the ABA did not adopt the report.

## SECTION V

### EFFECTIVE APPELLATE REVIEW OF RECUSAL DENIALS; STANDARDS OF REVIEW

Section II.B. recommends that whenever a trial judge does not grant a recusal motion, the motion should be referred, by an established mechanism (not by the challenged judge), to a referral judge to decide the motion. The referral judge's decision as to the motion's procedural sufficiency and/or its merits is subject to normal appellate review, as is a subject judge's denial of his or her own motion (to repeat, a practice that we do not endorse).

#### A. METHODS OF REVIEW

The standard mechanisms for appealing a rejected motion include motions for reconsideration, post-trial petitions, and interlocutory appeals. The denial of a motion to recuse may also provide the basis for a judicial discipline complaint, as when a judge denies a recusal motion for illicit reasons. We agree with the Conference of Chief Justices and others, however, that states should not rely on the discipline process as a deterrent to, or an appellate forum for, improper handling of recusal motions.

Although interlocutory appeals offer the earliest opportunity for relief, they disrupt appellate courts' operations—and we recommend that appellate courts not encourage them except in extraordinary cases. Interlocutory appeals seem especially questionable when a separate referral judge has decided the original motion. A Convening participant reasoned that in “nine cases out of ten, with a prompt review by a separate judge, the movant has almost everything he can reasonably expect, especially because he can still raise the recusal question as part of the regular appeal.” A stronger case for interlocutory appeals may lie when the subject judge denies his or her own motion and thus creates at least the appearance of self-protection. The way to avoid interlocutory appeals' disruptions in such circumstances is to eliminate the circumstance—bar the subject judge from deciding the motion and have a referral judge do so.

#### B. STANDARD OF REVIEW

Courts have differed on the degree of deference with which they should decide appeals of denied recusal motions, whether denied by the subject judge or by another judge to whom the motion was referred. So far the proper standard has been apparently a matter for case law rather than recusal rules, with most appellate courts adopting the more deferential abuse of discretion standard rather than reviewing the recusal denial based on a fresh examination of the motion, i.e., review de novo.<sup>31</sup> See Section V of Appendix B, however, for examples of court rules in two states that require de novo review.

Abuse of discretion review seems an appropriate way to balance fairness with conservation of resources. It clearly is appropriate in denials based on timeliness or non-conformity with procedural rules. We think it is also appropriate when hearing an appeal from the decision of a separate judge to whom the motion has been referred, the practice that we recommend strongly. Because de novo review calls for a more searching, start-from-scratch review in order to become familiar with the facts of the case, it may seem necessary when the subject judge has decided his or her own motion. However, just as we argued that a separate review at the trial court level obviates the need for disruptive interlocutory appeals, a separate review also obviates the need for resource-intensive de novo review on appeal.

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31 *Brennan Center Report*, *supra* note 10, at 12.

## SECTION VI

# EFFICIENT PROCEDURES FOR REPLACING RECUSED JUDGES

## A. TRIAL AND INTERMEDIATE APPELLATE COURTS

Trial courts that assign all cases to judges by any one of several random procedures should be able to use that process to identify replacement judges in recusal situations. As noted above in section II.C.2, most intermediate appellate courts sit in panels, and thus a challenged judge can be replaced fairly easily by assigning a different judge to the panel.

## B. APPELLATE COURTS

### 1. Methods for Identifying Replacement Justices

The purpose for which litigants seek recusal of a judge on a multi-judge appellate court is primarily to prevent the allegedly conflicted judge from participating in the case. If successful, there will usually still be a quorum of appellate judges to hear the case or, as noted, an easily reconstituted panel on an intermediate appellate court.

Not designating a temporary replacement or replacements, especially on a court of last resort, however, does risk loss of a quorum if several judges are recused; on courts with an odd number of judges, it risks a tie vote. Either situation renders the underlying appeal inconclusive (which may be the strategic goal of those seeking recusal).

States vary in policies as to whether and how to designate a temporary replacement for a recused high court justice. According to the Brennan Center report, 34 states allow the chief justice to designate the replacement, five allow the governor to do so, eight do not provide for a replacement, and the remaining states cede the designation to the legislature, the entire court, or either the chief justice or the governor.<sup>32</sup> Providing for a temporary replacement through these methods raises the possibility that the designator will select a designee strategically to affect the outcome of the underlying litigation. Even if that is not a goal, any selection made through these methods may carry the appearance of such a strategy. As to gubernatorial selection, one Convening participant noted that “governors’ appointment is good enough for mid-term judicial vacancies,” while others noted that those appointees “hear all kinds of cases, rather than a single case.”

A way to avoid these potential problems is an automatic, neutral process that cedes the choice to no individual or group of individuals. The Internal Operating Procedures of the seven-justice Florida Supreme Court, for example, direct the clerk of court to “notify the justices of any recusals in advance of oral argument or the conference in which the case is scheduled. If four of the remaining justices cannot ultimately agree to a disposition, the chief justice may” designate a “temporary ‘associate justice.’”<sup>33</sup> The designation is based on a system of rotation among the chief judges of the district courts of appeal, according to the number of the district, excepting from the rotation the chief judge in the district from

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32 *Brennan Center Report*, *supra* note 10, at 13–14.

33 FLORIDA SUPREME COURT, FLORIDA MANUAL OF INTERNAL OPERATING PROCEDURES 21 (2016) [http://www.floridasupremecourt.org/pub\\_info/documents/IOPs.pdf](http://www.floridasupremecourt.org/pub_info/documents/IOPs.pdf).

which the underlying litigation arose. If such a recusal occurs in a “discretionary jurisdiction case,” normally the court will “discharge jurisdiction” rather than use a temporary associate justice, unless four of the remaining justices agree that “extraordinary circumstances” justify deciding the case with a temporary justice. If the recusal occurs in a mandatory jurisdiction case in which the remaining justices are evenly divided, the chief justice invokes the designation procedure as a matter of course. According to the Clerk of the Court for the Florida Supreme Court, the designation procedure is effective albeit seldom used because recusals mainly would affect cases where the court has mandatory jurisdiction, such as in death penalty cases. In other cases, if the court is evenly divided and the case is within the court’s discretionary jurisdiction, the general practice would be to let the lower court decision stand.<sup>34</sup>

Of course, even neutral replacement procedures have the potential for strategic recusals. A justice deciding whether he has a conflict sufficient to merit a *sua sponte* recusal, for example, may be influenced in that decision by knowing which lower court judge or retired judge or justice is in line to serve as a replacement justice.

## 2. Protecting the High Court’s Law Declaring Function

Any system for using temporary replacement justices contains the risk that a temporarily constituted supreme court will decide an important legal question by a closely divided vote, creating a precedent that the full court (with the previously recused judge now sitting) may reverse if and when a separate case involving the same issue comes before it. A Convening participant described the tension as “between absolute justice for the individual parties in every case on the one hand and avoiding dilution of a state high court’s law-declaring function on the other.” The participant cited two unusual cases in which the state high court announced conflicting decisions on the same day,<sup>35</sup> but the participant added, “the same result can occur any time temporary replacements are used in a highest court.” The alternative is a non-precedential ruling or no ruling, due to a divided or quorum-less court, but in states with intermediate appellate courts, “the party will still have had at least one chance at an appeal.”

These tensions merely reinforce our earlier observation that setting recusal policy, like setting most any public policy, involves balancing competing risks and interests.

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34 JOHN TOMASINO, CLERK OF THE COURT FOR THE FLORIDA SUPREME COURT, MEMO TO JUSTICE BARBARA PARIENTE (March 14, 2017). On file with IAALS.

35 *State v. Petersen-Beard*, 377 P.3d 1127 (Kan. 2016); *State ex rel. Beisly v. Perigo*, 469 S.W.3d 434 (Mo. 2015).

## SECTION VII

# RESOURCES FOR SPECIFIC CONFIDENTIAL ADVICE FOR JUDGES FACING RECUSAL MOTIONS OR CONSIDERING SELF-RECUSAL, AND FOR GENERAL AND CONTINUING EDUCATION ABOUT JUDICIAL ETHICS

Fairness demands that courts deal efficiently with recusal motions according to prescribed procedures. It also demands that judges recuse themselves, in the absence of recusal motions, when they think they have a conflict of interest or there is a risk of the appearance of a conflict sufficient to undermine the appearance of impartiality.

## A. PROVIDING CONFIDENTIAL ADVICE WHEN JUDGES REQUEST IT

Especially in cases where the judge has no recusal motion to weigh, the judge should be able to seek confidential advice from a source sanctioned by the state judiciary that can walk the judge through the applicable rules while not offering a binding decision.

Different states take different approaches. More than 40 states have “judicial ethics advisory committees to which judges may submit inquiries regarding the propriety of contemplated future action under the code of judicial conduct,” and according to the National Center for State Courts, a “disproportionate number” of inquiries involve disqualification.<sup>36</sup> Ohio has such a body, the Board of Professional Conduct, which provides advice to lawyers and judges and publishes a small number of redacted opinions, most concerning lawyers.<sup>37</sup> Judges may also seek advice from private counsel through the Ohio Supreme Court’s “Judicial Hotline.” The Hotline is administered by a division of the Ohio Department of Administrative Services in connection with its contractual program to provide liability coverage to Ohio judges. Through the Judicial Hotline, courts and judges may receive free, confidential advice apportioned on an hourly basis (limited to two hours per year per judge), from three law firms concerning matters that have not yet become the subjects of lawsuits or formal complaints.<sup>38</sup> The Court reports that the majority of Hotline time to date has been devoted to judicial ethics issues, including issues related to recusal.<sup>39</sup> (The United States Judicial Conference Committee on Codes of Conduct also provides advisory opinions to federal judges on the code’s applicability to contemplated actions, and it refashions and publishes opinions likely to be of general interest. Of the 89 opinions published on the federal court website, 37 dealt directly with disqualification.<sup>40</sup>)

36 National Center for State Courts, Ethics Advisory Committees (2017) <http://www.ncsc.org/Topics/Judicial-Officers/Ethics/State-Links.aspx?cat=Ethics%20Advisory%20Committees>; Cynthia Gray, *So You’re Going to be a Judge: Ethical Issues for New Judges*, 52 CT. REV. 80 (2016) <http://aja.ncsc.dni.us/publications/courtrv/cr52-2/Gray.pdf>.

37 See OHIO BOARD OF PROFESSIONAL CONDUCT, <http://www.supremecourt.ohio.gov/Boards/BOC/default.aspx> (last visited May 24, 2017).

38 OHIO DEPARTMENT OF ADMINISTRATIVE SERVICES, JUDGES’ SELF-INSURED PROFESSIONAL LIABILITY, <http://das.ohio.gov/Divisions/GeneralServices/RiskManagement/Overview.aspx> (last visited May 24, 2017).

39 CRAIG MAYTON, MEMO TO CHIEF JUSTICE MAUREEN O’CONNOR (January 4, 2017). On file with IAALS.

40 See generally U.S. JUDICIAL CONF. COMM. ON CODES OF CONDUCT, <http://www.uscourts.gov/sites/default/files/vol02b-ch02.pdf> (last visited May 24, 2017).

States with advice-giving entities will have to decide whether judges who seek advice when faced with recusal motions should be required to disclose such consultation. Requiring disclosure might discourage judges from seeking guidance in the first place. A Convening participant suggested that while ethical rules generally counsel against judges' consulting outside sources, weighing recusal options is one area in which we should encourage it.

## B. CONTINUING JUDICIAL EDUCATION

In addition to providing a source for individual advice, state judiciaries should make available orientation and continuing judicial education about ethical requirements including substantive and procedural rules governing recusal. The 2011 ABA resolution called on “states in which judges are subject to elections of any kind to adopt . . . [g]uidelines for judges concerning disclosure and disqualification obligations regarding campaign contributions.”<sup>41</sup> We agree, but would not confine this assistance to the narrow area of campaign financing.

# SECTION VIII

## COLLECTION OF AGGREGATE DATA ON RECUSAL ACTIVITY

According to the 2008 *Draft Report of the Judicial Disqualification Project*, four states—Alaska, Minnesota, North Dakota, and Vermont—collect some type of statistical data on recusal and disqualification (the data does not include the reasons for disqualification).<sup>42</sup> Our research for this report revealed that a fifth state, Indiana, collects statistics on how many “special judges” are appointed each quarter by court and case type. A special judge may be appointed in a case when a motion for change of judge is granted or the sitting judge is disqualified or recuses him or herself (our research also indicated that such data is no longer collected in North Dakota).

Alaska has the most comprehensive system—a computerized case management system that tracks the number of cases reassigned because of recusal, including by peremptory challenge. Aggregate, website-posted data on recusal activity—motions filed, asserted bases, dispositions and reasons given, and *sua sponte* recusals—can enhance transparency and facilitate comparative assessment of the impact of, and compliance with, procedural rules. One Convening participant worried that “many courts have unwritten procedures and procedures that aren’t followed.” Authorities should make clear that the data in question are aggregate data without judge names or other identifiers, lest courts resist compliance with data collection out of fear of freedom-of-information-act type requests for sensitive information.

Because such data-gathering programs will have major implications for statewide and local information systems, establishing them initially on a pilot basis in a few diverse jurisdictions makes sense.

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<sup>41</sup> Resolution 107, *supra* note 14.

<sup>42</sup> ABA *Draft Report*, *supra* note 30, at 33.



# CONCLUSION

The increase in judicial campaign contributions, independent expenditures in support of judicial candidates, and relaxed rules governing judicial campaign speech have directed attention to the need for more rigorous recusal procedures to deal with conflict-of-interest claims based on campaign financing and campaign speech.

The attention to campaign-related recusals, however, has had a more general effect, revealing potential weaknesses in states' recusal procedures apart from any judicial election context. Do current recusal procedures serve the well-established rule that no person should be a judge in his or her own case, and do they do so transparently and efficiently?

We recommend that state judicial authorities take the opportunity to review their state's recusal procedures, asking the obvious questions:

- Which procedures are mandated by state constitutions, by statute, by court rules, or simply reflect tradition?
- Which values are important to elevate in the state's recusal procedures—transparency, efficiency, expeditious resolution, and/or freedom from the appearance of bias?
- Which procedures can the judiciary change on its own, which require legislative intervention, and which require constitutional change?
- How can and how should the judiciary assure all litigants that legitimate concerns about conflicts of interest will be effectively explored?
- How can and how should the judiciary assure judges that their legitimate interests in privacy and insulation from unwarranted attacks will be protected?

We offer this report not as a manual for recusal procedures revision, but rather as a checklist of the important considerations that state judiciaries on their own and in cooperation with legislatures, executive branches, the bar, and citizens can take into account in answering these questions.

And, as stated at the outset, IAALS expresses its deep appreciation to the participants in the 2016 Recusal Procedures Convening for their thoughtful illumination and consideration of recusal issues and challenges, and to El Pomar Foundation for making the Convening possible.

# APPENDIX A

## CONVENING PARTICIPANTS<sup>43</sup>

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<sup>43</sup> Participants' affiliations are provided for informational purposes and do not denote the affiliated organization's support for this report.



## APPENDIX B

## ILLUSTRATIVE PROVISIONS

Appendix B contains excerpts from constitutional provisions, statutes, rules of court, procedural rules, and formal statements of operating procedures that prescribe practices that are consistent with the recommendations in the text of the report.

The organizational sequence of the Appendix tracks that of the report.

A provision's inclusion in this Appendix does not signal IAALS' endorsement of it or a recommendation that states adopt it as written or with modifications. Nor does inclusion reflect any independent confirmation by IAALS that practice in the particular jurisdiction is necessarily consistent with the provision's prescribed behavior.

Inclusion only reflects IAALS' view that as jurisdictions consider implementing any of the report's recommendations, they look to the efforts of other jurisdictions.

This Appendix reflects observations of Convening participants, IAALS staff's non-exhaustive review of procedural provisions, and background research undertaken by staff of the National Center for State Courts in support of the Conference of Chief Justices' *Considerations in Developing State Recusal Rules*<sup>44</sup> and by the staff of the Brennan Center for Justice in support of the Center's report, *Judicial Recusal Reform: Toward Independent Consideration of Disqualification*.<sup>45</sup> We are grateful to both the National Center and the Brennan Center for providing access to their research.

### I. WRITTEN, CLEARLY ARTICULATED JUDICIAL RECUSAL PROCEDURES

As of 2014, 36 states had specific recusal procedures for trial judges, 12 had them for intermediate appellate courts, and 16 had them for state courts of last resort.

#### IIA. RECUSAL MOTIONS DECIDED BY ANOTHER JUDGE

##### Alaska Statutes, 22.20.020

(c) . . . If a judicial officer denies disqualification the question shall be heard and determined by another judge assigned for the purpose by the presiding judge of the next higher level of courts or, if none, by the other members of the supreme court. The hearing may be *ex parte* and without notice to the parties or judge.

##### California Code of Civil Procedure 170.3(c)

(5) A judge who refuses to recuse himself or herself shall not pass upon his or her own disqualification or upon the sufficiency in law, fact, or otherwise, of the statement of disqualification filed by a party. In that case, the question of disqualification shall be heard and determined by another judge agreed upon by all the parties who have appeared or, in the event they are unable to agree within five days of notification of the judge's answer, by a judge selected by the chairperson of the Judicial Council, or if the chairperson is unable to act, the vice chairperson. The clerk shall notify the executive officer of the Judicial Council of the need for a selection. The selection shall be made as expeditiously as possible. No challenge pursuant to this subdivision or Section 170.6 may be made against the judge selected to decide the question of disqualification.

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44 CCJ Resolution 8, *supra* note 8.

45 Brennan Center Report, *supra* note 10, at 4.

## Louisiana Code of Civil Procedure, Article 160

Recusation of judge of court of appeal. When a written motion is filed to recuse a judge of a court of appeal, he may recuse himself or the motion shall be heard by the other judges on the panel to which the cause is assigned, or by all judges of the court, except the judge sought to be recused, sitting *en banc*. . .

## Nevada Revised Statutes, 1.225(4)

Any party to an action or proceeding seeking to disqualify a justice of the Supreme Court or a judge of the Court of Appeals for actual or implied bias shall file a charge in writing, specifying the facts upon which such disqualification is sought. Hearing on such charge shall be had before the other justices of the Supreme Court or, if the charge concerns a judge of the Court of Appeals, the justices of the Supreme Court.

## Texas Rules of Civil Procedure, Rule 18a

(f)(1) Responding to the Motion. Regardless of whether the motion complies with this rule, the respondent judge, within three business days after the motion is filed, must either:

- (A) sign and file with the clerk an order of recusal or disqualification; or
- (B) sign and file with the clerk an order referring the motion to the regional presiding judge.

...

(g)(1) Motion. The regional presiding judge must rule on a referred motion or assign a judge to rule. If a party files a motion to recuse or disqualify the regional presiding judge, the regional presiding judge may still assign a judge to rule on the original, referred motion. Alternatively, the regional presiding judge may sign and file with the clerk an order referring the second motion to the Chief Justice for consideration.

## Texas Rules of Appellate Procedure, Rule 16.3

(b) Decision. Before any further proceeding in the case, the challenged justice or judge must either remove himself or herself from all participation in the case or certify the matter to the entire court, which will decide the motion by a majority of the remaining judges sitting *en banc*. The challenged justice or judge must not sit with the remainder of the court to consider the motion as to him or her.

## Utah Rules of Civil Procedure, Rule 63

(c)(1) The judge who is the subject of the motion must, without further hearing or a response from another party, enter an order granting the motion or certifying the motion and affidavit or declaration to a reviewing judge. The judge must take no further action in the case until the motion is decided. If the judge grants the motion, the order will direct the presiding judge of the court or, if the court has no presiding judge, the presiding officer of the Judicial Council to assign another judge to the action or hearing. The presiding judge of the court, any judge of the district, any judge of a court of like jurisdiction, or the presiding officer of the Judicial Council may serve as the reviewing judge.

(c)(2) If the reviewing judge finds that the motion and affidavit or declaration are timely filed, filed in good faith and legally sufficient, the reviewing judge shall assign another judge to the action or hearing or request the presiding judge or the presiding officer of the Judicial Council to do so.

## IIB. PROMPT REVIEW BY OTHER JUDGE(S) OF THE SUBJECT JUDGE'S MOTION DENIAL

### Mississippi Rules of Appellate Procedure, Rule 48B

If a judge of the circuit, chancery or county court shall deny a motion seeking the trial judge's recusal, or if within 30 days following the filing of the motion for recusal the judge has not ruled, the filing party may within 14 days following the judge's ruling, or 14 days following the expiration of the 30 days allowed for ruling, seek review of the judge's action by the Supreme Court. . .

### Michigan Court Rules, 2.003(D)(3)

(a) For courts other than the Supreme Court, the challenged judge shall decide the motion. If the challenged judge denies the motion,

- (i) in a court having two or more judges, on the request of a party, the challenged judge shall refer the motion to the chief judge, who shall decide the motion *de novo*;
- (ii) in a single-judge court, or if the challenged judge is the chief judge, on the request of a party, the challenged judge shall refer the motion to the state court administrator for assignment to another judge, who shall decide the motion *de novo*.

(b) In the Supreme Court, if a justice's participation in a case is challenged by a written motion or if the issue of participation is raised by the justice himself or herself, the challenged justice shall decide the issue and publish his or her reasons about whether to participate.

If the challenged justice denies the motion for disqualification, a party may move for the motion to be decided by the entire Court. The entire Court shall then decide the motion for disqualification *de novo*. The Court's decision shall include the reasons for its grant or denial of the motion for disqualification. The Court shall issue a written order containing a statement of reasons for its grant or denial of the motion for disqualification. Any concurring or dissenting statements shall be in writing.

## IIIA. SPECIFIED AND EXPEDITIOUS TIME LIMITS FOR DECIDING RECUSAL MOTIONS

### Florida Rules of Judicial Administration, Rule 2.330

(j) Time for Determination. The judge shall rule on a motion to disqualify immediately, but no later than 30 days after the service of the motion as set forth in subdivision (c). If not ruled on within 30 days of service, the motion shall be deemed granted and the moving party may seek an order from the court directing the clerk to reassign the case.

### Tennessee Supreme Court Rules, Rule 10B

1.03. . . . Upon the filing of a motion pursuant to section 1.01, the judge shall act promptly by written order and either grant or deny the motion. If the motion is denied, the judge shall state in writing the grounds upon which he or she denies the motion.

3.02(a) Upon the filing of a motion seeking disqualification, recusal, or determination of constitutional or statutory incompetence of an intermediate appellate judge, the judge in question shall act promptly by written order and either grant or deny the motion. If the motion is denied, the judge shall state in writing the grounds upon which he or she denies the motion. . .



3.03(a) If a motion is filed seeking disqualification, recusal, or determination of constitutional or statutory incompetence of a Supreme Court justice, the justice in question shall act promptly by written order and either grant or deny the motion. If the motion is denied, the justice shall state in writing the grounds upon which he or she denies the motion. . .

## IIIB. FREEZING THE LITIGATION

### Rules of Civil Procedure for the Superior Courts of Arizona, Rule 42.2

(e) Hearing and Assignment.

(3) On filing of the affidavit for cause, the named judge should proceed no further in the action except to make such temporary orders as are absolutely necessary to prevent immediate and irreparable harm from occurring before the request is decided and the action transferred. However, if the named judge is the only judge in the county, that judge may also perform the functions of the presiding judge.

### Texas Rules of Civil Procedure, Rule 18a

(f)(2) Restrictions on Further Action.

(A) Motion Filed Before Evidence Offered at Trial. If a motion is filed before evidence has been offered at trial, the respondent judge must take no further action in the case until the motion has been decided, except for good cause stated in writing or on the record.

### Utah Rules of Civil Procedure, Rule 63(c) – see IIA

## IV. RECUSAL MOTION DENIALS EXPLAINED IN WRITING OR ORALLY ON THE RECORD

### Uniform Rules, Superior Courts of the State of Georgia, Rule 25.6

The judge assigned may consider the motion solely upon the affidavits, but may, in the exercise of discretion, convene an evidentiary hearing. After consideration of the evidence, the judge assigned shall rule on the merits of the motion and shall make written findings and conclusions. . .

### Maine Rules of Civil Procedure, Rule 63

(B) Determination of Recusal by the Court. With or without a hearing, a judge may determine herself or himself to be recused. If the judge recuses in the matter, the judge may, but is not required to, set forth the reasons for recusing.

(C) Denial of Motion to Recuse. If a judge denies a motion to recuse, the judge shall briefly state the reasons for the denial in a written order, or orally on the record if the motion is made during the course of a proceeding that is being recorded, provided, however, that if a motion to recuse is made during or shortly before the start of an on-the-record proceeding, and the judge denies the motion, the judge need not state the reasons for denial of the motion until after the proceeding has been completed and the judge, or a jury, has issued any order or other ruling to conclude the proceeding.

### Michigan Court Rules, Rule 2.003(D)(3)(b) – see IIB

### Tennessee Supreme Court Rules, Rule 10B – see IIIA

## V. EFFECTIVE APPELLATE REVIEW OF RECUSAL DENIALS; STANDARDS OF REVIEW

Michigan Court Rules, Rule 2.003(D)(3) – see IIB

Oklahoma Supreme Court Rules, Rule 1.175

... Motion to disqualify a judge of the Court of Civil Appeals shall be filed with the clerk of the Supreme Court within ten (10) days after the date notice of assignment is mailed to counsel. The motion shall be decided by the division. If the division should refuse to disqualify its judge, the aggrieved party may seek review in the Supreme Court by filing a petition within ten (10) days from the date of the division's order. . .

Tennessee Supreme Court Rules, Rule 10B

2.01. . . . In both types of appeals authorized in this section, the trial court's ruling on the motion for disqualification or recusal shall be reviewed by the appellate court under a *de novo* standard of review, and any order or opinion issued by the appellate court should state with particularity the basis for its ruling on the recusal issue.

## VIA. EFFICIENT PROCEDURES FOR REPLACING RECUSED JUDGES – TRIAL COURTS

Rules of Civil Procedure for the Superior Courts of Arizona, Rule 42.1(f)

(3) Reassignment.

(A) On Stipulation. If a notice of change of judge is filed, the parties should inform the court in writing if they have agreed on an available judge who is willing to hear the action. An agreement of all parties may be honored and, if so, bars further changes of judge as a matter of right unless the agreed-on judge becomes unavailable. If a judge to whom an action is assigned by agreement later becomes unavailable because of a change of calendar assignment, death, illness, or other incapacity, the parties may assert any rights under this rule that existed immediately before the assignment to that judge.

(B) Absent Stipulation. If no judge is agreed on, the presiding judge must promptly reassign the action.

Utah Rules of Civil Procedure, Rule 63(c) – see IIA

## VIB. EFFICIENT PROCEDURES FOR REPLACING RECUSED JUDGES – APPELLATE COURTS

Supreme Court of Florida Manual of Internal Operating Procedures (X)

D. Method of Selection. Associate justices shall be the chief judges of the district courts of appeal selected on a rotating basis from the lowest numbered court to the highest and repeating continuously. A district court shall be temporarily removed from the rotation if the case emanated from it. If more than one associate justice is needed, they shall be selected from separate district courts according to the numerical rotation. If the chief judge of a district court who would be assigned under this procedure is recused from the case or otherwise unavailable, the next most senior judge on that court (excluding senior judges) who is not recused shall replace the chief judge as associate justice.

## Rules of the Supreme Court of Georgia, Rule 57

Disqualified or Not Participating. A disqualified or nonparticipating Justice shall be replaced by a senior appellate justice or judge, a judge of the Court of Appeals or a judge of a superior court whenever deemed necessary. A disqualified or nonparticipating Justice does not participate in any motion or decisions or the opinion on the merits and is not present when discussions regarding the case take place. Neither briefs and motions nor copies of bench briefs, draft opinions or other memoranda are circulated to the disqualified or nonparticipating Justice.

## Nevada Statutes 1.225

(5) Upon the disqualification of.

(a) A justice of the Supreme Court pursuant to this section, a judge of the Court of Appeals or a district judge shall be designated to sit in place of the justice as provided in Section 4 of Article 6 of the Constitution of the State of Nevada.

(b) A judge of the Court of Appeals pursuant to this section, a district judge shall be designated to sit in place of the judge as provided in Section 4 of Article 6 of the Nevada Constitution.

## Ohio Constitution, IV.02

(A) . . . If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. . .

## South Dakota Codified Laws, 16-1-5

Retired justices and judges, with their consent, and active judges may be authorized by the Chief Justice to act in the place of disqualified justices, or in the event of vacancies or other necessities as determined by the Chief Justice. The court shall provide for the reimbursement of their expenses.

## VII. RESOURCES FOR SPECIFIC CONFIDENTIAL ADVICE FOR JUDGES FACING RECUSAL MOTIONS OR CONSIDERING SELF-RECUSAL, AND FOR GENERAL AND CONTINUING EDUCATION ABOUT JUDICIAL ETHICS

This recommendation likely will not require the adoption of a statute or court rule to implement. The Ohio Supreme Court's "Judicial Hotline" discussed in the body of the report is one potential model.

## VIII. COLLECTION OF AGGREGATE DATA ON RECUSAL ACTIVITY

Indiana Code 33-24-6-3(2) requires the Division of State Court Administration to collect and compile statistical data on the judicial work of the courts. This data includes statistics on the number of special judges appointed each quarter by court and case type. "Special judges" may be appointed when a motion for change of judge is granted or the sitting judges is disqualified or recuses him/herself.



## APPENDIX C

## TEMPLATE FOR POSTING RECUSAL STANDARDS AND PROCEDURES; TEMPLATE FOR FORM MOTION SEEKING RECUSAL AND ACCOMPANYING DECLARATION

Section IB of the report recommends that state judiciaries “post recusal standards and procedures on their website” and that the recusal standards and procedures include a layperson-oriented statement of impermissible bases for recusal motions. It also recommends that states “post a standard-form recusal motion, particularly to assist pro se parties.”

The single document includes two separate but related templates. States may use one or the other or both, adapted to reflect their own standards and procedures. Parts I and II are sample, plain-language statements of recusal standards and procedures. Parts III and IV contain a standard-form recusal motion and accompanying declaration of factual support. (Part V suggests states that post a plain-language version of standards and rules also post the actual standards and statutory rules or rule-based language.)

The sample statement of procedures reflects the report’s recommendations for mechanisms to identify referral judges and judges deciding non-granted recusal motions.

States that decide to adapt either or both parts of the document should post their adaptation on the state judicial website and direct its placement on any individual court websites. Courts may also wish to have hard-copy versions available for distribution in clerks’ or court administrative offices.

# JUDICIAL RECUSAL: SEEKING A JUDGE'S REMOVAL FROM A CASE

## Recusal: An Introduction

Parties in civil, criminal, and appellate proceedings may request that the judge or justice assigned to the case no longer participate in it. Parties do so by filing a recusal motion (sometimes called a “disqualification motion”). This document can help you formulate a recusal motion and supporting documentation by summarizing the governing rules in everyday language and by providing a form motion to use in preparing your own motion.

Part I describes judicial recusal procedures. Part II summarizes the rules and requirements established by state law. Part III is a blank recusal MOTION and Part IV is a blank STATEMENT OF FACTS; you may use them in preparing your own documents. Part V contains the relevant legal provisions to which your motion and statement should refer.

Recusal promotes judicial impartiality. A judge should not preside in a case if that judge has, or may reasonably appear to have, a conflict of interest in the case or procedure. A conflict of interest is an interest or involvement in, or special knowledge, beliefs, or opinions about, the matters involved that could create a conflict between the judge's interest in an impartial decision on the one hand and his or her interest in a specific outcome on the other.

Recusal, however, impairs efficient court operations by delaying proceedings while the motion is under consideration and, if granted, while a replacement judge is identified for assignment and becomes familiar with the case. Thus judges will not grant recusal motions that do not clearly establish an actual or apparent conflict of interest.

## I. Recusal Procedures

1. For judges of [trial courts] and [intermediate appellate court].

- a. Parties may move that the judge assigned to the case recuse himself or herself from the case. (“Judge” as used here includes other judicial officers, but does not include clerks or other administrative personnel.)
- b. The recusal motion and statement of facts must be filed according to the rules and time limits summarized in part II.
- c. If the judge grants your request, he or she will refer the granted motion to a court or other designated person or agency, which will assign another judge to the case.
- d. A judge who does not grant the motion (i.e., recuse himself or herself) will send the motion to a designated court or judge, which will assign it to another judge to decide whether to grant it. The judge in your case will not make the assignment.
  - (1) The referral judge will first review the motion to determine whether it meets the basic requirements described in Part II—for example, whether you filed it according to the time limits and it contains actual factual allegations, not just unsupported assertions. If the judge determines that the motion does not meet these basic requirements, he or she will either dismiss it or return it to you to try and correct it.
  - (2) If the motion meets the basic requirements, the referral judge will decide whether the judge in your case should be recused or may continue to sit on the case.
  - (3) If the other judge grants the motion, he or she will inform a court or other designated person or agency, which will assign another judge to preside in the case.



- e. In some small courts, where another judge may not be present at the courthouse to decide the motion, the referral judge may decide from a remote location using telephone hearings and electronic submission of documents.
- f. If the judge assigned to decide your recusal motion denies it, you may file an appeal in the [appellate court] seeking review of that denial.
- g. Even if you establish that the judge's impartiality might reasonably be questioned, in some circumstances the judge may continue to preside over the case. For example, the judge might be the only judge available to sit in a fast-moving case that must be decided immediately. Or if the facts that lead you to call for recusal come to light only after the judge has devoted substantial attention to the matter and was previously unaware of the facts, the judge might be able to continue to preside if he or she can divest himself or herself of the situation creating the possible conflict of interest.

## 2. For justices of the supreme court.

- a. Appellants and appellees may request (i.e., move, or file a motion) that one or more justices recuse himself or herself from the case.
- b. The recusal motion and statement of facts must be filed according to the rules and time limits summarized in Part II.
- c. The justice(s) may grant your request and step aside in the case.
- d. If justice does not step aside, he or she will refer the motion to the other justices, who will, without the challenged justice's participation, decide whether to grant the motion.
- e. When justices are recused, either by themselves or by other justices, a judge of a lower court, through an established procedure, may be temporarily assigned as a replacement justice to participate in your case.

## II. Summary of Rules and Requirements

This is a summary of the rules and requirements for judicial recusal motions as set forth in STATUTE(S)/RULE(S). Read these statutes/rules in Part V of this document. To receive consideration, your motion must conform to the requirements in these statutes/rules.

- 1. You may not request a judge's recusal for reasons other than those summarized in section 3, below. Among other things, do not file a recusal motion because you disagree with a ruling the judge made unless you explain how the ruling meets one of the recusal reasons summarized in section 3.
- 2. You may file a recusal motion only if you are a party in the case.
- 3. Recusal is necessary only for one or more the reasons stated in STATUTE/RULE in Part V and summarized here. In your Statement of Facts, copy the provision(s) of STATUTE/RULE that you believe require recusal and provide *specific factual support* as to why the provision(s) require the judge's recusal. Even with concrete facts, your motion will be unsuccessful if the judge who decides your motion concludes that there is no real or apparent conflict of interest.

Recusal is warranted when specific facts establish that:

- a. The judge is a party in the case, or has a financial or other interest that could benefit from a decision in the case (refer to section X, Part V for the actual provision).
  - b. The judge, the judge's spouse or domestic partner, individually or as a fiduciary, or a child of the judicial officer has a direct financial interest in the matter. A "fiduciary" is a trustworthy person who acts on behalf of another person. A "financial interest" is ownership of something of more than minimal or trifling value (refer to section X, Part V for the actual provision).
  - c. An attorney or party in the case is—as to the judge or the judge's spouse or domestic partner—a spouse, domestic partner, parent, parent-in-law, grandparent, grandparent-in-law, or great grandparent; child, daughter-in-law or son-in-law, grandchild, grandchild-in-law, or great grandchild; a sibling or sibling-in-law, or an aunt, uncle, niece, or nephew (refer to section X, Part V for the actual provision).
  - d. The judge has been attorney for either of the parties in the present case (refer to section X, Part V for the actual provision).
  - e. The judge knows or learns from your or another motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous \_\_\_\_\_ year[s] made aggregate contributions to the judge's campaign for election or reelection as a judge in an amount that is greater than \$\_\_\_\_\_ for an individual or \$\_\_\_\_\_ for an organization or other non-individual (refer to section X, Part V for the actual provision).
  - f. The judge, while a judge or a 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 your case (refer to section X, Part V for the actual provision).
  - g. The judge's impartiality might reasonably be questioned even if none of the specific conditions described above applies in this case. The need for specific and relevant facts, while essential to support any motion, is especially strong for this provision (refer to section X, Part V for the actual provision).
4. File the motion [time limits specified by statute or rule] (refer to section X, Part V for the actual provision).
  5. File the motion and statement with the clerk of court, [who will send it to the judge] [and provide a copy to the judge by delivering it to the judge's chambers] (refer to section X, Part V for the actual provision).
  6. Give copies of your motion to other parties in your case. Those parties may file their own motion agreeing or opposing your motion (refer to section X, Part V for the actual provision).
  7. File no more than one recusal motion in the case, unless, after you file a motion, you learn of separate, additional reasons that you believe require the judge's recusal (refer to section X, Part V for the actual provision).
  8. Signing the motion signifies that, to the best of your knowledge (a) you are not filing the motion for any improper purpose (such as a motion filed simply to delay proceedings) and (b) you believe your reasons for seeking recusal have factual support. If the judge who decides the motion determines that you did not sign the motion in good faith, he or she may impose monetary or other sanctions (penalties) on you (refer to section X, Part V for the actual provision).

### III. Motion Form

## MOTION FOR JUDICIAL RECUSAL

I, \_\_\_\_\_, respectfully request that Judge \_\_\_\_\_ recuse him/herself in the case of \_\_\_\_\_, # \_\_\_\_\_, for reasons given in the accompanying STATEMENT OF FACTS.

By signing this motion, I certify that I am not filing this motion in order to delay the proceedings or for any purpose other than to request Judge \_\_\_\_\_'s recusal, and that the statements in the accompanying STATEMENT OF FACTS are true to the best of my knowledge.

---

(signature and date)

#### IV. Form Statement of Facts

STATEMENT OF FACTS ABOUT JUDGE \_\_\_\_\_  
AS TO THE CASE OF \_\_\_\_\_

Identify the specific provision(s) listed in Part V on which you base your request for recusal. Then provide specific facts and reasons why you believe the judge may have a conflict of interest that would make it difficult for the judge to make impartial decisions in your case.

Judge \_\_\_\_\_ should recuse himself or herself in this case because:

Provision from Part V:

This provision describes Judge \_\_\_\_\_ because (state applicable facts):

(signature\* and date)

\* My signature certifies that I am not filing this STATEMENT OF FACTS in order to delay the proceedings or for any purpose other than to request Judge \_\_\_\_\_'s recusal.

## V. Statutes/Rules

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## APPENDIX D

## TEMPLATE FOR ORDER GRANTING OR DENYING A RECUSAL MOTION

Some courts provide judges with forms or checklists containing common reasons for action on a recusal motion. Judges can complete, annotate as necessary, and file the form in support of the dispositive order. A Convening participant suggested we prepare a template that states may wish to use to fashion a checklist appropriate for their standards and procedures.

Although such a form might usually be considered for denied motions, the template provides for a granted motion as well, consistent with the report's recommendation that "[e]ven a granted motion might include a one-or-two-sentence clarification of the reason for the grant."

The template contemplates its use, consistent with the report's recommendations, by a separate judge to whom the recusal motion has been referred for decision.

We caution against any suggestion that a checklist is an appropriate substitute for judges' careful consideration of recusal motions. It should be, rather, a form of convenience to help guide that consideration and effect a more efficient explanation of it.

(Although the template includes space for the judge to summarize the motion and its allegations as an indication that the judge indeed read and considered the motion, there are countervailing reasons for not adopting this aspect of the template. At the least, if adopted the form should alert judges to the problems of summarizing lengthy, rambling allegations, including those that do not even purport to claim that the judge's impartiality might reasonably be questioned. Summaries of such allegations may simply prompt charges that the judge failed to appreciate the nuances and intricacies of the motion at issue.)



## ORDER

Case \_\_\_\_\_

Number \_\_\_\_\_

Date \_\_\_\_\_

\_\_\_\_\_ filed a motion seeking the recusal of Judge \_\_\_\_\_ on  
\_\_\_\_\_ (date). The motion was referred to me for decision. I received the motion on  
\_\_\_\_\_ (date).

☐ The motion is GRANTED because:

- ☐ A reasonable person might conclude that Judge \_\_\_\_\_'s impartiality might reasonably be questioned.
- ☐ Granting the motion does not indicate a finding that the allegations asserted are true.

☐ The motion is DENIED because:

- ☐ Movant is not a party to the case.  
\_\_\_\_\_
- ☐ Movant did not file the motion within the time limits set out in STATUTE/RULE and offers no adequate explanation for failure to file in a timely manner.  
\_\_\_\_\_
- ☐ Motion disputes a legal or procedural ruling that Judge \_\_\_\_\_ made in this case, but recusal normally is not required merely because a judge has ruled on an issue in the proceeding. [optional: Motion did not show how the ruling indicates that the judge's impartiality might reasonably be questioned.].  
\_\_\_\_\_
- ☐ Motion is not the first such motion filed in this case and states no separate, additional reasons that movant believes require recusal and that were unknown to movant at the time of the previous motion.  
\_\_\_\_\_
- ☐ Motion alleges no facts that are sufficient to establish that Judge \_\_\_\_\_'s impartiality might reasonably be questioned.  
[Optional: Facts alleged: \_\_\_\_\_]  
[Optional: Facts alleged are not sufficient because \_\_\_\_\_]
- ☐ Motion seeks recusal on grounds other than those provided in STATUTE/RULE.  
[Optional: Grounds asserted: \_\_\_\_\_]  
[Optional: These grounds are not sufficient because \_\_\_\_\_]
- ☐ Motion's evidence does not establish the allegation that Judge \_\_\_\_\_'s impartiality might reasonably be questioned.  
\_\_\_\_\_

\_\_\_\_\_  
Judge Presiding

\_\_\_\_\_  
Date



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