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Deciding Recusal Motions: Who Judges the Judges?

Leslie W. Abramson

DECIDING RECUSAL MOTIONS: WHO JUDGES THE JUDGES?

LESLIE W. ABRAMSON*

I. INTRODUCTION

Judicial impartiality is a significant element of justice. Judges should decide legal disputes free of any personal bias or prejudice. As a result of a conflict of interest, a judge may be unable to maintain impartiality in a case and thus should be disqualified. Even where a judge is impartial, but appears not to be, recusal is necessary. To promote the goal of judicial impartiality, most states have adopted the American Bar Association's Model Code of Judicial Conduct.[1] The Code prescribes disqualification for judges who recognize[2] the existence of a conflict of interest, or who encounter allegations of a conflict of interest in a motion to disqualify.[3]

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* Professor of Law, University of Louisville School of Law. The author gratefully acknowledges the able assistance provided by Cheryl Gentry Cooper, a third-year law student, in the preparation of this article.

1. MODEL CODE OF JUDICIAL CONDUCT Canon 3E (1990) [hereinafter CODE]. Although the 1990 version of the Code of Judicial Conduct is the most recently approved version by the American Bar Association, most states still follow the original version, which was adopted in 1972. As of late 1993, judicial codes or canons based in part on the 1990 ABA Model Code of Judicial Conduct have been adopted in Arizona, Arkansas, California, Colorado, Georgia, Hawaii, Illinois, Indiana, Maine, Maryland, Massachusetts, Nebraska, Nevada, North Dakota, Rhode Island, South Dakota, Texas, West Virginia, Wyoming, and the U.S. Judicial Conference.

2. The language of the Code leaves no doubt that, in the first instance, the recusal process is to be self-executing, without the need for a judge to wait for a recusal motion to be filed.

> [It] is intended to be used by a judge at the start of each case as a checklist to assist in deciding whether at that point he should disqualify himself from any participation in the proceedings. . . . [E]ven before appraising participation in the case under the [Code], the judge should first consult his own emotions and conscience, and pass an "internal test of freedom" from disabling conflicts.

LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT 10 (2d ed. 1992).

3. Canon 3 states in part:

> C. Disqualification
>
> (1) A judge should [shall] disqualify himself [or herself] in a proceeding in which his [or her] impartiality might reasonably be questioned, including but not limited to instances where:
>
> > (a) he [or she] has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> > (b) he [or she] served as lawyer in the matter in controversy, or lawyer with whom he [or she] previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

Frequently, concerns about conflicts of interest first become known to the judge when a party files a motion to disqualify. Where impartiality in a judicial system is taken seriously, who should be ruling on the motion to disqualify, the judge who is the target of the motion, or another judge who is probably unfamiliar with the circumstances that produced the motion? The Code itself fails to address the methods for handling a motion to recuse. Depending on the technique applied by court rules, statutes, or case law, a judge personally may decide the motion, pass on the legal sufficiency of the motion, or assign the recusal motion to another judge.[4]

(c) he [or she] knows that he [or she], individually or as a fiduciary, or his [or her] spouse or minor child residing in his [or her] household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
(d) he [or she] or his [or her] spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
(i) is a party to the proceeding, or an officer, director, or trustee of a party;
(ii) is acting as a lawyer in the proceeding;
(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
(iv) is to the judge's knowledge likely to be a material witness in the proceeding . . . .

MODEL CODE OF JUDICIAL CONDUCT Canon 3C (1972). The above model code has been replaced by the 1990 CODE, *supra* note 1, Canon 3E. The changes include: replacement of "should" in section (1) with "shall"; inclusion of gender neutral language; inclusion of parent in subsection (c) as well as any other member of the family residing in the judge's household; and inclusion of "more than de minimus" when referring to the interest in the proceeding in subsection (d)(iii). Many states' Codes of Judicial Conduct still retain the use of the 1972 language "should." *See, e.g.*, ALABAMA CANONS OF JUDICIAL ETHICS Canon 3C (1993); ALASKA CODE OF JUDICIAL CONDUCT Canon 3C (1992).

The Code itself is a "guiding precept upon which every judge by an objective in-depth search of his or her own conscience, must decide whether a fair trial dictates he or she should make way for another judge to preside." Forsmark v. State, 349 N.W.2d 763, 767 (Iowa 1984).

For the Mississippi Supreme Court, the Code enjoys the status of law. Collins v. Joshi, 611 So. 2d 898, 901 (Miss. 1992); *see Ex parte* Balogun, 516 So. 2d 606, 609 (Ala. 1987). Other courts disagree, interpreting the Code as standards of self-assessment of whether recusal is necessary. Reilly v. Southeastern Pennsylvania Transp. Auth., 489 A.2d 1291, 1298 (Pa. 1985), *overruled on other grounds*, Gallagher v. Harleysville Mut. Ins. Co., 617 A.2d 790 (Pa. Super. Ct. 1992).

4. In contrast to the diverse treatment of recusal motions that question whether a judge should continue to preside in a case, the case law is relatively uniform on the issue of whether a judge may review his or her prior work in a case. One issue that arises often is whether a judge who approved a search warrant should rule upon the validity of the same warrant. The Code of Judicial Conduct does not require recusal when the judge obtained knowledge of the facts of the case from a previous judicial ruling in that case. *See, e.g.*, Holloway v. State, 738 S.W.2d 796, 798 (Ark. 1987); State ex rel. French v. Hendricks Superior Court, 247 N.E.2d 519, 525 (Ind. 1969) (holding that participation by a judge in a probable cause determination does not necessarily disqualify him from trying case on merits). Whether citing the Code or other statutory or case law, the mere fact that

This Article deals with whether, and under what circumstances, a judge must, may, or cannot refer a motion to disqualify to another judge. Contrary to the traditional majority approach which leaves the decision on any motion to the challenged judge, this Article also suggests that the reasons alleged for the conflict of interest should determine the identity of the decisionmaker.

II. THE CHALLENGED JUDGE RULES ON THE MOTION TO RECUSE

In the majority of states, the decision of whether to grant or deny a motion to recuse is within the sound discretion of the challenged judge.[5] Many state

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a judge authorized arrest or search warrants is not a barrier to that judge presiding over the case on its merits. *See, e.g., id.*; Hawkins v. State, 586 S.W.2d 465, 466 (Tenn. 1979) ("It frequently happens in the course of litigation that a trial judge is required to review his own judicial determinations, particularly in post-trial proceedings, both civil and criminal. . . . Nothing in the law precludes a judge from doing so."); Stokes v. State, 853 S.W.2d 227, 242 (Tex. Ct. App. 1993). Thus, a judge may rule on a motion to suppress evidence seized pursuant to the warrant which that same judge authorized. *See, e.g.*, People v. Liberatore, 590 N.E.2d 219, 224 (N.Y. 1992); People v. Tambie, 522 N.E.2d 448, 455 (N.Y. 1988) ("There is no basis to conclude that such judges fail to give suppression motions anything less than fair and impartial considerations . . . ."); Owens v. State, 282 So. 2d 402, 414 (Ala. Crim. App. 1973), *cert. denied*, 282 So. 2d 417 (1973); State v. Poole, 472 N.W.2d 195, 197 (Minn. Ct. App. 1991); State v. Pointer, 343 A.2d 762, 766 (N.J. Super. Ct. App. Div. 1975), *cert. denied*, 351 A.2d 7 (N.J. 1975).

In Poorman v. Commonwealth, 782 S.W.2d 603 (Ky. 1989), *cert. denied*, 497 U.S. 1008 (1990), recusal was unnecessary for a judge who made rulings at defendant's probable cause and bond hearings when as an appellate judge she considered the same case on appeal. *Poorman*, 782 S.W.2d at 605-06. The Kentucky Supreme Court adhered to the general premise that a judge should not sit in review of a case decided by her. *Id.* However, where the appellate court did not review any previous decisions made at the trial court level, recusal was not necessary. *Id.*

5. 28 U.S.C. § 455 (1989); United States v. Cooley, 1 F.3d 985, 994 (10th Cir. 1993); United States v. Morris, 988 F.2d 1335, 1337 (4th Cir. 1993); United States v. Lovaglia, 954 F.2d 811, 815 (2d Cir. 1992); United States v. Nelson, 922 F.2d 311, 319 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 1635 (1991); United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986); Mo. Ann. Stat. § 508.090-508.140 (Vernon Supp. 1993); IDAHO R. CIV. P. 40(d), IDAHO R. CRIM. P. 25(b); OKLA. DIST. R. 15; Wyo. R. Civ. P. 40.1; *Ex parte* Rollins, 495 So. 2d 636, 637 (Ala. 1986); Moreland v. State, 469 So. 2d 1305, 1307 (Ala. Crim. App. 1985), *cert. denied* (Ala. 1985); Lokos v. State, 434 So. 2d 818, 822 (Ala. Crim. App. 1982), *aff'd*, 434 So. 2d 831 (Ala. 1983); Slinker v. State, 344 So. 2d 1264, 1268 (Ala. Crim. App. 1977); Matthews v. State, 854 S.W.2d 339, 341 (Ark. 1993); Woods v. State, 644 S.W.2d 937, 939 (Ark. 1983); Los v. Los, 595 A.2d 381, 385 (Del. 1991); Sivak v. State, 731 P.2d 192, 201 (Idaho 1986); Desfosses v. Desfosses, 813 P.2d 366, 368 (Idaho Ct. App. 1991); Roselle v. Heirs and Devisees of Grover, 789 P.2d 526, 529 (Idaho Ct. App. 1990); Smith v. State, 477 N.E.2d 857, 864 (Ind. 1985); Reynolds v. State, 575 N.E.2d 28, 30 (Ind. Ct. App. 1991); Poorman v. Commonwealth, 782 S.W.2d 603, 605-06 (Ky. 1989), *cert. denied*, 497 U.S. 1008 (1990); Lovett v. Commonwealth, 858 S.W.2d 205 (Ky. Ct. App. 1993); Estate of Tingley, 610 A.2d 266, 267 (Me. 1992); State v. Jacques, 537 A.2d 587, 591 (Me. 1988); Jefferson-El v. State, 622 A.2d 737, 741 (Md. 1993); Surratt v. Prince George's County, 578 A.2d 745, 757 (Md. 1990); Goldberger v. Goldberger, 624 A.2d 1328, 1330 (Md. Ct. Spec. App. 1993); Haddad v. Gonzalez, 576 N.E.2d 658, 663 (Mass. 1991); Commonwealth v. Kope, 570 N.E.2d 1030, 1032 (Mass. App. Ct. 1991); Azarian v. Ettinger, 435 N.E.2d 638, 639 (Mass. App. Ct. 1982); Collins v. Joshi, 611 So. 2d 898, 901 (Miss. 1992); Bryan v. Holzer, 589 So. 2d 648, 654

courts emphasize that judges are impartial participants in the legal process whose duty to preside when qualified is as strong as the duty to refrain from presiding when not qualified.[6] One rationale for a judge's personal handling of recusal motions is that the judge knows fully his or her own thoughts or feelings.[7] Therefore, "[t]he trial court, in the exercise of its 'personal conscience' is the 'sole arbiter' of a claim that recusal is warranted."[8] One court has noted the following:

> For 200 years our law has dictated that each individual judge decide according to the dictates of conscience the issue of his or her ability to sit impartially in judgment. Blackstone writes: The law will not suppose a possibility of bias or favor in a judge who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.[9]

(Miss. 1991); Ruffin v. State, 481 So. 2d 312, 317 (Miss. 1986); State ex rel. Wesolich v. Goeke, 794 S.W.2d 692, 695 (Mo. Ct. App. 1990); State v. Richter, 485 N.W.2d 201, 205 (Neb. 1992); State v. Shepard, 477 N.W.2d 567, 571 (Neb. 1991); *In re* Estate of Odineal, 368 N.W.2d 800, 804 (Neb. 1985); State v. Linsky, 379 A.2d 813, 823-24 (N.H. 1977); Magill v. Casel, 568 A.2d 1221, 1224 (N.J. Super. Ct. App. Div. 1990); State v. Hernandez, 846 P.2d 312, 326 (N.M. 1993); Klindera v. Worley Mills, Inc., 634 P.2d 1295, 1298 (N.M. Ct. App. 1981); Martinez v. Carmona, 624 P.2d 54, 59 (N.M. Ct. App. 1980); Anjam v. Anjam, 594 N.Y.S.2d 822, 823-24 (N.Y. App. Div. 1993); Spremo v. Babchik, 589 N.Y.S.2d 1019, 1022 (N.Y. App. Div. 1992); Burdick v. Shearson American Express, Inc., 559 N.Y.S.2d 506, 508 (N.Y. App. Div. 1990); Reilly v. Southeastern Pennsylvania Transp. Auth., 489 A.2d 1291 (Pa. 1985), *overruled on other grounds* Gallagher v. Harleysville Mut. Ins. Co., 617 A.2d 790 (Pa. Super. Ct. 1992); State v. Cruz, 517 A.2d 237, 240 (R.I. 1986); State v. Clark, 423 A.2d 1151, 1158 (R.I. 1980); Reading v. Ball, 354 S.E.2d 397, 398 (S.C. Ct. App. 1987); Payne v. Holiday Towers, Inc., 321 S.E.2d 179, 183 (S.C. Ct. App. 1984); State ex rel. Phillips v. Henderson, 423 S.W.2d 489, 492 (Tenn. 1968); *In re* Cameron, 151 S.W. 64, 74 (Tenn. 1912); Caruthers v. State, 814 S.W.2d 64, 67 (Tenn. Crim. App. 1991); Bagwell v. International Union, United Mine Workers of Am., 423 S.E.2d 349, 359 (Va. 1992), *cert. granted*, 113 S. Ct. 2439 (1993); Deahl v. Winchester Dept. of Social Serv., 299 S.E.2d 863, 867 (Va. 1983); Welsh v. Commonwealth, 416 S.E.2d 451, 459 (Va. Ct. App. 1992); Buchanan v. Buchanan, 415 S.E.2d 237, 238 (Va. Ct. App. 1992); State v. Carviou, 454 N.W.2d 562, 563 (Wis. Ct. App. 1990); Matter of Farmon, 841 P.2d 99, 101 (Wyo. 1992).

6. *See, e.g.*, Goldberger v. Goldberger, 624 A.2d 1328, 1330 (Md. Ct. Spec. App. 1993); State v. Hernandez, 846 P.2d 312, 326 (N.M. 1993); State v. Clark, 423 A.2d 1151, 1158 (R.I. 1980).

7. *See, e.g.*, Spremo v. Babchik, 589 N.Y.S.2d 1019, 1022 (N.Y. App. Div. 1992).

8. Burdick v. Shearson American Express, Inc., 559 N.Y.S.2d 506, 508 (N.Y. App. Div. 1990). The court in *Burdick* found that absent statutory disqualification for interest, past counsel for parties, or relationships that require mandatory disqualification, all other claims were left solely to the conscience of the judge. *Id.*

9. State v. Hunt, 527 A.2d 223, 224 (Vt. 1987). *Hunt* involved an action to recuse two justices who had disciplinary charges filed against them concerning the case in question. The court noted that even though the decision to grant or deny a recusal motion was discretionary, a judge must recuse himself or herself where disciplinary charges had been filed concerning the case in question. *Id. See also* State v. Forte, 553 A.2d 564, 565 (Vt. 1988).

In Vermont, until the recent the adoption of Vt. R. Crim. P. 50(d), the question of recusal fell within the broad rule that judges must initially decide the issues of recusal as a matter of sound

Twenty-seven states agree that recusal rests within the sound discretion of the challenged judge. However, these states differ on the legal source or authority used to decide whether recusal is necessary: (1) the Code of Judicial Conduct; (2) statutes addressing the recusal or disqualification issue; (3) rules of civil or criminal procedure; or (4) state constitutional provisions for an impartial judiciary. It is common for states to use some or all of the above sources to support the discretionary rule.

Some states that follow the discretionary rule use the Code as the standard for recusal,[10] and a motion to recuse must be addressed to the challenged judge.[11] The Pennsylvania Supreme Court described the role of a judge in

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discretion. *See id.*; Daitchman v. Daitchman, 483 A.2d 270, 271 (Vt. 1984). Vt. R. Crim. P. 50(d) now requires Vermont judges faced with a motion to recuse to pass the motion to a disinterested judge. *See infra* note 40.

10. *Ex parte* Balogun, 516 So. 2d 606, 609 (Ala. 1987); Moreland v. State, 469 So. 2d 1305, 1307 (Ala. Crim. App. 1985); Lokos v. State, 434 So. 2d 818, 822 (Ala. Crim. App. 1982), *aff'd*, 434 So. 2d 831 (Ala. 1983); Matthews v. State, 854 S.W.2d 339, 341 (Ark. 1993); Los v. Los, 595 A.2d 381, 384 (Del. 1991); Reynolds v. State, 575 N.E.2d 28, 30 (Ind. Ct. App. 1991); Estate of Tingley, 610 A.2d 266, 267 (Me. 1992); Jefferson-El v. State, 622 A.2d 737, 741 (Md. 1993); Haddad v. Gonzalez, 576 N.E.2d 658, 663 (Mass. 1991); State v. Linsky, 379 A.2d 813, 823-24 (N.H. 1977); State ex rel. Bardacke v. Welsh, 698 P.2d 462, 475 (N.M. Ct. App. 1985); Reading v. Ball, 354 S.E.2d 397, 398 (S.C. Ct. App. 1987).

For additional disqualification grounds in the above states, see ALA. CODE § 12-1-12 (1986); ARK. CONST. art. 7, § 20, ARK. CODE ANN. § 16-9-206 (Michie 1987); MD. CONST. art. 4, § 7, MD. R. CIV. P. 3-505.

11. Canon 3 of the Code of Judicial Conduct states a judge "should" [shall] disqualify himself or herself "in a proceeding which his [or her] impartiality might reasonably be questioned . . . ." MODEL CODE OF JUDICIAL CONDUCT Canon 3C(1) (1972). *See* MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (1990); *see supra* note 3.

A mere unsupported accusation of bias is not sufficient to require recusal. *See, e.g., Ex parte* Rollins, 495 So. 2d 636, 637 (Ala. 1986). Instead, the judge must examine whether impartiality might reasonably be questioned pursuant to the Code. *See, e.g., id.*; Matthews v. State, 854 S.W.2d 339, 341 (Ark. 1993); Haddad v. Gonzalez, 576 N.E.2d 658, 663 (Mass. 1991) (stating that when faced with a recusal motion, a judge must first consult his own emotions and conscience); State v. Cruz, 517 A.2d 237, 240 (R.I. 1986).

"Judges must refrain from presiding over cases in which they might be interested and avoid all appearance of bias." *Matthews*, 854 S.W.2d at 341. To be disqualified, the bias alleged must stem from an extrajudicial source, not from prior evidence in the case. *See, e.g., Ex parte* Rollins, 495 So. 2d at 637; Reynolds v. State, 575 N.E.2d 28, 30 (Ind. Ct. App. 1991); Brendla v. Acheson, 554 A.2d 798, 799 (Me. 1989); Reading v. Bell, 354 S.E.2d 397, 398 (S.C. Ct. App. 1987).

The Supreme Court of Rhode Island, in State v. Clark, 423 A.2d 1151 (R.I. 1980), adopted the following standard for responding to motions for recusal:

> [A] judge has a great obligation not to disqualify himself when there is no occasion to do so as he has to do when the occasion does arise . . . Before a judge is required to recuse in order to avoid the appearance of impropriety, facts must be elicited indicating that it is reasonable for members of the public or a litigant or counsel to question the trial justices' impartiality. However, recusal is not in order by a mere accusation that is totally unsupportable by substantial fact . . . .

Other states vary somewhat in their approach to the exercise of judicial discretion in ruling

considering a recusal motion:

> If the judge feels that he can hear and dispose of the case fairly and without prejudice, his decision will be final unless there is an abuse of discretion . . . . If the judge wishes a full exposition of the question of unfairness, he may . . . summon another judge to decide it . . . .[12]

In other words, a party should present a motion to recuse to the challenged judge who generally decides the motion.[13]

Some states adopting the discretionary rule establish the grounds for recusal through state statutes, and in many cases, through both statutes and the Code of Judicial Conduct. Most of those statutes deal specifically with only the grounds for recusal, without addressing the procedures for resolving the motion.[14] For

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on recusal motions. The New Hampshire courts, for example, while citing the Code of Judicial Conduct as the standard for judicial disqualification, support the use of the Code via the state constitution, which states in part: "It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit." N.H. CONST. pt. I, art. 35. To require disqualification according to the New Hampshire courts, "there must exist bias or such likelihood of bias, or an appearance of bias that the judge is unable to hold the balance between vindicating the interests of the court and the interests of the accused." State v. Linsky, 379 A.2d 813, 823-24 (N.H. 1977). *See also* N.H. SUPER. CT. R. 50-A (superior court rule), N.H. SUPER. CT. R. 1.8-A(H) (district and municipal court rule).

12. Reilly v. Southeastern Pennsylvania Transp. Auth., 489 A.2d 1291, 1299 (Pa. 1985); *overruled on other grounds*, Gallagher v. Harley Mut. Ins. Co., 617 A.2d 790 (Pa. Super. Ct. 1992).

13. "A trial judge is bound to excuse himself [or herself] only when he [or she] has personal knowledge of the disputed facts and has decided to testify at the recusal hearing." *Reilly*, 489 A.2d at 1299.

A state may elect to qualify the unfettered discretion that a judge otherwise has to decide recusal motions. For example, under Maryland law, recusal is discretionary with the trial judge, unless a party alleges personal misconduct and the motion is legally sufficient and timely: "when the asserted basis for recusal is personal conduct of the trial judge that generates serious issues about his or her personal misconduct, then the trial judge must permit another judge to decide the motion for recusal." Surratt v. Prince George's County, 578 A.2d 745, 758 (Md. 1990). The recusal motion must set forth facts sufficient to show the purported misconduct, and should be supported by an affidavit as testimony or both. *Id.*

14. The state statutes are as follows:

Connecticut, CONN. GEN. STAT. ANN. § 51-39 (West Supp. 1993). The Connecticut Supreme Court in interpreting the standard by which a recusal motion should be viewed stated that the standard to be employed is an objective, not a subjective, view. Papa v. New Haven Fed'n of Teachers, 444 A.2d 196, 206 (Conn. 1982). The test is "whether another, not knowing whether or not the judge is actually impartial, might reasonably question his [or her] impartiality, on the basis of all the circumstances." *Id.* at 207 (quoting Rice v. McKenzie, 581 F.2d 1114, 1116 (4th Cir. 1978)). *See also* CONNECTICUT CODE OF JUDICIAL CONDUCT Canon 3C (1992).

Iowa, IOWA CODE § 602.1606 (1988). The party seeking recusal bears the burden of providing a basis for it. State v. Farni, 325 N.W.2d 107, 110 (Iowa 1982). *See also* IOWA CODE OF JUDICIAL CONDUCT Canon 3D (1992).

example, Virginia's disqualification test results from both the statutory provision and the Code of Judicial Conduct: whether a trial judge should recuse himself or herself is left to the reasonable discretion of the trial judge.[15]

On the other hand, some states are far more explicit about the procedures for deciding a motion to recuse. Missouri statutes provide both standards and procedures for the recusal of a judge: "[w]hether disqualification of a judge hinges on a statute or on a rule, [the court] adheres to the liberal construction of that statute or rule in favor of the right to disqualify."[16] Such a liberal construction is necessary to promote and maintain public confidence in the judicial system.[17] A party may seek to change a judge for cause by statute[18] or under the Missouri Code of Judicial Conduct.[19] After being presented with a motion to disqualify the judge for cause, the challenged judge should initially review the application to determine whether the petition meets the requirements of time, notice, and form.[20] After the procedural determination, the judge must determine whether the petition on its face alleges facts that warrant disqualification for cause.[21] If an application satisfies the above statutory requirements, it is legally sufficient. The judge may then grant the motion to

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Kentucky, KY. REV. STAT. ANN. § 26A.015 (Michie 1992). *See also* Ky. Sup. Ct. R. 4.300, KENTUCKY CODE OF JUDICIAL CONDUCT Canon 3C (1991).

Mississippi, MISS. CODE ANN. § 9-1-11 (1972). *See also* MISS. CONST. art. 6 § 165; MISSISSIPPI CODE OF JUDICIAL CONDUCT Canon 3C (1993).

Nebraska, NEB. REV. STAT. 24-739 (Supp. 1992) (previously NEV. REV. STAT. § 24-315). *See also* NEBRASKA CODE OF JUDICIAL CONDUCT Canon 3C (1993).

New York, N.Y. JUD. LAW § 14 (McKinney 1983). *See also* NEW YORK CODE OF JUDICIAL CONDUCT Canon 3C (1992).

Virginia, VA. CODE ANN. § 16.1-69.23 (Michie 1988).

Wisconsin, WIS. STAT. ANN. § 757.19(2) (West 1981 & Supp. 1992). *See* State v. Carviou, 454 N.W.2d 562, 564 (Wis. Ct. App. 1990) (quoting State v. American TV & Appliance of Madison, Inc., 443 N.W.2d 662 (Wis. 1989)).

15. Bagwell v. International Union, United Mine Workers of America, et al., 423 S.E.2d 349, 359 (Va. 1992), *cert. granted*, 113 S. Ct. 2439 (1993); Deahl v. Winchester Dept. of Social Serv., 299 S.E.2d 863, 867 (Va. 1983); Welsh v. Commonwealth, 416 S.E.2d 451, 454 (Va. Ct. App. 1992); Buchanan v. Buchanan, 415 S.E.2d 237 (Va. Ct. App. 1992).

On appeal, reversal of the decision will not occur absent a showing of abuse of discretion. *Bagwell*, 423 S.E.2d at 359. A trial judge should consider if he or she harbors such a bias or prejudice that would deny a party a fair trial. *Welsh*, 416 S.E.2d at 459. In addition, a judge should consider the public's perception of the judge's fairness. *Buchanan*, 415 S.E.2d at 238.

16. State v. Frye, 794 S.W.2d 692, 695 (Mo. Ct. App. 1990).

17. *Id.*

18. MO. ANN. STAT. § 508.090 - 508.140 (Vernon Supp. 1993).

19. MISSOURI CODE OF JUDICIAL CONDUCT Canon 3C (1992). In addition, pursuant to MO. R. CIV. P. 51.05, a party is entitled to one change of judge as a matter of right in a civil proceeding. A party must submit timely application and service of a copy of application and notice of hearing on the other party. *Id.*

20. MO. ANN. STAT. § § 508.120, 508.140 (Vernon Supp. 1993).

21. State v. Frye, 794 S.W.2d 692, 697 (Mo. Ct. App. 1990).

disqualify or hold a hearing on the record.[22] If the challenged judge is to testify, a disinterested judge must hear the issue; if not, the decision is within the challenged judge's discretion.[23]

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22. *Id.* at 699.

23. *Id.* Upon appellate review, the court is limited to deciding whether the trial court's ruling was an abuse of discretion. *Id. See also* MO. STAT. ANN. § 478.255 (Vernon 1987 & Supp. 1990) (reassignment procedure), MO. R. CRIM. P. 32.08 (joint application for change of venue and change of judge), MO. R. CRIM. P. 32.10 (judicial disqualification without application).

In addition to the above states cited, the federal system has a statutory basis for the recusal or disqualification of a federal judge—28 U.S.C. §§ 144 & 455 (1989). Section 144 provides a procedure for a party to recuse a judge:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Id. § 144.

Under both federal statutes, recusal is appropriate where "a reasonable person, knowing all the facts, would conclude that the judge's impartiality might reasonably be questioned." United States v. Lovaglia, 954 F.2d 811, 815 (2d Cir. 1992). *See, e.g.*, United States v. Cooley, 1 F.3d 985, 993 (10th Cir. 1993); United States v. Morris, 988 F.2d 1335, 1337 (4th Cir. 1993); United States v. Nelson, 922 F.2d 311, 319 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 1635 (1991); United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986). The standard for review on appeal is whether the judge abused his discretion. *In re* Hale, 980 F.2d 1176, 1178 (8th Cir. 1992). *Cf.* United States v. Sidener, 876 F.2d 1334, 1336 (7th Cir. 1989) (finding that in order to preserve a reasonable challenge under § 455(a), a defendant must immediately move for writ of mandamus if the motion is denied).

Peremptory strikes similar to § 144 exist in state systems. For example, in Washington, pursuant to Wash. Rev. Code § 4.12.040 and § 4.12.050 (1988), a party has the right to a change of judge if he or she files an affidavit of prejudice before the court rules on any motion or issue which requires exercise of discretion. "The purpose of the statute 'was to remove discretion from the trial court when presented with a motion for change of judge.'" Hanno v. Neptune Orient Lines, 838 P.2d 1144, 1145 (Wash. Ct. App. 1992) (quoting Marine Power & Equip. Co., Inc. v. Dept. of Transp., 687 P.2d 202 (Wash. 1984)). If the affidavit is not timely filed, the court then looks to Wash. Code of Judicial Conduct for guidance. Absent compliance with the WASHINGTON REV. CODE § 4.12.040 and § 4.12.050 (1988), a party must demonstrate prejudice on the part of a judge. State v. Cameron, 737 P.2d 688, 691 (Wash. Ct. App. 1987). Casual and unspecific allegations of bias are not sufficient to establish a reversal on appellate review. *Id. See also* WASH REV. CODE § 3.34.110 (West 1988) (disqualification of district court judge).

Alaska also permits peremptory disqualification of a judge. According to ALASKA STAT. § 22.20.022 (1993):

> If a party or a party's attorney. . . files an affidavit alleging under oath the belief that a fair and impartial trial cannot be obtained, the presiding district court or superior judge, respectively, shall at once, and without requiring proof, assign the action to another judge . . . .

Id. § 22.20.022(a). A party is entitled to one peremptory strike per action. *Id.* § 22.20.022. *See*

In a few states adhering to the discretionary rule, civil, criminal, or court rules supplement statutory law or the Code of Judicial Conduct. For example, New Jersey court rules[24] and statutes[25] support a ruling by the challenged judge:

> Submission of a recusal motion to the challenged judge is not only required by statute and rule; it is also sound practice. Often, the ground for recusal is an objective one, such as the judge's family relation to a party or to an attorney, or having represented a party, or having given an opinion on a matter in question, or having an interest in the event of the action or any other reason which might preclude a fair and unbiased hearing and judgement, or which might reasonably lead counsel or the parties to believe so. The facts supporting or refuting an objective ground for recusal are peculiarly within the knowledge of the judge.[26]

Oklahoma has altered the discretionary rule to provide an aggrieved party an alternative to the challenged judge deciding the motion to disqualify. The initial decision upon a motion to recuse is still within the discretion of the challenged judge.[27] However, upon refusal of a judge to grant the recusal motion, an interested party may represent the motion to the Chief Judge.[28] If the refusal is upheld, the interested party thereafter may institute a proceeding with an appellate court.[29]

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also ALASKA R. CRIM. P. 25(d), ALASKA R. CIV. P. 42(C).

24. N.J. R. OF GEN. APPLIC. §§ 1:12-1, 1:12-2, 1:12-3. For other states, see *supra* note 14 and accompanying text.

25. N.J. REV. STAT. § 2A:15-49 (1987). *See also* NEW JERSEY CODE OF JUDICIAL CONDUCT Canon 3C (1992).

26. Magill v. Casel, 568 A.2d 1221, 1224 (N.J. Super. Ct. App. Div. 1990). In addition, if the basis for recusal is a subjective one such as bias, the judge has the best insight to his or her mind. *Id.* Or, if the ground for recusal is a problem of the appearance of impropriety, the judge is in a good position to analyze it. *Id.*

If a judge who is being challenged desires not to rule on the motion, the court may appoint three disinterested persons as triers. N.J. REV. STAT. § 2A:15-50 (1987); *see also Magill*, 568 A.2d at 1224-25.

27. OKLA. DIST. CT. R. 15(a). *See* OKLA. APP. CT. R. 3.6 which provides that a judge of the Court of Appeals may disqualify himself or herself or, upon a motion to disqualify, the division shall decide. If the division fails to recuse, the interested party may seek review from the Supreme Court within ten days from date division order. *Id.*

28. OKLA. DIST. CT. R. 15(b).

29. *Id.* *See* OKLA. STAT. tit. 20, §§ 1401, 1402 (1993) for grounds of disqualification of trial judge and appellate judge (interest, relationship, past representation). *See also* § 1404 for additional disqualification grounds.

III. THE CHALLENGED JUDGE MAY RULE ONLY ON THE LEGAL SUFFICIENCY AND TIMELINESS OF A MOTION TO RECUSE

In several jurisdictions, a judge may decide only the legal sufficiency and timeliness of a motion to disqualify. The purpose of the rule is to prevent a party from being forced to litigate a matter before a judge with a "bent of mind."[30]

> [O]rdinarily, the question of whether a judge should be disqualified in a civil case is a matter within the discretion of the trial court. [However, where an] attorney for one of the litigants signs a verified affidavit alleging conduct and statements on the part of the trial judge which, if true, show bias or prejudice or the appearance of bias or prejudice on the part of the trial judge, it is an abuse of discretion if that judge does not withdraw from the case, even though he or she believes the statements are false or that the meaning attributed to them by the party seeking recusal is erroneous.[31]

Under the legal sufficiency doctrine "[w]hen a trial judge is presented with a motion to recuse, or disqualify, accompanied by an affidavit," the state statute or rule limits the judge to passing upon the timeliness of the motion and the legal sufficiency of the affidavit.[32] If the judge finds the motion timely, the affidavit sufficient, and that the recusal would be authorized if some or all of the facts set forth in the affidavit are true, another judge is assigned to hear the

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30. Johnson v. District Court, 674 P.2d 952, 956 (Colo. 1984). *See also* Goebel v. Benton, 830 P.2d 995 (Colo. 1992); Wright v. District Court, 731 P.2d 661, 664 (Colo. 1987); Hammons v. Birket, 759 P.2d 783, 784 (Colo. Ct. App. 1988), *cert. denied* (Colo. 1988).

31. *Goebel*, 830 P.2d at 998-99 (quoting Johnson v. District Court, 674 P.2d at 956).

32. GA. SUPER. CT. R. 25.3. *See* Birt v. State, 350 S.E.2d 241, 242 (Ga. 1986); Bedford, Kirschner & Venker v. Goodman, 399 S.E.2d 723, 725 (Ga. Ct. App. 1990); Central of Georgia R.R. v. Lightsey, 374 S.E.2d 787, 788 (Ga. Ct. App. 1988).

See also COLO. C. P. R. 97 (civil cases), COLO. REV. STAT. § 16-6-201 (1986) (criminal proceedings), COLO. R. CRIM. P. 21; D.C. SUP. CT. CIV. R. 63-I; FLA. ST. ANN. § 38.10 (West 1988), FLA. STAT. ANN. R. JUD. ADMIN. RULE 2.160 (West Supp. 1993) (county and circuit judges); HAW. REV. STAT. § 601-7(1985); LA. CODE. CIV. PRO. ANN. art 151, et seq. (West Supp. 1993); MINN R. CIV. P. 63.02-04, MINN. R. CRIM. P. 26.03, MINN. STAT. ANN. § 487.40(2)(a-b) (West 1990), MINN. STAT. ANN. § 542.16 (West 1988); MONT. CODE ANN. §§ 3-1-803 to -805 (1993); N.C. GEN. STAT. § 15A-1223 (1988). In North Carolina, a trial judge when presented with a motion to recuse himself or herself should "either recuse himself or refer a recusal motion to another judge if there is 'sufficient force in the allegations contained in defendant's motion to proceed to find facts.'" State v. Poole, 289 S.E.2d 335, 343 (N.C. 1982) (quoting North Carolina Nat'l Bank v. Gillespie, 230 S.E.2d 375, 380 (N.C. 1976)).

motion.[33]

When assessing the motion under the legal sufficiency doctrine, a judge must accept the facts as stated in the motion as true. "[T]he only question involved is whether the facts alleged are sufficient to compel the judge to disqualify himself."[34] Mere opinions or conclusions unsubstantiated by facts are not legally sufficient to require disqualification.[35] However, "it is not the prerogative of the trial judge to pass upon the truth or falsity of the sworn statements, but rather it is the judge's duty only to pass upon the legal sufficiency of the factual averments in the affidavit."[36]

IV. WHEN PRESENTED WITH A MOTION TO RECUSE, THE CHALLENGED JUDGE MUST TRANSFER THE MOTION TO A DISINTERESTED JUDGE

In the remaining states, if a party believes that the assigned judge cannot grant a party a fair trial, the party may file a motion for a change of judge pursuant to the appropriate state provision. Upon receipt of the motion (or in some cases a motion accompanied by an affidavit), a judge must not pass on the legal sufficiency or timeliness of the motion. Instead, the judge must relinquish

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33. *See, e.g.*, GA. SUPER. CT. R. 25.3. Under GA. SUPER. CT. R. 25.4, if the challenged judge decides that the motion to recuse meets the statutory requirements, the motion shall be assigned to another judge, selected as follows:

(a) single-judge circuit—district administrative judge shall select the judge;

(b) within a two-judge circuit, the other judge shall hear the motion;

(c) multi-judge circuit, random impartial assignment method; if no random assignment rules exist (1) the chief judge shall decide or (2) if chief judge is one against whom motion filed the senior judge in terms of service shall select the judge.

For a further breakdown of the selection process, see GA. SUP. CT. R. 25.4.

See also LA. CODE CIV. PROC. ANN. art. 155 (West 1960) (In district court having two or more judges, the judge sought to be recused shall refer motion to another judge of court); art. 156 (Court having a single judge shall appoint a district judge of an adjoining county or in some circumstances a lawyer domiciled in the judicial district); art. 159 (Supreme Court, upon having a recusal motion filed against one of the justices, shall have the motion heard by another member of Court); art. 160 (Court of Appeals upon recusal motion against one of its members may view the motion as a panel or en banc).

In some jurisdictions, in addition to the three decisions a judge must make, some state statutes and rules mandate a determination of whether a certification of good faith accompanied the affidavit. *See, e.g., In re* Bell, 373 A.2d 232, 234 (D.C. 1977); Pistorino v. Ferguson, 386 So. 2d 65 (Fla. Dist. Ct. App. 1980); HAW. REV. STAT. § 601-7 (1985).

34. Goebel v. Benton, 830 P.2d 995, 999 (Colo. 1992).

35. *Id.*

36. *Id. See also In re* Bell, 373 A.2d 232, 234 (D.C. 1977); State v. Mata, 789 P.2d 1122, 1126 (Haw. 1990).

his or her judicial duties to another judge as to the recusal motion.[37]

Courts differ as to the treatment of the motion after it is filed. In several states,[38] upon receipt of the motion, the judge hears the motion informally and decides whether to step aside.[39] If the judge refuses, the party may file an

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37. One court has stated the following:

> Judges will frequently be assigned cases involving unpleasant issues and difficult problems. Often litigants and their attorneys will be particularly vexatious. In many cases, publicity adverse to the judge is virtually certain no matter what decision he or she reaches. In such cases, judges insufficiently attuned to their responsibilities might readily welcome a baseless request for recusal as an escape from a difficult case. To surrender to such temptation would justly expose the judiciary to public contempt based on legitimate public concern about judicial integrity and courage. While we agree that judges must avoid the appearance of bias, it is equally important to avoid the appearance of shirking responsibility.

Feichtinger v. State, 779 P.2d 344, 348 (Alaska 1989) (citing Amidon v. State, 604 P.2d 575, 577 (Alaska 1979)).

38. *See* ALASKA STAT. § 22.20.020(c) (1992); KAN. STAT. ANN. § 20-311d(a)(1988); MICH. R. CIV. P. 2.003(B); S.D. CODIFIED LAW ANN. §§ 15-12-19 - 15-12-37, et seq. (1984); TEX. R. CIV. P. ANN. R. 18a and b (West 1993), TEX. R. APP. P. 15, 15a (disqualification of appellate judges); UTAH R. CRIM P. 29 (1992) ("If the prosecution or a defendant in any criminal action . . . files an affidavit that the judge before whom the action or proceeding is to be tried or heard has a bias or prejudice. . . . [t]he judge shall proceed no further until the challenge is disposed of."); VT. R. CRIM P. 50(d); VT. R. CIV. P. 40(e); VT. R. APP. P. 31(e); VT. STAT. ANN. tit. 12 § 61 (1992), which states in part the statutory grounds for disqualification.

See also UTAH R. CIV. P. 63(b) (1992), which states in part:

> Whenever a party to any action or proceeding, civil or criminal, or his attorney shall make and file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice . . . such judge shall proceed no further therein, except to call in another judge to hear and determine the matter.

Id. If the challenged judge questions the sufficiency of the allegations, he shall transfer the question to another judge in the court who shall pass upon the legal sufficiency of the allegations. UTAH R. CRIM. P. 29(d); UTAH R. CIV. P. 63(b). *See also* UTAH CODE ANN. § 78-7-1 (1992), which provides the grounds for disqualification for interest or relation to parties.

39. *See* OR. REV. STAT. §§ 14.250, 14.260 (1991). Oregon differs from the other states in that once a party submits a motion accompanied by an affidavit, the judge either must recuse himself or have a disinterested judge rule on the good faith of the affidavit. OR. REV. STAT. § 14.250 states in part:

> No judge of a circuit court shall sit to hear or try any suit, action, matter or proceeding when it is established . . . that any party or attorney believes that such party or attorney cannot have a fair and impartial trial or hearing before such judge.

OR. REV. STAT. § 14.250. Pursuant to OR. REV. STAT. § 14.260, the motion to recuse must be supported by an affidavit. The affidavit need only state that the motion is made "in good faith and not for the purpose of delay." If the required affidavit is filed, the challenged judge should grant the motion, unless the judge questions the affiant's good faith. If this occurs, a disinterested judge shall conduct a hearing. The judge bears the burden of proving that the motion was made in bad faith or for purpose of delay. State ex rel. Kafoury v. Jones, 843 P.2d 932, 934-35 (Or. 1992). *See* OR. REV. STAT. § 14.270 (1991) for judicial disqualification procedures; *see also* OR. REV. STAT. § 46.141 (1991) (application of § 14.270 to district court judges).

affidavit seeking a change of judge.[40] Upon the filing of the affidavit, the administrative judge (or other assigned judge) will rule on the motion.[41]

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40. *See* KAN. STAT. ANN. § 20-311d (1992); MICH. R. CIV. P. 2.003(C)(1),(2) (1993). A motion to disqualify must be filed within 14 days after the moving party discloses the grounds for disqualification and include an affidavit setting forth grounds for disqualification. *Id.*

In South Dakota, if a party requesting recusal is denied through the informal process the party may file an affidavit seeking to change the judge. To be sufficient, the affidavit must state the title of the action and shall recite that the affidavit is made in good faith, not for the purpose of securing a delay and that the party making the request has reason to believe or does actually believe that a fair trial cannot be had. S.D. CODIFIED LAW ANN. § 15-12-22 to -26 (1984). *See* State v. Tapio, 432 N.W.2d 268 (S.D. 1988) (The Supreme Court of South Dakota provides an excellent summary of the recusal process).

TEX. R. CIV. P. ANN. R. 18a (West 1993) provides:

> (a) At least ten days before the date set for trial or other hearing . . . any party may file with the clerk of the court a motion stating grounds why the judge before whom the case is pending should not sit in the case . . . (c)Prior to any further proceedings in the case, the judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to sit, and shall make no further orders and shall take no further action in the case except for good cause stated in the order in which such action is taken.

Id. 18a (a-c).

VT. R. CRIM. P. 50(d) provides in part:

> (1) A motion for disqualification of a judge shall be made as soon as practicable after the cause or ground becomes known. A motion which is filed in violation of this paragraph shall not for this reason be denied but may, in the discretion of the court, render the attorney or party subject to sanctions.
>
> (2) Motions for disqualification shall be accompanied by an affidavit, or a certificate of a party's attorney subject to the obligations of Rule 49(d), stating the reason therefor and, when such reason was first known.
>
> (3) The judge whose disqualification is sought shall either disqualify himself or herself or, without ruling on the motion, refer the motion to the Administrative Judge for Trial Courts or a designee thereof. The Administrative Judge or designee may refer the motion to another judge for decision or may rule on the motion even if the Administrative Judge, or the designee, is the subject of the motion but only if that judge cannot refer the motion to another judge for decision.

Id. 50(d)(1-3).

41. The state statutes provide the following:

ALASKA STAT. § 22.20.020 (1992):

> 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.

Id.

KAN. STAT. ANN. § 20-311d(b) (1988). Upon filing the affidavit, the administrative judge will determine the legal sufficiency of the affidavit. *Id.*

MICH. R. CIV. P. 2.003(C)(3) (1993). If the challenged judge denies the recusal motion, the challenged judge must then refer the motion to the chief judge whose decision will be reviewed for abuse of discretion. *Id. See also* Stockler v. Rose, 436 N.W.2d 70 (Mich. Ct. App. 1989).

S.D. CODIFIED LAW ANN. § 15-12-32 (1984). The challenged judge submits the affidavit to the presiding circuit judge who reviews it pursuant to S.D. CODIFIED LAW ANN. § 15-12-32 to

Reversal of a trial judge's decision not to recuse occurs if there is an abuse of discretion:[42] if "it is plain that a fair minded person could not rationally come to [the same] conclusion on the basis of the known facts."[43]

In other jurisdictions, the challenged judge conducts no informal hearings. For example, in Illinois, disqualification of a judge in criminal[44] or civil[45] cases requires a motion or petition supported by an affidavit.[46] A hearing then must be conducted by a judge not challenged in the motion.[47] The burden of

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determine if the affidavit is timely, no waiver of the right to file the affidavit occurred, or the affidavit is not legally defective. *Id.* *See also* State v. Tapio, 432 N.W.2d 268, 271 (S.D. 1986).

TEX. R. CIV. P. ANN. R. 18a(d) (West 1993) provides:

> If the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district an order of referral, the motion, and all opposing and concurring statements.

Id.

VT. R. CRIM. P. 50(d) (1992) provides in part:

> The judge whose disqualification is sought shall either disqualify himself or herself or, without ruling on the motion, refer the motion to the Administrative Judge for Trial Courts or a designee thereof . . . .

Id. 50(d)(3).

42. *See, e.g.*, Stockler v. Rose, 436 N.W.2d 70, 76 (Mich. Ct. App. 1989).

43. Blake v. Gilbert, 702 P.2d 631, 640 (Alaska 1985) (quoting Amidon v. State, 604 P.2d 575, 577 (Alaska 1979)).

44. ILL. COMP. STAT. ch. 725, para. 5/114-5 (West 1992). Section d states, "[a]ny defendant may move at any time for substitution of judge for cause, supported by affidavit. Upon filing of such motion a hearing shall be conducted as soon as possible after its filing by a judge not named in the motion; provided, however, that the judge named in the motion need not testify, but may submit an affidavit if the judge wishes." *Id.* para. 5/114-5(d).

45. ILL. COMP. STAT. ch. 735, para. 5/2-1001 (West 1992) states:

> (i) Each party shall be entitled to a substitution of judge for cause.
>
> (ii) Every application for substitution of judge for cause shall be made by petition, setting forth the specific cause for substitution and praying a substitution of judge. The petition shall be verified by the affidavit of the applicant.
>
> (iii) Upon the filing of a petition for substitution of judge for cause, a hearing to determine whether the cause exists shall be conducted as soon as possible by a judge other than the judge named in the petition.

Id. para. 5/2-1001(a)(3)(i-iii). *See also* ILLINOIS CODE OF JUDICIAL CONDUCT Canon 3, Ill. S. Ct. R. 63 (1987): "[a] judge should disqualify himself [or herself] in a proceeding in which his impartiality might reasonably be questioned . . . ." *Id.* at Canon 3(C).

46. ILL. COMP. STAT. ch. 725, para. 5/114-5(d) (West 1992); ILL. COMP. STAT. ch. 735, para. 5/2-1001(a)(3)(ii) (West 1992). It is important to note that ILL. COMP. STAT. ch. 725, para. 5/114-5(a-c) (West 1992) and ILL. COMP. STAT. ch. 735, para. 5/2-1001(a)(2) (West 1992) provide for substitution of judge "as a right." Each party is entitled to one substitution of judge without cause per case. ILL. COMP. STAT. ch. 725, para. 5/114-5(a-c) (West 1992) and ILL. COMP. STAT. ch. 735, para. 5/2-1001(a)(2) (West 1992). This motion must be presented before trial begins and before the judge to whom it is presented has ruled on any substantial issue in the case. *Id.*

47. ILL. COMP. STAT. ch. 725, para. 5/114-5(d) (West 1992); ILL. COMP. STAT. ch. 735, para. 5/2-1001(a)(3)(iii) (West 1992).

Arizona, Ohio, and Nevada have similar statutory provisions. *See* ARIZ. R. CRIM. P. 10.1

proving cause rests upon the party asserting recusal:[48] the burden of proof to

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(1991), which provides in part:

> c. Hearing. Promptly after the filing of the motion, the presiding judge shall provide for a hearing on the matter before a judge other than the judge challenged . . . .

Id. 10.1(c).

ARIZ. R. CIV. P. 42(f) (1991) provides in part:

> 3. Duty of Judge After filing of Notice of Affidavit. When a notice or an affidavit for change of judge is timely filed, the judge named in the notice or affidavit shall proceed no further in the action except to make such temporary orders as may be absolutely necessary to prevent immediate and irreparable injury, loss or damage from occurring before the action can be transferred to another judge. However, if the named judge is the only judge in the county where the action is pending, that judge shall also perform the functions of the presiding judge.

Id. 42(f)(3). In addition to a change of judge for cause, Rule 42(f)(1) provides for a change of judge as a matter of right. *See also* ARIZ. R. CRIM. P. 10.2 (change of judge upon request), ARIZ. R. CRIM. P. 10.6 (duty of judge upon filing of recusal motion under 10.1 or 10.2).

OHIO REV. CODE ANN. § 2501.13 (Anderson 1991) provides in part:

> When a judge of the court of appeals is interested in a cause or matter pending before the court in a county of his district, is related to, or has a prejudice for or against, a party to a cause or matter pending before the court or the party's counsel, sat in the lower court in the same cause or matter, or otherwise is disqualified to sit in a cause or matter pending before the court, any party to the cause or matter, or the counsel of any party may file an affidavit with the clerk of the supreme court, setting forth the fact of the interest, bias, prejudice, or disqualification. . . . The chief justice, or any judge of the supreme court designated by him, shall pass upon the disqualification of the judge pursuant to Section 5 (C) of Article IV, Ohio Constitution.

Id. See also OHIO REV. CODE ANN. § 2701.03 (Anderson 1992); OHIO REV. CODE ANN. § 2937.20 (Anderson 1987) for court of common plea and lower court judges. Statute wording is similar.

NEV. REV. STAT. ANN. § 1.230 (Michie 1986) states that after the affidavit is filed and a copy served upon the challenged judge, the judge shall either transfer the case to another department or file a written answer with the clerk of the court within two days after the affidavit was filed. *Id.* 1.235(5)(a),(b). The hearing on the motion to recuse will be heard by another judge agreed upon by the parties or appointed by the presiding judge or the Supreme Court. *Id.* 1.235(5)(b)(1),(2). *See also* NEV. REV. STAT. ANN. § 1.225 (Michie 1986) (procedure for disqualifying supreme court justices).

N.D. CENT. CODE § 29-15-21 (1991) states in part:

> 6. Upon receipt of a copy of a demand for change of judge, the judge sought to be disqualified has no authority or discretion to determine the timeliness or validity of the demand and shall proceed no further or take any action in the action or proceeding and is thereafter disqualified from doing any further acts unless the demand is invalidated by the presiding judge. . . .

Id. § 29-15-21(6). *But see* Sargent County Bank v. Wentworth, 500 N.W.2d 862 (N.D. 1993); NORTH DAKOTA CODE OF JUDICIAL CONDUCT 3C. These sources do not mention § 29-15-21, perhaps because the statutory motion would not be timely. *See also* N.D. CENT. CODE § 27-07.1-23 (1991) (applying § 29-25-21 to county courts).

48. People v. Hall, 499 N.E.2d 1335, 1346-47 (Ill. 1986), *cert. denied*, 480 U.S. 951 (1987); People v. Mercado, 614 N.E.2d 284, 287 (Ill. App. Ct. 1993).

show prejudice is by a preponderance of the evidence,[49] and the decision will stand unless it is against the manifest weight of the evidence.[50]

In California, a judge has several options in disposing of a motion for recusal. The challenged judge is not authorized to pass on the question of disqualification.[51] According to the statute,

> If a judge who should disqualify himself or herself refuses or fails to do so, any party may file with the clerk a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting grounds for disqualification of the judge . . . .[52]

The judge then has three options: (1) without conceding disqualification, request any other judge agreed upon by the parties to sit and act in his or her place;[53] (2) within ten days after the filing or service, file a consent to disqualify;[54] or (3) file a written verified answer admitting or denying the allegations.[55] If the judge does not file a consent or answer within the allocated time, the judge is deemed to have consented to disqualification.[56] No judge who refuses to step aside can rule upon his or her own disqualification or "upon the sufficiency of law, fact, or otherwise of the statement of disqualification filed by the party."[57]

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49. People v. Mercado, 614 N.E.2d at 287; *see also* ARIZ. R. CRIM. P. 10.1 (1992); ARIZ R. CIV. P. 42(f) (1992); State v. Greenway, 823 P.2d 22, 29 (Ariz. 1991).

50. Disqualifying a trial judge from hearing a case on grounds of prejudice "is not . . . a judgement to be made lightly." People v. Vance, 390 N.E.2d 867, 870 (Ill. 1979). The rule necessitating careful scrutiny of allegations of prejudice derives from the fact that a finding of bias will reflect unfavorably upon the judge, and that an allegation of prejudice "tends to disrupt the orderly functioning of the judicial system." People v. Mercado, 614 N.E.2d at 288 (quoting People v. Vance, 390 N.E.2d 867, 870 (Ill. 1979)). However, the court in applying such close scrutiny desired to remain faithful to the concern of the disqualification statute to ensure the accused a fair trial. *Id.* at 289.

51. CAL. CIV. PRO. CODE § 170.3(C)(1) (West Supp. 1993). Under CAL. CIV. PRO. CODE § 170.6 (West Supp. 1993), a party has a peremptory disqualification. *See* CAL. CIV. PRO. CODE § 170.4 (West Supp. 1994) (powers of disqualified judge). *See also* People v. Superior Court, 207 Cal. Rptr. 131 (Cal. Ct. App. 1984).

52. CAL. CIV. PRO. CODE § 170.3(C)(1) (West Supp. 1993).

53. *Id.* § 170.3(C)(2).

54. *Id.* § 170.3(C)(3).

55. *Id.*

56. CAL. CIV. PRO. CODE § 170.3(C)(4) (West Supp. 1993).

57. *Id.*; § 170.3(C)(5). Such a question must be heard by another judge—either one who has been agreed upon by all the parties or if unable to agree within five days of the notification of the judge's answer, by a judge selected by the chairperson of the Judicial Council. *Id.*

In West Virginia, the timing of the motion for recusal determines who rules on the motion. A verified written motion to disqualify a judge may be filed and shall be accompanied by a certificate of counsel stating it was made in good faith. W.VA. TRIAL CT. RULES XVII(A)(1). If the motion is filed seven days in advance of any trial date, the challenged judge must proceed no further. The judge must transmit a copy of the motion and certificate to the Chief Justice of the

V. A PROPOSAL FOR UNIFORM RECUSAL PROCEDURE

With some exceptions, the procedural approach used to resolve judicial disqualification motions does not depend on the grounds alleged for recusal. For example, allegations of the appearance of partiality are not automatically transferred to another judge. Because almost all states have adopted the Model Code of Judicial Conduct,[58] the Code can serve as a standard for deciding which procedural method is appropriate for each disqualifying category of cases—appearance of partiality, personal bias, prior professional relationships, current familial relationships, and current financial interest in a party or the case.

The general standard for disqualification states that a judge should be disqualified in a proceeding in which the judge's "impartiality might reasonably be questioned."[59] Judges and attorneys frequently invoke this general principle when the factual circumstances underlying the motion do not fit the specific disqualifying categories in the Code's subsections. Thus, this general language serves as a "catch-all" or residual provision. Motions containing allegations of an appearance of partiality should be decided by another judge. Avoiding the appearance of impropriety is "as important to developing public confidence in the judiciary as avoiding impropriety itself."[60] Because this provision "asks what a reasonable person knowing all the relevant facts would think about the impartiality of the judge,"[61] the challenged judge is perhaps the last person who should rule on the motion.

The first of the Code's specific grounds is relatively general: a judge can be disqualified for having a personal bias toward a party or personal knowledge about disputed facts. One rationale for the discretionary view is that the judge knows best his or her own thoughts or feelings.[62] Does the subjectivity of

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Supreme Court of Appeals with a letter advising whether the judge will recuse himself or require a hearing on the matter. Once the Chief Justice receives the motion, the justice will rule on the legal sufficiency of the motion. *Id.* XVII(A)(2). If the motion is filed less than seven days before trial date, the challenged judge shall proceed to have an immediate hearing on the motion for disqualification. The judge may grant or deny the motion. *Id.* XVII(A)(1)(c).

58. *See* CODE, *supra* note 1.

59. *See* CODE, *supra* note 1.

60. United States v. Hollister, 746 F.2d 420, 425-26 (8th Cir. 1984).

61. Roberts v. Bailar, 625 F.2d 125, 129 (6th Cir. 1980). *See* Matter of Mason, 916 F.2d 384, 386 (7th Cir. 1990), in which Judge Easterbrook posed the dilemma of the "appearance of partiality" standard.

62. It has been noted that:

> [e]ach judge brings to the bench a background with neighbors, friends and acquaintances, and business and social relations. The results of these associations and the impressions they create in the judge's mind form a personality and philosophical disposition toward the world. . . . In short, a judge is expected to act according to his

assessing personal bias suggest that the challenged judge should be deciding such motions to recuse? Should that answer be affected by the fact that identifying bias is necessarily more elusive than recognizing a family or financial interest? The suggestion of a subjective personal bias also implies an objective appearance of partiality. Unless a judge steps aside voluntarily after receiving the motion to disqualify, the motion should be referred to another judge. Like the judge whose behavior is in question, the deciding judge will hear only circumstantial evidence of whether the challenged judge has a *personal* bias toward a party. Even without the ability of the deciding judge to "get inside the head" of the challenged judge, promoting the integrity of the decisionmaking process is better served by having another judge resolve the personal bias issues presented.

The remainder of the specific Code sections addresses the judge's prior professional relationships and the judge's and relatives' familial relationships and financial interests in a party or the case. Unlike the appearance of partiality and personal bias standards, these conflict standards appear easy to recognize. Still, the presence of one or more of the specific reasons for recusal also creates the appearance of partiality.

A close reading of the Code suggests that another judge should be deciding motions alleging these bases for recusal. Each Code section contains ambiguous phrases that are subject to case-by-case and possibly self-serving judicial interpretation or application: (1) the prohibition against presiding in a case when the judge served as a lawyer requires interpretation of the term "matter in controversy;"[63] (2) the ban on a judge's financial interest in a party or a proceeding does not include an interest that is "de minimis;"[64] and (3) the standard for family conflicts precludes judicial involvement when the judge or a family member has "an interest that could be substantially affected by the outcome of the proceeding."[65]

VI. CONCLUSION

Procedurally, states administer motions to disqualify in three ways: (1) to permit the challenged judge to exercise discretion and rule on the motion; (2) to restrict the challenged judge to a determination of the sufficiency and timeliness of the motion; and (3) to require the challenged judge to transfer the motion

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values. Indeed, proof that a judge's mind is a complete *tabula rasa* demonstrates lack of qualification, not lack of bias.

Abramson, *supra* note 2, at 24.

63. *Id.* at 53-54.

64. *See* Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 NEB. L. REV. n.92 (forthcoming 1994).

65. *See* Abramson, *supra* note 2, at 76-78.

immediately upon receipt of the motion without ruling on its substance or facial compliance. This Article describes the methods by which statutes, court rules, and case law prescribe who should rule on judicial disqualification motions, either the challenged judge or another judge.

The appearance of partiality and the perils of self-serving statutory interpretation suggest that, to the extent logistically feasible, another judge should preside over such motions. To permit the judge whose conduct or relationships prompted the motion to decide the motion erodes the necessary public confidence in the integrity of a judicial system which should rely on the presence of a neutral and detached judge to preside over all court proceedings.