

Judicial Disqualification In Michigan



“We would desire that all . . . courts be irreproachable in patience, tact, wisdom, and courtesy, not only learned in the law but impervious to the vexations and irritations that plague the rest of mankind.”
***Mahlen Land Corp v Kurtz*, 355 Mich 340, 350 (1959).**

Michigan Supreme Court

- The Honorable Robert P. Young, Jr., *Chief Justice*
- The Honorable David F. Viviano, *MJI Supervising Justice*
- The Honorable Stephen J. Markman, the Honorable Brian K. Zahra, the Honorable Bridget Mary McCormack, the Honorable Richard H. Bernstein, and the Honorable Joan L. Larsen, *Justices*
- The Honorable Milton L. Mack, Jr., *State Court Administrator*
- Mr. Thomas P. Clement, *Supreme Court General Counsel*
- Mr. Larry S. Royster, *Supreme Court Chief of Staff*

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Judicial Disqualification in Michigan

Summaries of Updates: May 2, 2016–September 1, 2016

Updates have been issued for the *Judicial Disqualification in Michigan*. A summary of each update appears below. The updates have been integrated into the website version of the benchbook. Clicking on the links below will take you to the page(s) in the benchbook where the updates appear. The text added or changed in each update is underlined.

1.5(B) Reasons for Disqualification

- “Under the Due Process Clause [of the Fourteenth Amendment of the United States Constitution] there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant’s case.” *Williams (Terrance) v Pennsylvania*, 579 US ___, ___ (2016) (holding that where a state supreme court justice was formerly involved in a case as the prosecutor and had given his official approval to seek the death penalty against the defendant, the justice’s failure to recuse himself from the appellate postconviction proceedings in which the defendant sought relief from his conviction and death sentence constituted reversible constitutional error).

1.13 Remedy for Failure to Disqualify in Appellate Proceedings Involving Multimember Courts

- “[A]n unconstitutional failure to recuse constitutes structural error even[, in appellate proceedings,] if the judge in question did not cast a deciding vote[;]” “a due process violation arising from the participation of an interested judge is a defect ‘not amenable’ to harmless-error review, regardless of whether the judge’s vote was dispositive.” *Williams (Terrance) v Pennsylvania*, 579 US ___, ___ (2016). “An inability to guarantee complete relief for a constitutional violation, however, does not justify withholding a remedy altogether[;]” rather, the defendant “must be granted an opportunity to present his [or her] claims

to a court unburdened by any 'possible temptation . . . not to hold the balance nice, clear[,] and true between the State and the accused.'" *Williams (Terrance)*, 579 US at ____.

1.14 Case Law

- "Under the Due Process Clause [of the Fourteenth Amendment of the United States Constitution] there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Williams (Terrance) v Pennsylvania*, 579 US ___, ___ (2016) (holding that where a state supreme court justice was formerly involved in a case as the prosecutor and had given his official approval to seek the death penalty against the defendant, the justice's failure to recuse himself from postconviction proceedings in which the defendant sought relief from his conviction and death sentence constituted reversible constitutional error).

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1.1 Overview

All parties to a dispute have the right to due process of law in order to resolve the dispute, and due process of law requires that the parties be given a hearing before an unbiased and impartial decisionmaker as part of the resolution process. *Withrow v Larkin*, 421 US 35, 46 (1975); *In re Murchison*, 349 US 133, 136 (1955); *Tumey v Ohio*, 273 US 510, 523 (1927). All states, including Michigan, have developed rules and ethical standards to determine whether disqualification is proper in situations where a decisionmaker's impartiality may be an issue. See [MCR 2.003](#) and the Michigan Code of Judicial Conduct.

Judicial power was first described by the Michigan Supreme Court in 1859 as “the power to hear and determine controversies between adverse parties, and questions in litigation.” *In re Justin*, 490 Mich 394, 414 (2012), quoting *Daniels v People*, 6 Mich 381, 388 (1859). “The fundamental purpose in resolving such controversies is quite simple: the fair ascertainment of the truth.” *In re Justin*, *supra* at 414, citing *People v Johnson (Herbert)*, 356 Mich 619, 621 (1959).

“A trial judge is presumed to be impartial and the party who asserts partiality has a heavy burden of overcoming that presumption.” *In re MKK*, 286 Mich App 546, 566 (2009). “A showing of prejudice usually requires that the source of the bias be in events or information outside the judicial proceeding.” *In re MKK*, *supra* at 566. “Disqualification on the basis of bias or prejudice cannot be established merely by repeated rulings against a litigant, even if the rulings are erroneous.” *Id.*

“Letters, or even complaints, to the Judicial Tenure Commission alone do not require disqualification of a trial judge.” *Ireland v Smith*, 214 Mich App 235, 249 (1995). Under circumstances where a party has filed a grievance with the Judicial Tenure Commission, disqualification is not necessary until the judge is privately censured or the Judicial Tenure Commission itself files a complaint. *People v Bero*, 168 Mich App 545, 552 (1988). See also *Czuprynski v Bay Circuit Judge*, 166 Mich App 118, 123-127 (1988).

In some circumstances, a judge will be clearly obligated to disqualify himself or herself because of undisputed factors such as a close family relationship with a party or advocate involved in the case. See [MCR 2.003\(C\)\(1\)\(g\)\(i\)-\(ii\)](#). In other circumstances, however, the question may not be so clearly defined—such as determining when a judge has “personal knowledge of disputed evidentiary facts concerning the proceeding.” [MCR 2.003\(C\)\(1\)\(c\)](#).

The federal court system has developed a *duty to sit* doctrine that emphasizes the “obligation to remain on any case absent good grounds for recusal.” *Adair v Michigan*, 474 Mich 1027, 1039-1040 (2006) (C.J.

Taylor and J. Markman), citing *Laird v Tatum*, 409 US 824, 837 (1972), where the United States Supreme Court “not[ed] that the court of appeals had unanimously concluded that judges have a duty to sit when not disqualified that is equally as strong as the duty not to sit when disqualified.”

1.2 Michigan Court Rule

The judicial disqualification rules in [MCR 2.003](#) apply to all judges in Michigan, including Michigan Supreme Court justices, unless otherwise noted in the rule. [MCR 2.003\(A\)-\(B\)](#) state:

“(A) **Applicability.** This rule applies to all judges, including justices of the Michigan Supreme Court, unless a specific provision is stated to apply only to judges of a certain court. The word ‘judge’ includes a justice of the Michigan Supreme Court.

(B) **Who May Raise.** A party may raise the issue of a judge’s disqualification by motion or the judge may raise it.”

The remaining portions of [MCR 2.003](#) are discussed throughout the benchbook, where appropriate.

1.3 Michigan Code of Judicial Conduct

Selected portions of the Michigan Code of Judicial Conduct appear below.¹

- **Code of Judicial Conduct, [MCJC 1](#)**, states:

“An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. A judge should always be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary. The provisions of this code should be construed and applied to further those objectives.”

- **Code of Judicial Conduct, [MCJC 2\(A\)](#)**, states:

“Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of

¹ See <http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/Michigan%20Code%20of%20Judicial%20Conduct.pdf> for the complete Michigan Code of Judicial Conduct.

constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.”

- **Code of Judicial Conduct, MCJC 3(C)**, states:

“**Disqualification.** A judge should raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under [MCR 2.003\(C\)](#).”

- **Code of Judicial Conduct, MCJC 3(D)**, states:

“**Waiver of Disqualification.** A disqualification of a judge may be waived as provided by [MCR 2.003\(E\)](#).”

1.4 Ethics Opinions

The Judicial Ethics Committee of the State Bar of Michigan occasionally releases informal written opinions answering questions of judicial ethics that are presented to the committee for consideration.² These opinions are not binding and do not have the effect of law, but many times are helpful to the inquirer in deciding ethical issues regarding future conduct. Two justices of the Michigan Supreme Court have “note[d] that these opinions are merely advisory, that they are not binding on any court, and that they are merely the opinions of volunteer lawyers of a state bar committee.”³

“Ex parte communication between a judge and the Regulation Counsel for the Committee on Professional and Judicial Ethics concerning contemplated conduct of the inquiring judge is appropriate even though the inquiry involves a matter currently pending before that judge.” [State Bar of Michigan Ethics Opinion, JI-8 \(July 19, 1989\)](#).

“If the subject of an ethics inquiry relates to a pending matter which the judge must decide, the judge should notify the parties in the pending matter that the judge is seeking assistance and provide the parties an opportunity to review the question submitted.” [State Bar of Michigan Ethics Opinion, JI-8 \(July 19, 1989\)](#).

² Written ethics opinions are accessible on the State Bar of Michigan’s web site at <http://www.michbar.org/opinions/ethicsopinions.cfm#opinions>. For an index of ethics opinions interpreting the Code of Judicial Conduct, see www.michbar.org/opinions/ethics/mcjc.cfm. See also [Sections 1.10 and 1.11](#) for a list and discussion of select ethics opinions addressing judicial disqualification.

³ Chief Justice Clifford Taylor and Justice Stephen Markman in *Adair v Michigan*, 474 Mich 1027, 1039 n 13 (2006) (noting that the particular advisory opinion at issue was in direct conflict with a court rule and thus had no bearing on the case).

1.5 Reasons for Disqualification

Disqualification is required if a judge cannot impartially hear a case for any reason. [MCR 2.003\(C\)\(1\)\(a\)-\(g\)](#) list reasons that *require* the judge's disqualification in cases where the factors listed are established. According to [MCR 2.003\(C\)](#):

“(C) Grounds.

(1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

(a) The judge is biased or prejudiced for or against a party or attorney.

(b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, 556 US 868 . . . (2009),^[4] or (ii) [] failed to adhere to the appearance of impropriety standard set forth in [\[MCJC 2\]](#) of the Michigan Code of Judicial Conduct.^[5]

(c) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(d) The judge has been consulted or employed as an attorney in the matter in controversy.

(e) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(f) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has more than a de minimus economic interest in the subject matter in controversy that could be substantially impacted by the proceeding.

(g) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:^[6]

⁴ The probability of actual bias on the part of a judge who would be hearing a case involving a party who contributed \$3 million to the judge's campaign was too high to be constitutionally tolerable. *Caperton v Massey*, 556 US 868 (2009).

⁵ The amended version of [MCR 2.003](#) incorporated the *appearance of impropriety* standard formerly found only in the Code of Judicial Conduct.

(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 more than a de minimus interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding."

If any of the above reasons exist for disqualification, a judge must sign an order of disqualification. See [MCR 2.003\(C\)](#); SCAO form MC 264, *Order of Disqualification/Reassignment*, available at www.courts.mi.gov/Administration/SCAO/Forms/courtforms/general/mc264.pdf.

A trial judge is presumed "impartial[,] and the party asserting otherwise bears a heavy burden to overcome that presumption." *Huntington Nat'l Bank v Daniel J Aronoff Living Trust*, 305 Mich App 496, 517 (2014), citing *In re MKK*, 286 Mich App 546, 566 (2009) (finding that "[t]he record here simply [did] not establish that this case is one of those extreme cases warranting relief[]"), citing *In re MKK*, 286 Mich App at 566.

A. Personal Bias or Prejudice

Disqualification is *always required* when a judge is biased or prejudiced for or against a party to the proceedings or an advocate appearing in the proceedings. [MCR 2.003\(C\)\(1\)\(a\)](#).

"[[MCR 2.003\(C\)\(1\)\(a\)](#)⁷] requires a showing of *actual* bias[, and a]bsent actual bias or prejudice, a judge will not be disqualified pursuant to this section." *Cain v Dep't of Corrections*, 451 Mich 470, 495 (1996).

"Coupled with the requirement of actual bias, [[MCR 2.003\(C\)\(1\)\(a\)](#)⁸] also requires that the judge be 'personally' biased or prejudiced in order to warrant disqualification[.]" *Cain*, 451 Mich at 495. *Personal bias* has been defined as a bias having "its origin in events or sources of information gleaned outside the judicial proceeding." *Cain, supra* at 495-496. The United States Supreme Court has characterized *personal bias* as "a favorable or unfavorable disposition or opinion

⁶ Third degree of relationship includes parents, grandparents, great-grandparents, uncles, aunts, brothers, sisters, nephews, nieces, children, grandchildren, and great-grandchildren of the judge and his or her spouse, and the spouse of any of the family members listed. See generally *Crystal v Hubbard*, 414 Mich 297, 313 n 6 (1982).

⁷ Formerly [MCR 2.003\(B\)\(1\)](#).

⁸ Formerly [MCR 2.003\(B\)\(1\)](#).

that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess . . . , or because it is excessive in degree” *Liteky v United States*, 510 US 540, 550 (1994).

The burden of proving actual bias or prejudice falls on the party moving for disqualification. *People v Bero*, 168 Mich App 545, 549 (1988), citing *Czuprynski v Bay Circuit Judge*, 166 Mich App 118, 124 (1988).

“Disqualification on the basis of bias or prejudice cannot be established merely by repeated rulings against a litigant, even if the rulings are erroneous. . . . [Moreover,] [a] generalized hostility toward a class of claimants does not present disqualifying bias.^[9] Further, a trial judge’s remarks made during trial, which are critical of or hostile to counsel, the parties, or their cases, ordinarily do not establish disqualifying bias.” *In re MKK*, 286 Mich App at 566-567 (internal citations omitted).

B. Risk of Actual Bias Affecting Due Process Rights

“In lieu of exclusive reliance on [a judge’s] personal inquiry [into his or her own actual bias], or on appellate review of the judge’s determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.” *Caperton*, 556 US at 883. See also [MCR 2.003\(C\)\(1\)\(b\)](#). These objective standards ask whether “‘under a realistic appraisal of psychological tendencies and human weakness,’ the interest ‘poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.’” *Caperton, supra* at 883-884, quoting *Withrow v Larkin*, 421 US 35, 47 (1975). The *Caperton* Court noted that the facts presented were extreme cases where the Constitution required disqualification. *Caperton, supra* at 887. “Because the [states’] codes of judicial conduct provide more protection than due process requires [by adopting the objective *appearance of impropriety* standard], most disputes over disqualification will be resolved without resort to the Constitution.” *Id.* at 890.

In *Crampton v Mich Dep’t of State*, 395 Mich 347, 351 (1975), the Michigan Supreme Court gave the following situations as examples in which a judge is required to disqualify himself or herself from presiding over the case because a constitutional basis for disqualification exists:¹⁰

⁹ “[The] respondent[’s] conten[tion] that [the judge was] bias[ed] . . . toward young biological fathers who desire to raise their children[]” did not present disqualifying bias. *In re MKK*, 286 Mich App at 566.

(1) where the judge has a financial interest in the outcome of the matter before the court. *Crompton*, 395 Mich at 351, citing *Ward v Monroeville*, 409 US 57, 60 (1972) (even though the mayor was not personally compensated from traffic fines collected, the mayor was responsible for the village's finances and might be inclined to continue the high level of fines by unfairly adjudicating traffic offenses); *Tumey v Ohio*, 273 US 510 (1927) (the village mayor was disqualified from sitting as judge on the "liquor court" because the mayor received direct compensation from fines collected for violations of the state's prohibition act).

(2) where the judge has been the target of a party's personal abuse or criticism. *Crompton*, 395 Mich at 351, citing *Mayberry v Pennsylvania*, 400 US 455, 465 (1971) (judge had been insulted and slandered by a defendant and there existed an ongoing bitter controversy).

(3) where the judge is "enmeshed," that is, deeply involved in other matters involving a party. *Crompton*, 395 Mich at 351, citing *Johnson v Mississippi*, 403 US 212, 215 (1971) (it was not appropriate for a losing judge in a civil rights suit to adjudicate criminal contempt charges against the individual who won the suit against the judge).

(4) where the judge's prior participation in the case (as accuser, investigator, fact-finder or initial decisionmaker) may have influenced his or her conclusion about the outcome of the case. *Crompton*, 395 Mich at 351, citing *In re Murchison*, 349 US 133 (1955) (it was not appropriate for a one-man grand jury to adjudicate contempt charges against witnesses the grand juror had charged with perjury and their refusal to answer his questions). [See also *Williams \(Terrance\) v Pennsylvania*, 579 US _____ \(2016\) \(it was reversible constitutional error where a state supreme court justice failed to recuse himself from appellate postconviction proceedings in which the defendant sought relief from](#)

¹⁰ The situations described in *Crompton*, 395 Mich at 351 must be interpreted narrowly. *Cain v Dep't of Corrections*, 451 Mich 470, 500 n 36 (1996). In explaining *Crompton*, the *Cain* Court stated: "Importantly, we recognize the amorphous nature of the situations listed in *Crompton* as 1 through 4; therefore, an analysis of the examples given as illustrative of each particular situation is critical. These situations are not to be viewed as catch-all provisions for petitioners desiring disqualification. On the contrary, we find these situations to be factually specific on the basis of the examples given. Thus, we interpret the test and scenarios outlined in *Crompton* narrowly. However, this is not to say that the *Crompton* list is exclusive." *Cain*, *supra* at 500 n 36.

his conviction and death sentence when the justice was formerly involved in the case as the prosecutor and gave his official approval to seek the death penalty against the defendant).¹¹

“[A] trial judge’s ruling regarding the admission of evidence, no matter how erroneous, is not grounds for disqualification.” *People v Roscoe*, 303 Mich App 633, 411 (2014) (trial judge’s erroneous admission of the victim’s statement in violation of the rules of evidence and the defendant’s right to confrontation was not grounds for disqualification under [MCR 2.003\(C\)\(1\)\(b\)](#)).

C. Appearance of Impropriety

The *appearance of impropriety* standard “cannot be equated with any person’s perception of impropriety, lest a judge find himself or herself subject to a barrage of recusal motions on the part of any person who apprehends an impropriety, however unreasonable this apprehension. Rather, this standard must be assessed in light of what can be gleaned from existing court rules and canons, historical practices and expectations, and common sense.” *Adair v Michigan*, 474 Mich 1027, 1039 (2006). The standard requires an objective inquiry “made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.” *Adair, supra* at 1039, quoting *Microsoft Corp v United States*, 530 US 1301, 1302 (2000).

“[A] trial judge’s ruling regarding the admission of evidence, no matter how erroneous, is not grounds for disqualification.” *People v Roscoe*, 303 Mich App 633, 411 (2014). “[O]ne erroneous ruling does not give the appearance of impropriety.” *Id.* (trial court’s incorrect application of the forfeiture-by-wrongdoing rule was not grounds for disqualification under [MCR 2.003\(C\)\(1\)\(b\)](#)).

1.6 Waiver of Disqualification

Michigan’s version of judicial disqualification rules allows a judge to hear most matters even when disqualification may be appropriate, if the parties consent. [MCR 2.003\(E\)](#) states:

“(E) **Waiver of Disqualification.** Parties to the proceeding may waive disqualification even where it appears that there may be grounds for disqualification of the judge. Such

¹¹ “[U]nder the Due Process Clause [of the Fourteenth Amendment of the United States Constitution] there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant’s case.” *Williams (Terrance)*, 579 US at ____.

waiver may occur whether the grounds for disqualification were raised by a party or by the judge, so long as the judge is willing to participate. Any agreement to waive the disqualification must be made by all parties to the litigation and shall be in writing or placed on the record.”

This is reinforced in the Code of Judicial Conduct. The Code of Judicial Conduct, [MCJC 3\(D\)](#), states:

“**Waiver of Disqualification.** A disqualification of a judge may be waived as provided by [MCR 2.003\(E\)](#).”

1.7 Procedures for Disqualification

[MCR 2.003\(D\)](#) governs the procedure by which a motion to disqualify is raised in a case.

“(D) Procedure.

(1)(a) **Time for Filing in the Trial Courts.** To avoid delaying trial and inconveniencing the witnesses, all motions for disqualification must be filed within 14 days of the discovery of the grounds for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith.

(b) **Time for Filing in the Court of Appeals.** All motions for disqualification must be filed within 14 days of disclosure of the judges’ assignment to the case or within 14 days of the discovery of the grounds for disqualification. If a party discovers the grounds for disqualification within 14 days of a scheduled oral argument or argument on the application for leave to appeal, the motion must be made forthwith.

(c) **Time for Filing in the Supreme Court.** If an appellant is aware of grounds for disqualification of a justice, the appellant must file a motion to disqualify with the application for leave to appeal. All other motions must be filed within 28 days after the filing of the application for leave to appeal or within 28 days of the discovery of the grounds for disqualification. If a party discovers the grounds for disqualification within 28 days of a scheduled oral argument or argument on the application for leave to appeal, the motion must be made forthwith.

All requests for review by the entire Court pursuant to [MCR 2.003](D)(3)(b) must be made within 14 days of the entry of the decision by the individual justice.

(d) **Untimely Motions.** Untimely motions in the trial court, the Court of Appeals, and the Supreme Court may be granted for good cause shown. If a motion is not timely filed in the trial court, the Court of Appeals, or the Supreme Court, untimeliness is a factor in deciding whether the motion should be granted.

(2) **All Grounds to be Included; Affidavit.** In any motion under this rule, the moving party must include all grounds for disqualification that are known at the time the motion is filed. An affidavit must accompany the motion.”

1.8 Ruling on the Motion to Disqualify

MCR 2.003(D)(3) governs ruling on a motion for disqualification.

“(3) Ruling.

(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.”

“When [the] Court [of Appeals] reviews a decision on a motion to disqualify a [trial court] judge, the trial court’s findings of fact are reviewed for an abuse of discretion, while the application of the facts to the relevant law is reviewed de novo.” *People v Roscoe*, 303 Mich App 633, 411 (2014), quoting *People v Wells*, 238 Mich App 383, 391 (1999).

1.9 If Motion to Disqualify Is Granted

[MCR 2.003\(D\)\(4\)](#) governs the process by which another judge is assigned to a case in which the original judge is disqualified.

“(4) If Disqualification Motion Is Granted.

(a) For courts other than the Supreme Court, when a judge is disqualified, the action must be assigned to another judge of the same court, or, if one is not available, the state court administrator shall assign another judge.

(b) In the Supreme Court, when a justice is disqualified, the underlying action will be decided by the remaining justices of the Court.”

1.10 Disclosures With or Without Disqualification

Disclosure of real or perceived conflict is consistent with a judge’s duty to “promote public confidence in the integrity and impartiality of the judiciary.” Code of Judicial Conduct, [MCJC 2\(B\)](#).

State Bar of Michigan ethics opinions required judicial disclosures in a variety of circumstances:

- A judge is a member of an investment club with an advocate or party.

“A judge may ethically participate in an ‘investment club’ which has no lawyers as members. A judge may ethically participate in an ‘investment club’ which has lawyers who may appear before the judge. However, a judge must refrain from financial and business dealings that tend to reflect adversely on the judges’s impartiality. If other members of the investment club are lawyers that are likely to frequently come before the

judge, the judge should either decide not to seek membership in the club or terminate the current membership.” [State Bar of Michigan Ethics Opinion, JI-119 \(May 12, 1998\)](#).

Furthermore, “[i]f the judge can reasonably conclude that members of the investment club that are lawyers are not likely to appear before the court on which the judge serve[s], the judge may ethically participate even if it is possible that a lawyer member may appear. Should the situation arise where a fellow lawyer member of the club appears before the judge, the judge must clearly disclose relevant information regarding the membership either in writing or on the record and recuse unless asked to proceed.” [State Bar of Michigan Ethics Opinion, JI-119 \(May 12, 1998\)](#).

- The appearing attorney is the former personal attorney for the judge.

“If a lawyer appearing before an administrative hearing officer^[12] has previously represented the adjudicator or a member of the judges’s household on legal matters, the adjudicator and the lawyer must disclose the prior representation to all other parties and their counsel.” [State Bar of Michigan Ethics Opinion, JI-102 \(June 6, 1995\)](#).

“Whether a judge should recuse in such matters is a question determined on the merits of any motion for disqualification which may be filed.” [State Bar of Michigan Ethics Opinion, JI-102 \(June 6, 1995\)](#).

- A circuit judge, a district court magistrate, and a sheriff jointly own recreation property.

“It is not unethical for a circuit judge, district court magistrate and a deputy sheriff working in the same county to co-own recreational real estate property. The circuit judge and the district court magistrate should disclose the investment to parties and counsel when the deputy sheriff appears as a witness in a pending matter. When the circuit judge reviews decisions of the magistrate, the judge should disclose the investment to parties and counsel.” [State Bar of Michigan Ethics Opinion, JI-86 \(March 23, 1994\)](#).

- The lawyer appearing before the judge is the judge’s current campaign manager or a member of the judge’s reelection

¹² Judicial disqualification rules are frequently used to assist administrative hearing officers in such matters.

committee.

“An incumbent judge is not automatically disqualified from presiding in a matter in which a member of the judge’s reelection campaign committee appears as an advocate for a party. The judge has an affirmative duty to disclose the relationship to opposing counsel and all parties. The lawyer has an affirmative duty to disclose the relationship to the client, and, if the judge fails to make timely disclosure, to the opposing counsel.” [State Bar of Michigan Ethics Opinion, JI-79 \(February 7, 1994\)](#).

“A lawyer who serves on an incumbent judge’s reelection campaign committee shall not represent a party in a matter in which the judge presides if that representation could be materially limited by the lawyer’s responsibilities to the judge and a disinterested lawyer would reasonably conclude that the representation would [] be adversely affected.” [State Bar of Michigan Ethics Opinion, JI-79 \(February 7, 1994\)](#).

- The judge sits on the board of a civic organization and a member of the organization is a witness in a case before the judge.

“A judge who serves on the board of an organization whose members appear as witnesses in proceedings before the judge must disclose the judge’s membership on the board and recuse unless the parties ask the judge to proceed in the matter.” [State Bar of Michigan Ethics Opinion, JI-66 \(March 26, 1993\)](#).

However, “[a] judge whose affiliation with an organization results in frequent disqualification must resign from the organization.” [State Bar of Michigan Ethics Opinion, JI-66 \(March 26, 1993\)](#).

- An attorney representing all the judges of a court in a pending matter appears before any one of the judges on an unrelated matter.

“While litigation against the judges of a court for actions taken in an official judicial capacity is pending, and counsel for the judges appears before any of the judges in an unrelated matter, the judge must disclose the relationship to the parties and their counsel.” [State Bar of Michigan Ethics Opinion, J-5 \(July 24, 1992\)](#).

“[A]lthough recusal is [a] question of law for the presiding judge’s initial decision, a judge has the obligation to disclose

any ongoing lawyer/client relationship to all parties in any matter in which a member of the law firm representing the judge appears." [State Bar of Michigan Ethics Opinion, J-5 \(July 24, 1992\)](#).

- A lawyer who works for a non-profit legal aid organization for which the judge sits on the advisory board appears before the judge.

"A judge serving on the board of directors of a nonprofit legal aid organization is required to disclose the relationship when one of the parties appearing before the judge is represented by a lawyer from the legal aid organization." [State Bar of Michigan Ethics Opinion, JI-51 \(April 3, 1992\)](#).

- A judge has received regular or periodic or one-time contributions from a lawyer or firm appearing before the judge.

A judge is not automatically disqualified from hearing a case in which an advocate or the advocate's firm appears when the advocate or firm has contributed to the judge's election. However, if "the matter over which the judge presides is a matter which affects the [contribution,] [t]he judge should disclose the relationship on the record, and recuse unless the parties ask the judge to proceed." [State Bar of Michigan Ethics Opinion, J-4 \(March 8, 1991\)](#). See also *Adair v Michigan*, 474 Mich 1027, 1042 ("lawful contributions made within [statutorily prescribed] limits, lawfully reported and lawfully disclosed, cannot fairly constitute a basis for judicial disqualification").

- A lawyer is dating the judge hearing the matter or lawyers are dating and representing adverse parties.

"Where lawyers are dating and representing adverse parties, or a lawyer is dating the judge hearing the matter, the lawyers must disclose the relationship to their clients if the relationship is sufficiently close that the clients would possibly consider its existence to be prejudicial to the impartial administration of justice." [State Bar of Michigan Ethics Opinion, R-3 \(July 21, 1989\)](#).

- The judge and appearing lawyer are in a landlord/tenant relationship.

"A relationship between a landlord/judge and a tenant/lawyer creates the appearance of impropriety if the lawyer practices before the judge." [State Bar of Michigan Ethics Opinion, JI-6](#)

(June 1, 1989).

“A full disclosure of the relationship must be made to all litigants, and the consent of all litigants obtained, in order to avoid a disqualification.” [State Bar of Michigan Ethics Opinion, JI-6 \(June 1, 1989\)](#).

The ethics opinion goes on to instruct judges to “manage investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as can be done without serious financial detriment, a judge should divest investments and other financial interests that require frequent disqualification.” [State Bar of Michigan Ethics Opinion JI-6 \(June 1, 1989\)](#).

1.11 Disqualification May Be Required

In addition to the grounds set out in [MCR 2.003\(C\)](#), the Michigan State Bar has suggested that a judge *must* disqualify himself or herself under the following circumstances:¹³

- The lawyer appearing before the judge also represents the judge or the judge’s former law firm in a pending malpractice litigation matter.

“A judge who, along with the judge’s former law firm, is a defendant in a malpractice action, may not preside over any matter in which a member of the former law firm, or a member of the law firm which represents the judge and the former law firm in the malpractice action, appears until the malpractice action is resolved.” [State Bar of Michigan Ethics Opinion JI-39 \(June 26, 1991\)](#).

- A lawyer and his or her spouse both serve as judicial officers.

“When a lawyer and the lawyer’s spouse both serve as judicial officers, one spouse should not supervise the performance of or review judicial decisions of the other.” [State Bar of Michigan Ethics Opinion JI-31 \(December 8, 1990\)](#).

“A judge’s disqualification from reviewing decisions of the judge’s spouse is not imputed to other members of the judge’s court.” [State Bar of Michigan Ethics Opinion JI-31 \(December 8, 1990\)](#).

¹³Note that [MCR 2.003\(E\)](#) allows for a waiver of disqualification where all parties consent in writing and on the record.

- A party or attorney is cohabiting with the judge.

“A judge . . . should [be] disqualif[ied] if [a party’s attorney] is cohabiting with or dating the judge. . . . A judge must disclose to [the] parties if the judge is living with or dating a lawyer for either of the parties in the matter.” [State Bar of Michigan Ethics Opinion R-3 \(July 21, 1989\)](#).

1.12 Disqualification Not Necessarily Required

According to [MCR 2.003\(C\)\(2\)](#), disqualification is not required under specific circumstances.

“(2) Disqualification not warranted.

(a) A judge is not disqualified merely because the judge’s former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge.

(b) A judge is not disqualified based solely upon campaign speech protected by *Republican Party of Minn v White*, 536 US 765 (2002),^[14] so long as such speech does not demonstrate bias or prejudice or an appearance of bias or prejudice for or against a party or an attorney involved in the action.”

In addition, disqualification *may not* be required *on the face* of the following circumstances.

- The employer of the judge’s spouse appears before the judge as a witness.

Absent a showing of actual bias, a judge is not automatically disqualified from presiding in a matter involving the judges’s spouse’s employer as a witness or a person presenting reports, as long as the judge’s spouse’s involvement does not include “participation in the preparation of the testimony or the reports.” [State Bar of Michigan Ethics Opinion JI-62 \(December 12, 1992\)](#).

- A police officer who is a probation officer with the judge’s court is a witness in the case.

¹⁴ Prohibiting a judicial candidate from giving his or her views on disputed legal or political issues violates the First Amendment. *Republican Party of Minn v White*, 536 US 765, 788 (2002).

Absent a showing of actual bias, a judge need not disqualify himself or herself in a case where a police officer is called as a witness, and the police officer is also a probation officer with the judge's court. [State Bar of Michigan Ethics Opinion JI-61 \(December 12, 1992\)](#).

- A judge from the same court is a witness in the case.

Absent a showing of actual bias, a judge need not disqualify himself or herself from presiding over a matter in which another judge from the same court is a witness, as long as the presiding judge is not the trier of fact or the judge-witness is not a necessary witness involving a contested fact. [State Bar of Michigan Ethics Opinion JI-57 \(August 24, 1992\)](#).

- A judge is presiding over a matter, and the judge and the lawyer have been opposing parties in the past.

"A judge is not automatically disqualified from presiding in a matter in which a lawyer/commissioner appears on behalf of a client. While litigation in which a judge and a lawyer are opposing parties is pending, the judge is disqualified from presiding in unrelated cases in which the lawyer appears. A judge is not automatically disqualified from presiding in cases in which the lawyer appears merely because the lawyer has in the past been an opposing party to the judge." [State Bar of Michigan Ethics Opinion R-15 \(July 24, 1992\)](#).

- The chief judge as "employer" of all individuals working for the court.

"The chief judge of a [trial] court, who serves as 'employer' of all persons working for the court, may hire a lawyer as an employee of the court to represent juveniles in delinquency and in neglect proceedings or parents in neglect proceedings, only if (1) the judge does not interfere with the independent professional judgment of the lawyer or with the lawyer-client relationship; (2) the judge avoids ex parte contacts concerning matters undertaken by the lawyer; and (3) the judge takes steps to minimize any appearance of bias." [State Bar of Michigan Ethics Opinion JI-50 \(March 19, 1992\)](#).

- The judge is "personally acquainted" with an advocate or party.

A judge's personal acquaintance with an attorney or party, without an indication that the nature of the acquaintance suggests bias, does not require the judge's automatic

disqualification. [State Bar of Michigan Ethics Opinion JI-44 \(November 1, 1991\)](#).

- The lawyer is being hostile toward the judge.

“A judge may not ‘perpetually recuse’ from cases of a particular advocate or particular party because of derogatory comments made against the judge by the advocate or the party in a particular case, or because of the judge’s personal dislike of a particular advocate.” [State Bar of Michigan Ethics Opinion, JI-44 \(November 1, 1991\)](#).¹⁵

- A Court of Appeals judge sued in a matter is not automatically disqualified from an unrelated case involving the appearance of a lawyer for the judge or the judge’s opponent.

“Absent actual bias or another clear reason, a Court of Appeals judge, sued in one case need not mandatorily recuse from another unrelated case where the lawyer for the judge or for the judge’s opponent is engaged.” [State Bar of Michigan Ethics Opinion JI-43 \(October 3, 1991\)](#).

“The Court of Appeals judge should consider voluntary recusal to avoid an untoward appearance while the judge’s own case is pending. If the judge decides the possible attribution of bias or prejudice is too attenuated to warrant recusal, the judge should still advise all parties and their counsel of the relationship and seriously consider any subsequent request for recusal.” [State Bar of Michigan Ethics Opinion JI-43 \(October 3, 1991\)](#).

- A judge’s appointee appears before the judge as an advocate.

“Absent circumstances which show bias a judge is not per se disqualified from presiding over matters presented by an appointee.” [State Bar of Michigan Ethics Opinion JI-29 \(October 30, 1990\)](#).

- A retired judge may serve as mediator or arbitrator of matters under specific circumstances.

¹⁵ But see *Withrow v Larkin*, 421 US 35, 47 (1975), where the United States Supreme Court stated: “[V]arious situations have been identified in which experience teaches that the probability of actual bias . . . is too high to be constitutionally tolerable. Among these cases are those in which [the adjudicator] . . . has been the target of personal abuse or criticism from the party before him [or her].” See also *Crampton v Mich Dep’t of State*, 395 Mich 347, 352 (1975), where the Michigan Supreme Court held that actual bias need not be shown “where a trial judge had been insulted, slandered, and vilified during trial . . . [and] had become ‘embroiled in a running, bitter controversy’ and was not ‘likely to maintain that calm detachment necessary for fair adjudication,’” quoting *Mayberry v Pennsylvania*, 400 US 455, 465 (1971).

“A retired judge may participate as mediator or arbitrator as long as (a) the retired judge does not participate during the period of any judicial assignment, (b) the retired judge is disqualified from mediation and arbitration in matters in which the judge served as judge, and is disqualified as judge from matters in which the judge participated as mediator or arbitrator, and (c) the participation does not reflect adversely on the retired judge’s impartiality or raise an appearance of impropriety.” [State Bar of Michigan Ethics Opinion JI-28 \(July 12, 1990\)](#).

- A judge may serve on the Attorney Discipline Committee and is not necessarily disqualified from hearing a case in which a lawyer who faced the Discipline Committee appears in the case.

“A judge may serve as a member of an attorney discipline board hearing panel and participate in a disciplinary proceeding against a lawyer.” [State Bar of Michigan Ethics Opinion JI-24 \(May 17, 1990\)](#).

“A judge is not automatically disqualified from presiding in a matter in which a party was a respondent in a disciplinary proceeding in which the judge served as a member of the attorney discipline board hearing panel, or from presiding in a matter in which a lawyer for a party is a member of the disciplinary respondent’s law firm.” [State Bar of Michigan Ethics Opinion JI-24 \(May 17, 1990\)](#).

1.13 Remedy for Failure to Disqualify in Appellate Proceedings Involving Multimember Courts

“[A]n unconstitutional failure to recuse constitutes structural error even[, in appellate proceedings,] if the judge in question did not cast a deciding vote[.]” “a due process violation arising from the participation of an interested judge is a defect ‘not amenable’ to harmless-error review, regardless of whether the judge’s vote was dispositive.” *Williams (Terrance) v Pennsylvania*, 579 US ___, ___ (2016).

“An inability to guarantee complete relief for a constitutional violation, however, does not justify withholding a remedy altogether[.]” rather, in criminal proceedings, a defendant “must be granted an opportunity to present his [or her] claims to a court unburdened by any ‘possible temptation . . . not to hold the balance nice, clear[,] and true between the State and the accused.” *Williams (Terrance)*, 579 US at ___ (vacating and remanding for further proceedings the judgment of a state supreme court where it was reversible constitutional error for a state supreme court

justice to not recuse himself from appellate postconviction proceedings in which the defendant sought relief from his conviction and death sentence when the justice was formerly involved in the case as the prosecutor and gave his official approval to seek the death penalty against the defendant; “[d]ue process entitles [the defendant] to ‘a proceeding in which he [or she] may present his case with assurance’ that no member of the court is ‘predisposed to find against him[or her]’”), quoting *Marshall v Jerrico, Inc.*, 446 US 238, 242 (1980); *Tumey v Ohio*, 273 US 510, 532 (1927).

1.14 Caselaw

The following cases discuss judicial disqualification:

- *Williams (Terrance) v Pennsylvania*, 579 US ___, ___ (2016)

“Under the Due Process Clause [of the Fourteenth Amendment of the United States Constitution] there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant’s case.” *Williams (Terrance)*, 579 US at ___. “The involvement of multiple actors and the passage of time do not relieve [a] former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences that his or her own earlier, critical decision may have set in motion[.]” “[n]o attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision[, and w]hen a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome.” *Id.* at ___, ___.

- *In re Justin*, 490 Mich 394, 414 (2012)

A judge may not “sit as a neutral arbiter over his [or her] own cases[.]” *In re Justin*, supra at 414. In *In re Justin*, the judge “fixed” traffic tickets for himself and his family members. *Id.* The Court noted that “the simple fact of the matter is that [the] respondent’s actions were deliberately calculated to ensure that no court proceedings would ever be held. . . . The entire judicial process was consciously sidestepped.” *Id.* at 414-415. “In short, [the] respondent deliberately abused the judicial power with which he was entrusted to prevent the truth of his own wrongdoing from being discovered.” *Id.* at 415.

- *Cain v Dep't of Corrections*, 451 Mich 470, 498-499 (1996)

Judicial disqualification for actual bias or prejudice is constitutionally mandated under the Due Process Clause only in the most extreme cases. Disqualification without a showing of actual bias is warranted in situations where experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerated.

- *Crampton v Mich Dep't of State*, 395 Mich 347, 356 (1975)

"[I]t is impermissible for officials who are entrusted with responsibility for arrest and prosecution of law violators to sit as adjudicators in a law enforcement dispute between a citizen and a police officer. In this situation . . . , the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."

- *Butler v Simmons-Butler*, 308 Mich App 195, 228 (2014)

"The trial court has authority to manage proceedings to achieve orderly disposition of cases[,] and "[t]he trial judge's comments to [the] defendant during trial comported with that authority" where the trial court required live cross examination of a witness rather than admitting the witness's statement, and instructed the defendant that she could cross examine witnesses and present additional evidence. *Butler*, 308 Mich App at 228. Further, "a party cannot establish disqualification based on bias or prejudice merely by repeated rulings against the party, even if the rulings are erroneous[.]" *Id.* at 228 (citations omitted). Moreover, "that [the] defendant was found in contempt and was ordered to jail does not indicate bias[]" where the defendant "intentionally violated the court's parenting order, hid the children from [the] plaintiff, and refused to appear for a show cause hearing." *Id.* at 228. Finally, the Michigan Court of Appeals rejected the defendant's contention that "the trial judge's Facebook 'friendships' established a level of disqualifying bias[.]" and noted that "[o]nce the issue was raised[,] the judge deleted the two 'friend' designations, and informed the parties that she could handle the case in an unbiased fashion." *Id.* at 229 n 7.

- *Gates v Gates*, 256 Mich App 420, 440 (2003)

"[J]udicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a ""deep-seated favoritism or

antagonism that would make fair judgment impossible” and overcomes a heavy presumption of judicial impartiality.” *Gates, supra* at 440, citing *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 597 (2001), quoting *Cain*, 451 Mich at 496, quoting *Liteky v United States*, 510 US 540, 555 (1994).

- *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 598 (2001)

“[S]ituations that arose in a judge’s past, and that give rise to a request to disqualify, cannot overcome the presumption of impartiality if their connection to the case at hand is too tenuous. Any fundraising assistance involved in the trial judge’s candidacy for the Michigan Supreme Court three years earlier was so tenuous that it could not overcome the presumption of impartiality. There was no ongoing matter or relationship between the trial judge and the board members and no ongoing basis of reason for the trial judge to favor those board members.”

- *People v Gomez*, 229 Mich App 329, 331 (1998)

Even when a trial court makes comments during trial that could be construed as biased, the defendant must still overcome a heavy presumption of impartiality. *Gomez, supra* at 331. In *Gomez*, the trial court referred to the defendant as “Mr. Pro Se,” and suggested that the defendant had no defense. *Id.* According to the Court of Appeals, “[e]ven considering these (and other) comments, we do not believe that the record reflects a showing of actual bias or prejudice, as required by [the court rule].” *Id.*

- *In re Hamlet (After Remand)*, 225 Mich App 505, 524 (1997), overruled on other grounds *In re Trejo*, 462 Mich 341, 354 n 10 (2000).

“Opinions formed by a judge on the basis of facts introduced or events that occur during the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Likewise, judicial remarks during the course of a trial that are “critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.”” *In re Hamlet, supra* at 524, quoting *Cain*, 451 Mich at 497 n 30, quoting *Liteky*, 510 US at 555.

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