

# Judicial Recusal Ethics

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North Dakota Supreme Court

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## Introduction

- “Recusal is the process by which a trial court voluntarily removes itself, while disqualification is the process by which a party seeks to remove a judge from the case”

Forrest v. State, 904 So. 2d 629 n.1 (Fla. Dist. Ct. App. 2005)

- “In many jurisdictions, the term ‘recusal’ is used interchangeably with the term ‘disqualification’”

ABA Model Code Jud. Conduct 2.11 cmt. 1 (2007)

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## Introduction

- “A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned”

ABA Model Code Jud. Conduct, Canon 3E(1) (1990)

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## Introduction

- “A judge shall hear and decide matters assigned to the judge except those in which disqualification is required”

ABA Model Code Jud. Conduct, Canon 3B(1) (1990)

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## Introduction

- “There is as much an obligation for judge not to recuse himself when there is no occasion for him to do so as there is for him to do so when there is”

United States v. Burger, 964 F.2d 1065 (10th Cir. 1992)



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## Introduction

- “[W]hen a judge recuses himself or herself frequently, attorneys and litigants may well be encouraged to use recusal motions as a means of judge shopping”

Virginia Jud. Ethics Adv. Op. 01-8

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## Introduction

- “Recusal motions should not be used as strategic devices to ‘judge shop’”

McCann v. Commc'ns Design Corp., 775 F.Supp. 1506 (D.Conn.1991)

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## Introduction

- Attorney sanctioned under Federal Civil Rule 11 and 28 U.S.C. § 1927 for groundless, bad faith and untimely motion to disqualification judge

Perkins v. General Motors Corp., 965 F.2d 597, 601-02 (8th Cir. 1992)

- Attorney sanctioned for frivolous, malicious, improper and unsupported motion to disqualification judge

Trackwell v. B & J P'ship, Ltd., 437 F.Supp.2d 1052, 1062 (D. Neb. 2006)



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## Question 1

- The judge maintains a Facebook page and has several lawyer “friends.” One of the judge’s Facebook “friends” is opposing counsel on your case assigned to the judge
  - What are the disqualification or recusal considerations?
  - Should judges be able to use social media websites to interact with lawyers and others who might appear before them?

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## Social Networks

- Lawyer “friends” NOT permitted:
  - Improper for judge to identify lawyers who may appear before judge as “friends”
  - Improper for judge to maintain site allowing lawyers to be listed as judge’s “friend”
  - But proper for campaign committee to have page

Florida Jud. Adv. Op. 2009-20

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## Social Networks

- Lawyer “friends” ARE permitted, but:
  - Judge must maintain dignity of court
  - No discussion of pending matters
  - Must preserve impartiality of judge and court
  - Cannot use for independent investigation

South Carolina Adv. Op. 17-2009  
New York Jud. Ethics Adv. Op. 08-176 (2009)  
Kentucky Jud. Ethics Adv. Op. JE-119 (2010)  
Ohio Jud. Adv. Op. 2010-7 (2010)

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## Social Networks

- Other participation permitted:
  - Florida Jud. Ethics Adv. Op. 2010-06  
Judge member of voluntary bar’s Facebook group
  - Florida Jud. Ethics Adv. Op. 2010-04
    - Judicial assistant may have site outside of judicial duties and independent of judge

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## The Law

- 28 U.S.C. § 455(a):
  - “Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned”
- 7 G.C.A. § 6105(a):
  - “Any Judge shall disqualify himself or herself in any proceeding in which his or her impartiality might reasonably be questioned”

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## Social Networks

- What is the “impartiality” requiring disqualification from presiding over a case?
  - “‘Impartiality’ or ‘impartial’ denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge”

ABA Model Code Jud. Conduct, Terminology (1990)

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## Social Networks

- “[T]he reasonable person standard applies to recusal cases”
- “A court should not hypothesize about what the reasonable person would believe only upon hearing the moving party’s allegations. Instead, it should decide what the reasonable person would believe about a judge’s partiality given all the relevant facts in the controversy”

Ada v. Gutierrez, 2000 Guam 22 ¶ 12

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## Social Networks

- “[C]ourts must apply the reasonable person standard within the context of the jurisdictions, parties, and controversies involved”
- Disqualification judge properly decided “the relative seclusion of the Guam political system, and the nature of Guam families, the remaining judges may well have more conflicts than [current judge]”

Ada v. Guutierrez, 2000 Guam 22 ¶ 13



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## Question 2

- You tried a case, lost and appealed. The appellate court agreed with you and reversed for a new trial
- The same judge will preside but has personal knowledge of disputed evidentiary facts because previous trial and has made rulings adverse to your client
  - Is the judge disqualified from sitting on the case?

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## The Law

- 28 U.S.C. § 455(b)(1):
  - “He shall also disqualify...[w]here he has... personal knowledge of disputed evidentiary facts concerning the proceeding”
- 7 G.C.A. § 6105(b)(1):
  - “A Judge shall also disqualify. . .[w]here he or she has...personal knowledge of disputed evidentiary facts concerning the proceeding”

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## Trial on Remand

- “The standard under [28 U.S.C.] § 455 is...whether a reasonable person would conclude that a judge is biased or prejudiced against a particular defendant”

United States v. Davidson, 482 F.Supp. 827, 829 (W.D.Okla.1979)

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## Trial on Remand

- “[B]ias or prejudice must be personal, which generally requires that such be established by matters outside and apart from litigation”

United States v. Davidson, 482 F.Supp. 827, 829 (W.D.Okla.1979)

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## Trial on Remand

- “The determinate of disqualification for personal bias or prejudice is not a judge's introspective estimate of his own ability impartially to hear case, but is what a reasonable person knowing all the relevant facts would think about the impartiality of the judge”

Roberts v. Bailar, 625 F.2d 125 (6th Cir. 1980)  
Van Dox v. Superior Court, 2008 Guam 7 ¶ 32

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## Trial on Remand

- “To prove personal bias or prejudice warranting recusal, the movant must show that the judge's bias or prejudice is both: (1) personal, i.e., directed against a party, and (2) extrajudicial”

Nickerson-Malpher v. Baldacci, 522 F.Supp.2d 293 (D. Me. 2007)

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## Trial on Remand

- “[D]isqualifying bias must normally stem from extrajudicial sources, but there may be an exception where ‘such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party’”

Van Dox v. Superior Court, 2008 Guam 7 ¶ 35

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## Trial on Remand

- “‘Extrajudicial conduct’ . . . is not conduct arising geographically outside the courtroom, rather, it is conduct from something outside of events of the courtroom proceeding itself”

Person v. Gen. Motors Corp., 730 F.Supp. 516 (W.D.N.Y. 1990)

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## Trial on Remand

- Natural sympathies and feelings that may arise during a proceeding are not grounds for disqualification unless they become actual bias or prejudice for or against either party

Lazofsky v. Sommerset Bus Co., Inc., 389 F.Supp. 1041 (E.D.N.Y.1975)

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## Trial on Remand

- “Judicial rulings alone almost never constitute valid basis for bias or partiality motion for disqualification. . .and can only in the rarest circumstances evidence the degree of favoritism or antagonism required when no extrajudicial source is involved”

Liteky v. United States, 510 U.S. 540 (1994)

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## Trial on Remand

- “Opinions held by judges as result of what they learned in earlier proceedings are not ‘bias’ or ‘prejudice’ requiring recusal, and it is normal and proper for judge to sit in the same case upon remand and successive trials involving the same defendant”

Liteky v. United States, 510 U.S. 540 (1994)



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### Question 3

- Your client seeks postconviction relief in Guam Superior Court where the judge has made several pre-trial rulings adverse to your client. Acting pro se, your client has sued the judge in federal court and made an ethics complaint based on some of those rulings
  - Is the Guam Judge disqualified from presiding in the postconviction relief case?

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### Impartiality

- “If we are to recuse ourselves simply because we have been sued by the applicant, then who is left to decided this case?”
- “[A] judge is not disqualified merely because a litigant sues or threatens to sue him. Such an easy method for obtaining disqualification should not be encouraged”

Scheehle v. Justices of S.Ct. of Ariz., 120 P.3d 1092, 1105 (Ariz. 2005)

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### Impartiality

- Recusal is not required due to unfounded charges intended to create a dispute and cause recusal
- Recusal is unnecessary, facilitates forum shopping, is unfair to other party and burdens the next judge who will meet the same fate

Indiana Jud. Ethics Adv. Op. 3-07  
Nebraska Jud. Ethics Adv. Op. 05-2

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## Impartiality

- “Where a party or the party’s attorney acts toward a judge in a manner calculated to create bias or prejudice, disqualification of the judge ordinarily will not be required. A party should not be able to engage in ‘judge shopping’ by manufacturing bias or prejudice that previously did not exist”

Arizona Jud. Ethics Adv. Op. 98-02



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## Question 4

- The judge’s brother was Director of the Guam Department of Labor. The brother has moved to a different job. The Department has been sued on a matter going back in time to when the brother worked at Department
  - Must the judge recuse?

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## Judge’s Family

- A judge has no reason to recuse “once his or her immediate relatives no longer work for those firms currently before the court”

Ada v. Gutierrez, 2000 Guam 22 ¶ 20

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## Judge's Family

- “Normally, a judge need only be concerned about a party’s affiliation to themselves and ‘those family members in their households’”

Van Dox v. Superior Court, 2008 Guam 7 ¶ 38

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## Judge's Family

- “[T]he intent behind disqualification laws was [not] to require judges to keep, update, and check biographies of their immediate and extended family every time they begin hearing a case”

Ada v. Gutierrez, 2000 Guam 22 ¶ 21

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## Judge's Family

- “We do not want to open a Pandora’s box in which parties begin drawing a judge’s family tree each time it seems that a judge will rule against them”

Ada v. Gutierrez, 2000 Guam 22 ¶ 21

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### Question 5

- The judge’s daughter is president of a bank that was robbed. The daughter was not present and was not a witness in the criminal case. However, the bank brought a civil suit against the robber for damages
  - Can the judge remain on the case?
  - If recusal is required, can the parties waive the judge’s disqualification?

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### The Law

- A judge shall disqualify where 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 person:
  - “is a party to the proceeding, or an officer, director, or trustee of a party”

28 U.S.C. § 455(b)(5)(i)  
7 G.C.A. § 6105(b)(5)(i)

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### The Law

- “The degree of relationship is calculated according to the civil law system”

28 U.S.C. § 455(d)(2)  
7 G.C.A. § 6105(d)(2)

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## The Law

- “[I]f, following complete disclosure to all parties in the proceeding of the reasons for his or her disqualification, all parties agree to having the Judge continue to sit in the proceedings, he or she need not disqualify himself or herself”

7 G.C.A. § 6105(b)

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## The Law

- “No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b)”

28 U.S.C. § 455(e)

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## Question 6

- The brother of the judge’s best friend is a party appearing in court. Is recusal required?
  - “Mere allegations of social relationship between judge and litigant in his court are not sufficient grounds for disqualification of judge”
    - TV Commc'ns Network, Inc. v. ESPN, Inc., 767 F.Supp. 1077 (D. Colo.1991)

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### Question 7

- Does judge’s personal acquaintance with a lawyer require disqualification?
  - Friendships do not of themselves cause prejudice and require disqualification
  - “We have found no authority which suggests that a judge's long acquaintance with a local lawyer renders the judge incapable of evaluating the lawyer's advocacy on behalf of a client in a particular case”

Michigan Jud. Ethics Adv. Op. JI-44 (1991)  
Virginia Jud. Ethics Adv. Op. 01-8

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### Question 8

- Does judge’s personal acquaintance with a party require disqualification?
  - “Unless the judge has personal knowledge about the particular matter at issue which is not part of the evidence presented, the judge should ordinarily be able to set aside personal familiarity and adjudicate the matter”

Michigan Jud. Ethics Adv. Op. JI-44 (1991)

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### Question 9

- The judge has a home mortgage from Big Bank, which is now a party to litigation  
Must the judge recuse?
  - “[D]isqualification is not required in this case, assuming the judge’s loan is ordinary in every respect and the merits of the particular case do not implicate the judge’s business with the bank in any significant way”

Indiana Jud. Ethics Adv. Op. 3-93

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### Question 10

- Sparky Electric Company provides power to judge’s home. Company has a case before that judge. Must judge recuse?
  - Mere status as a utility ratepayer not itself enough to disqualify
    - Answer changes if utility rates would increase substantially with an adverse litigation outcome
    - Answer changes if utility is a cooperative and you are a member receiving patronage dividends that may be materially affected

United States Adv. Op. 78 (1998)

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### Question 11

- The judge owns stock in corporation Dividend, Inc., which has a subsidiary called LittleCash, Ltd., a plaintiff before the judge. Is the judge disqualified from sitting on the case?
  - Judge is required to recuse upon learning one of the parties was a wholly-owned subsidiary of a company in which he owned stock

Catherines v. Copytele, Inc., 608 F.Supp. 1031 (E.D.N.Y.1985)

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### Judge’s Family

- A “financial interest in the subject matter in controversy or in a party to the proceeding” requires recusal whether or not the outcome of the proceeding could have any effect on the interests, while judge’s “any other interest that could be substantially affected by the outcome of the proceeding” requires recusal only if the other interests could be substantially affected

In re Cement Antitrust Litigation, 688 F.2d 1297 (9th Cir. 1982)

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## Question 12

- The judge's adult married daughter is a technology manager for a law firm. Is judge disqualified from that firm's cases?
  - Even when immediate relatives still work for a party or a law firm, disqualification is not required unless the relative holds such a high position or a large ownership that a favorable decision would directly benefit them

Ada v. Gutierrez, 2000 Guam 22 ¶ 20

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## Judge's Family

- “[D]isqualification is warranted only ‘if the child would receive future employment bonuses based upon his or her parent’s favorable ruling for the firm’”

Van Dox v. Superior Court, 2008 Guam 7 ¶ 38



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## Question 13

- To retaliate against the judiciary for a particular ruling they dislike, the Legislature and the Governor enact a law retroactively reducing every active and *pro tempore* judge's pay by 25 percent. A group of judges sue
  - Who decides the case?

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## Rule of Necessity

- “By decisional law, the rule of necessity may override the rule of disqualification”

ABA Model Code Jud. Conduct, Canon 3E(1), cmt. (1990)

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## Rule of Necessity

- “[T]he rule of disqualification must yield to the demands of necessity, and a judge... may act in a proceeding wherein he is disqualified by interest, relationship, or the like...so that his refusal to act would destroy the only tribunal in which relief could be had and thus prevent a determination of the proceeding”

Schwab v. Ariyoshi, 555 P.2d 1329, 1332 (Haw. 1976)

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## Rule of Necessity

- “Under [the rule of necessity], it is the duty of the disqualified judge to hear and decide the controversy, however disagreeable it may be”

Schwab v. Ariyoshi, 555 P.2d 1329, 1332 (Haw. 1976)

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## Rule of Necessity

- “For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order”

ABA Model Code Jud. Conduct, Canon 3E(1), cmt. (1990)

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## Rule of Necessity

- “In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable”

ABA Model Code Jud. Conduct, Canon 3E(1), cmt. (1990)

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## Rule of Necessity

- “Because every judge on the Supreme and Superior Courts of Guam was appointed by either one of the parties in this case, every judge who could hear this case could be accused of appearing partial. If every judge could appear partial, it becomes less important for [the challenged judge] to disqualify himself”

Ada v. Gutierrez, 2000 Guam 22 ¶ 14

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## Rule of Necessity

- “The ‘Rule of Necessity’ is distinct from the ‘Duty to Sit’ doctrine, under which ‘there is an obligation to remain on any case absent good grounds for recusal’”

Citizens Protecting Mich.'s Const. v. Sec'y of State, 755 N.W.2d 147, 149 n.5 (Mich. 2008)



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