

# 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 Megan K. Cavanagh, *Chief Justice*
- The Honorable Noah P. Hood, *MJI Supervising Justice*
- The Honorable Brian K. Zahra, *Justice*
- The Honorable Richard Bernstein, *Justice*
- The Honorable Elizabeth M. Welch, *Justice*
- The Honorable Kyra Harris Bolden, *Justice*
- The Honorable Kimberly A. Thomas, *Justice*
- The Honorable Thomas P. Boyd, *State Court Administrator*
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# Note on Precedential Value

The Michigan Judicial Institute endeavors to present accurate, binding precedent when discussing substantive legal issues. “The essence of the common law doctrine of precedent or stare decisis is that the rule of the case creates a binding legal precept.” *Hudson v Dep’t of Corrections*, \_\_\_ Mich App \_\_\_, \_\_\_ (2025) (quotation marks and citation omitted). “Maintaining consistency in the law is one of the primary benefits of stare decisis, as it provides the public with some level of predictability in how the courts have interpreted the law.” *Plachta v Plachta*, \_\_\_ Mich App \_\_\_, \_\_\_ (2026). Generally, trial courts “must follow the published decisions of the Court of Appeals and the Michigan Supreme Court.” *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382 (2007).

**Negative subsequent history.** Several cases in this book have been reversed, vacated or overruled in part and/or to the extent that they contained a specific holding on one issue or another. While a case that has been fully reversed, vacated, or overruled is no longer binding precedent, it is less clear when an opinion is not reversed, vacated or overruled in its entirety. Some cases state that “an overruled proposition in a case is no reason to ignore all other holdings in the case.” *People v Carson*, 220 Mich App 662, 672 (1996). See also *Stein v Home-Owners Ins Co*, 303 Mich App 382, 389 (2013) (distinguishing between reversals in their entirety and reversals in part); *Graham v Foster*, 500 Mich 23, 31 n 4 (2017) (because the Supreme Court vacated a portion of the Court of Appeals decision, “that portion of the Court of Appeals’ opinion [had] no precedential effect and the trial court [was] not bound by its reasoning”). However, other cases provide that a “decision that has been reversed on other grounds has no precedential value.” *Dunn v Detroit Inter-Ins Exch*, 254 Mich App 256, 262 (2002), citing *Taylor v Kurapati*, 236 Mich App 315 (1999). See also *Horace v City of Pontiac*, 456 Mich 744, 754–755 (1998) (holding that where the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, “no rule of law remain[s] from the Court of Appeals decision”). Note that *Stein* specifically distinguished its holding from the *Dunn* holding because the precedent discussed in *Dunn* involved a reversal in its entirety while the precedent discussed in *Stein* involved a reversal in part. *Stein*, 303 Mich App at 389.

Because it may be unclear under certain circumstances how subsequent case history may affect the precedential value of a particular opinion, trial courts should proceed with caution when relying on cases that have negative subsequent history. The analysis presented in a case that is not binding may still be persuasive. See generally, *Dunn*, 254 Mich App at 264-266.

**United States Supreme Court.** Michigan courts are bound by “our state Supreme Court precedent, unless the United States Supreme Court has addressed a federal

constitutional question.” *People v Beasley*, 239 Mich App 548, 559 (2000). “A plurality opinion of the United States Supreme Court, however, is not binding precedent.” *Id.*, citing *Texas v Brown*, 460 US 730, 737 (1983).

**Federal appellate and district courts.** “Cases from foreign jurisdictions, which are not binding, can be persuasive.” *Bazzy v Citizens Ins Co of America*, \_\_\_ Mich App \_\_\_, \_\_\_ (2025) (cleaned up). Accordingly, state courts are not bound by the decisions of lower federal courts construing federal law, and Michigan courts “are free to follow or reject their authority.” *People v Gillam*, 479 Mich 253, 261 (2007).

**Michigan Supreme Court.** A Michigan “Supreme Court opinion becomes binding precedent for intermediate appellate and trial courts at the time a signed opinion is date-stamped and filed with the Clerk of the Supreme Court, unless” the opinion “specifically states that the opinion is effective at a different date.” *Riley v Northland Geriatric Center*, 425 Mich 668, 678 (1986). “The clear rule in Michigan is that a majority of the [Michigan Supreme] Court must agree on a ground for decision in order to make that binding precedent for future cases.” *People v Sexton*, 458 Mich 43, 65 (1998), quoting *People v Anderson*, 389 Mich 155, 170 (1973). See [MCR 7.315\(A\)](#) (“Except for affirmance of action by a lower court or tribunal by even division of the justices, a decision of the Court must be made by concurrence of a majority of the justices voting.”). “Plurality decisions in which no majority of the justices participating agree as to the reasoning are not an authoritative interpretation binding . . . under the doctrine of *stare decisis*.” *Negri v Slotkin*, 397 Mich 105, 109 (1976). However, “a [plurality] decision rendered by less than four justices who nevertheless constitute a majority of a legally constituted quorum is binding on the Court of Appeals and the trial courts.” *Id.* at 106. “If there is merely a majority for a particular result, then the parties to the case are bound by the judgment but the case is not authority beyond the immediate parties.” *Sexton*, 458 Mich at 65, quoting *Anderson*, 389 Mich at 170. In other words, “plurality opinions in which no majority of the participating justices agree with respect to the reasoning for the holding are not generally considered authoritative interpretations that are binding under the doctrine of *stare decisis*.” *Auto Club Group Ins Co v Booth*, 289 Mich App 606, 613 (2010).

For information regarding the precedential value of an order or judgment issued by the Michigan Supreme Court, see the Michigan Judicial Institute’s [Appeals & Opinions Benchbook, Section 1.4\(B\)](#).

**Michigan Court of Appeals.** “A published opinion of the Court of Appeals has precedential effect under the rule of *stare decisis*.” [MCR 7.215\(C\)\(2\)](#). Accordingly, “the publication of an opinion of the Court of Appeals creates binding precedent until the Michigan Supreme Court enters a decision altering [the] Court’s decisions or its rationale.” *Esordi v Macomb Twp*, \_\_\_ Mich App \_\_\_, \_\_\_ (2025) (citation omitted). “A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or

after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in [MCR 7.215].” MCR 7.215(J)(1). “Under the plain terms of MCR 7.215(C)(2), all published decisions of [the] Court [of Appeals] issued prior to November 1, 1990, are binding, precedential decisions under stare decisis.” *Plachta*, \_\_\_ Mich App at \_\_\_. “They are *not* merely persuasive and are not on par with unpublished decisions.” *Id.* at \_\_\_. Although the Court of Appeals is “not strictly required to follow uncontradicted opinions . . . decided before November 1, 1990, those opinions are nonetheless considered to be precedent and entitled to significantly greater deference than are unpublished cases.” *People v Bensch*, 328 Mich App 1, 7 n 6 (2019) (quotation marks and citation omitted). See also *People v Schurr*, \_\_\_ Mich App \_\_\_, \_\_\_ n 6 (2024) (stating “decisions published before November 1, 1990, [are binding] only on the trial courts and only are precedent if uncontradicted”). In other words, “there is no difference in the precedential effect of a pre- versus post-1990 decision.” *Plachta*, \_\_\_ Mich App at \_\_\_. “Instead, the only difference between a pre- and post-November 1, 1990 decision is that the latter must be followed by a subsequent panel unless it is overruled by a conflict panel or the Supreme Court, while the former must be followed unless a subsequent three-judge panel concludes it is distinguishable or warrants reversal.” *Id.* at \_\_\_.

For more information regarding the precedential nature of Court of Appeals opinions, see the Michigan Judicial Institute’s [Appeals & Opinions Benchbook](#), [Section 1.4\(C\)](#).

# Acknowledgments

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The **Michigan Judicial Institute** was created in 1977 by the Michigan Supreme Court. MJI is responsible for providing educational programs and written materials for Michigan judges and court personnel. In addition to formal seminar offerings, MJI is engaged in a broad range of publication activities, services, and projects that are designed to enhance the professional skills of all those serving in the Michigan court system. MJI welcomes comments and suggestions. Please send them to **Michigan Judicial Institute, Hall of Justice, P.O. Box 30048, Lansing, MI 48909. (517) 373-7171.**



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# Judicial Disqualification in Michigan

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## *Part I: Procedure*<sup>1</sup>

### **A. 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).

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<sup>1</sup>See the Michigan Judicial Institute’s [Judicial Disqualification Checklist](#) and [Judicial Disqualification Flowchart](#), quick reference materials concerning the procedure for judicial disqualification.

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." *Daniels v People*, 6 Mich 380, 388 (1859). "The fundamental purpose in resolving such controversies is quite simple: the fair ascertainment of the truth." *In re Justin*, 490 Mich 394, 414 (2012) "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).

## B. Authorities Governing or Addressing Judicial Disqualification

**Michigan Code of Judicial Conduct.** The [Michigan Code of Judicial Conduct](#) contains eight canons that set out expectations regarding a judge's or judicial candidate's behavior while in office (or while campaigning), many of which are relevant to the issue of judicial disqualification.

**Michigan Court Rules.** [MCR 2.003](#), concerning disqualification of a judge, "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." [MCR 2.003\(A\)](#).

**State Bar of Michigan Ethics Opinions.** The Judicial Ethics Committee of the State Bar of Michigan releases informal written opinions answering questions of judicial ethics that are presented to the committee for consideration.<sup>2</sup> 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. *Adair v Michigan*, 474 Mich 1027, 1039 n 13 (2006).

"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 \(July 19, 1989\)](#).

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<sup>2</sup> Written ethics opinions are accessible on the State Bar of Michigan's [website](#). For a table of ethics opinions interpreting the Michigan Code of Judicial Conduct, see [www.michbar.org/opinions/ethics/mcjc](http://www.michbar.org/opinions/ethics/mcjc).

“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 \(July 19, 1989\)](#).

## C. Who May Raise the Issue of Disqualification

“A party may raise the issue of a judge’s disqualification by motion or the judge may raise it.” [MCR 2.003\(B\)](#).

A trial judge is required to raise the issue of disqualification sua sponte under certain circumstances. *People v Gibson*, 90 Mich App 792, 796 (1979). For example, “reassignment for resentencing is appropriate to preserve the interests of justice and fairness where it would be unreasonable to expect the trial judge to be able to put out of his mind his previously expressed views and findings without substantial difficulty.” *People v Weathington*, 183 Mich App 360, 362 (1990) (quotation marks and citation omitted).

## D. Grounds for Disqualification

### 1. Disqualification Warranted

This subsection sets out the grounds for judicial disqualification. Cases and other authorities discussing specific factual situations involving these grounds are discussed in [Part II](#).

Under [MCR 2.003\(C\)\(1\)](#), “[d]isqualification of a judge<sup>3</sup> 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)], or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

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<sup>3</sup> For purposes of [MCR 2.003](#), “[t]he word ‘judge’ includes a justice of the Michigan Supreme Court.” [MCR 2.003\(A\)](#).

(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.<sup>[4]</sup>

(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:

(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 reasons for disqualification exist, a judge must sign an order of disqualification. See SCAO Form MC 264, *Order of Disqualification/Reassignment*.<sup>5</sup>

A more detailed description of the procedural requirements of some of the grounds for disqualification is set out in the following subsections.

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<sup>4</sup>If you are a newly elected/appointed judge and were previously a prosecutor or city attorney, it is advisable to disclose such and to execute a waiver during your first two years on the bench. See [State Bar of Michigan Ethics Opinion JI-34 \(December 21, 1990\)](#), for more detailed information.

<sup>5</sup>Note: disqualification from hearing an attorney's case will likely require future disqualification.

### a. Bias or Prejudice

Judicial disqualification is warranted under [MCR 2.003\(C\)\(1\)\(a\)](#) where “[t]he judge is biased or prejudiced for or against a party or attorney.”

“[[MCR 2.003\(C\)\(1\)\(a\)](#)]<sup>6</sup> requires a showing of *actual* bias. Absent actual bias or prejudice, a judge will not be disqualified pursuant to [[MCR 2.003\(C\)\(1\)\(a\)](#)].” *Cain v Dep’t of Corrections*, 451 Mich 470, 495 (1996). “[T]he party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality.” *Id.* at 497.

“[T]he party moving for disqualification bears the burden of proving actual bias or prejudice.” *People v Bero*, 168 Mich App 545, 549 (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. Further, while personal animus toward a party requires disqualification, . . . [a] generalized hostility toward a class of claimants does not present disqualifying bias. 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 546, 566-567 (2009) (internal citations omitted).

There is no “rule of automatic disqualification solely because a judge has sat as a factfinder in a prior trial. . . . [U]nless there are special circumstances which increase the risk of unfairness, disqualification of a trial judge as factfinder in the second trial is not required solely because the trial judge sat as factfinder in the first trial.” *People v Upshaw*, 172 Mich App 386, 389 (1988). Additionally, “the mere filing of a party’s or attorney’s complaint is [not] sufficient to require automatic disqualification.” *Bero*, 168 Mich App at 552. Rather, “disqualification is not required until the judge is privately censured or a complaint is filed by the Judicial Tenure Commission itself.” *Id.*

### b. Serious Risk of Actual Bias or Appearance of Impropriety

Judicial disqualification is warranted under [MCR 2.003\(C\)\(1\)\(b\)](#) where “[t]he 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

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<sup>6</sup> Formerly [MCR 2.003\(B\)\(1\)](#).

in [*Caperton v Massey*, 556 US 868 (2009)], or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.”

### **i. Serious Risk of Actual Bias**

“The Due Process Clause requires an unbiased and impartial decisionmaker. Thus, where the requirement of showing actual bias or prejudice under [MCR 2.003(C)(1)(a)<sup>7</sup>] has not been met, or where the court rule is otherwise inapplicable, parties have pursued disqualification on the basis of the due process impartiality requirement.” *Cain v Dep’t of Corrections*, 451 Mich 470, 498 (1996). However, “[d]isqualification pursuant to the Due Process Clause is only required ‘in the most extreme cases.’” *In re MKK*, 286 Mich App 546, 567 (2009), quoting *Cain*, 451 Mich at 498.

“Due process principles require disqualification, absent a showing of actual bias or prejudice, ‘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 tolerable.’” *MKK*, 286 Mich App at 567, quoting *Cain*, 451 Mich at 498. The inquiry is an objective one that focuses on whether, “under a realistic appraisal of psychological tendencies and human weakness, the [judicial] 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 v Massey*, 556 US 868, 883-884 (2009) (quotation marks and citation omitted).

*Caperton*, 556 US at 872, involved a situation where “the Supreme Court of Appeals of West Virginia reversed a trial court judgment, which had entered a jury verdict of \$50 million”; “[f]ive justices heard the case, and the vote to reverse was 3 to 2.” The United States Supreme Court held that “the Due Process Clause of the Fourteenth Amendment was violated when one of the justices in the majority denied a recusal motion,” where “[t]he basis for the recusal motion was that the justice had received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the corporation found liable for the damages.” *Id.* The Court reiterated that “[u]nder our precedents there are objective standards that require

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<sup>7</sup> Formerly MCR 2.003(B)(1).

recusal when ‘the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable,’” and held that “[a]pplying those precedents . . . in all the circumstances of the case, due process requires recusal.” *Id.*, quoting *Withrow v Larkin*, 421 US 35, 47 (1975). Specifically, the Court “conclude[d] that there is a serious risk of actual bias--based on objective and reasonable perceptions--when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent,” and “applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required [the justice’s] recusal.” *Caperton*, 556 US at 884, 886. Moreover, “objective standards may . . . require recusal whether or not actual bias exists or can be proved,” and “[t]he failure to consider objective standards requiring recusal is not consistent with the imperatives of due process.” *Id.* at 886. However, the Court noted that “[t]he Due Process Clause demarks only the outer boundaries of judicial disqualifications. . . . Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution[, and a]pplication of the constitutional standard implicated in [*Caperton*] will thus be confined to rare instances.” *Id.* at 889-890 (quotation marks and citation omitted).

“Among the situations identified by the [United States Supreme] Court as presenting . . . [a] risk [of actual bias that is too high to be constitutionally tolerable] are where the judge or decisionmaker

- (1) has a pecuniary interest in the outcome;
- (2) ‘has been the target of personal abuse or criticism from the party before him’;
- (3) is ‘enmeshed in [other] matters involving petitioner . . . ’; or
- (4) might have prejudged the case because of prior participation as an accuser, investigator, factfinder or initial decisionmaker.” *Crampton v Dep’t of State*, 395 Mich 347, 351 (1975).<sup>8</sup>

**Judge’s failure to recuse where recusal was warranted but no serious risk of actual bias.** See *People v Loew*, \_\_\_ Mich \_\_\_, \_\_\_

(2024), where the Michigan Supreme Court determined that the trial judge violated Canon 3(A)(4)(a) of the Michigan Code of Judicial Conduct by initiating *ex parte* communications with the prosecutor during a sexual assault jury trial about deficiencies in the police investigation of the case. Although the Court held that the judge ought to have recused herself due to the appearance of impropriety under [MCR 2.003\(C\)\(1\)\(b\)\(ii\)](#) and in violation of Canon 2(A), these *ex parte* communications “[did] not show [the judge] was actually biased or that there was an unconstitutionally high probability she was actually biased . . . .” *Loew*, \_\_\_ Mich at \_\_\_.

## ii. Appearance of Impropriety

“Under [MCR 2.003\(C\)\(1\)\(b\)](#), the test for determining whether there is an appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.” *Kern v Kern-Koskela*, 320 Mich App 212, 232 (2017) (quotation marks and citations omitted).

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.” *Id.* (quotation marks and citation omitted).

See e.g., *People v Loew*, \_\_\_ Mich \_\_\_ (2024):

“[E]ven if due process does not require a judge to recuse herself, [MCR 2.003\(C\)\(1\)\(b\)\(ii\)](#)

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<sup>8</sup> For case examples, see [Part II](#). Note, however, that the situations described in *Crampton*, 395 Mich at 351 must be interpreted narrowly. *Cain*, 451 Mich at 500 n 36. In explaining *Crampton*, the *Cain* Court stated: “Importantly, we recognize the amorphous nature of the situations listed in *Crampton* 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 *Crampton* narrowly. However, this is not to say that the *Crampton* list is exclusive.” *Cain*, 451 Mich at 500 n 36.

may still require a judge to disqualify herself if the judge, based on objective and reasonable perceptions, has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct. Canon 2(A) states that a judge must avoid all impropriety and appearance of impropriety. To decide whether a judge has failed to avoid the appearance of impropriety, we consider whether the judge's conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." *Loew*, \_\_\_ Mich at \_\_\_ (cleaned up).

In *Loew*, the trial judge violated Canon 3(A)(4)(a) of the Michigan Code of Judicial Conduct by initiating ex parte communications with the prosecutor during a sexual assault jury trial involving deficiencies in the police investigation of the case. *Loew*, \_\_\_ Mich at \_\_\_. The Court held that the judge ought to have recused herself due to the appearance of impropriety under [MCR 2.003\(C\)\(1\)\(b\)\(ii\)](#): "No matter the content of the ex parte communications, it is 'a gross breach of the appearance of justice when [a party's] principal adversary is given private access to the ear of the court . . .'" *Loew*, \_\_\_ Mich at \_\_\_, quoting *United States v Minsky*, 963 F2d 870, 874 (CA 6, 1992) (alteration in original).

"This is not to suggest that one instance of ex parte communications always requires a judge to disqualify herself," as "a brief ex parte exchange concerning a matter unrelated to the defendant or the proceeding might not create in reasonable minds a perception that the judge is biased." *Loew*, \_\_\_ Mich at \_\_\_. Here, however, the "ex parte exchange with [the prosecutor] was not about some matter unrelated to defendant or his trial," and "considering the contents of her communications, one might reasonably question whether the trial judge was interested in seeing the prosecution succeed or seeing defendant convicted." *Id.* at \_\_\_. "For that reason, the trial judge should have known that grounds for her disqualification might have existed under [MCR 2.003\(C\)\(1\)\(b\)\(ii\)](#)," and "[u]nder Canon 3(C), she should have raised the issue of her disqualification sua sponte, and . . . recused herself." *Loew*, \_\_\_ Mich at \_\_\_.

However, “the canons do not grant litigants any substantive or procedural rights.” *Id.* at \_\_\_\_\_. Consequently, a judge’s failure to recuse herself under [MCR 2.003\(C\)\(1\)\(b\)\(ii\)](#) is a “nonconstitutional error” that alone does not create a legal basis to grant a new trial under [MCR 6.431\(B\)](#). *Loew*, \_\_\_ Mich at \_\_\_\_\_. Rather, the court must consider whether a new trial is warranted under [MCL 769.26](#) because “the error resulted in a miscarriage of justice.” *Loew*, \_\_\_ Mich at \_\_\_\_\_ (quotation marks omitted). “[U]nder [MCL 769.26](#) and our precedent interpreting it, a miscarriage of justice occurs only when a nonconstitutional error affected the finder of fact.” *Loew*, \_\_\_ Mich at \_\_\_\_\_. Because “[t]his was not a bench trial, and there is no dispute that the jury was unaware of the trial judge’s ex parte communications,” the judge’s failure to recuse herself “did not result in a miscarriage of justice under [MCL 769.26](#) because it had no effect on the finder of fact.” *Loew*, \_\_\_ Mich at \_\_\_\_\_.

## 2. Disqualification Not Warranted

### a. Former Law Clerk Attorney of Record

“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.” [MCR 2.003\(C\)\(2\)\(a\)](#).

### b. Campaign Speech

“A judge is not disqualified based solely upon campaign speech protected by *Republican Party of Minn v White*, 536 US 765 (2002), 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.” [MCR 2.003\(C\)\(2\)\(b\)](#).

## E. Disclosure Required

Judicial disclosure of certain activities or relationships may be necessary. However, not all situations necessarily require disqualification; after disclosure in some circumstances, parties may waive disqualification<sup>9</sup> and elect to proceed with the assigned judge. See [MCR 2.003\(E\)](#). State Bar

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<sup>9</sup> See [Section G](#) for more information on waiver of disqualification.

of Michigan Ethics Opinions have required judicial disclosure 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 judge’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. If 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 \(May 12, 1998\)](#). See also *In re Disqualification of 50th Dist Court Judge*, 193 Mich App 209, 214 (1992) (“in matters in which a judge has a financial interest with an attorney appearing in the matter, the judge has a duty to disclose the relationship on the record”).

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

“If a lawyer appearing before an administrative hearing officer has previously represented the adjudicator or a member of the judge’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 \(March 23, 1994\)](#). See also *In re Disqualification of 50th Dist Court Judge*, 193 Mich App at 214 (“in matters in which a judge has a financial interest with an attorney appearing in the matter, the judge has a duty to disclose the relationship on the record”).

- **The lawyer appearing before the judge is the judge’s current campaign manager or a member of the judge’s reelection 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 \(February 7, 1994\)](#). “The duty to disclose continues until the final campaign report for the candidacy has been filed.” *Id.*

- **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 \(March 26, 1993\)](#).

“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 *In re Disqualification of 50th Dist Court Judge*, 193 Mich App at 214 (“in matters in which a judge has a financial interest with an attorney appearing in the matter, the judge has a duty to disclose the relationship on the record”).

- **A lawyer for one of the parties is dating, living with, or married to the judge hearing the matter.**

“Because of the importance of avoiding even the appearance of impropriety, a judge should always disclose to parties in a case before him or her if he or she is dating a lawyer for either of the parties.” [State Bar of Michigan Ethics Opinion, R-3 \(July 21, 1989\)](#). Similarly, a judge must disclose if his or her “spouse is a

member of or employed by a firm representing a party in a case” or if the judge is living with a lawyer for either party. *Id.*

- **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 \(June 1, 1989\)](#). See also *In re Disqualification of 50th Dist Court Judge*, 193 Mich App at 214 (“in matters in which a judge has a financial interest with an attorney appearing in the matter, the judge has a duty to disclose the relationship on the record”).

“A judge should 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 \(June 1, 1989\)](#).

## **F. Procedure for Disqualification**

### **1. Time for Filing**

#### **a. 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 discovery is made within 14 days of the trial date, the motion must be made forthwith.” [MCR 2.003\(D\)\(1\)\(a\)](#).

#### **b. In the Court of Appeals**

“All motions for disqualification must be filed within 14 days of disclosure of the judge’s 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.” [MCR 2.003\(D\)\(1\)\(b\)](#).

### **c. 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 on the application for leave to appeal, the motion must be made forthwith.” [MCR 2.003\(D\)\(1\)\(c\)](#).

“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.” [MCR 2.003\(D\)\(1\)\(c\)](#).

### **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.” [MCR 2.003\(D\)\(1\)\(d\)](#). See *Kendzierski v Macomb Co*, 503 Mich 938, 939 n 4 (2019) (noting that [MCR 2.003\(D\)\(1\)\(d\)](#) is “confusing[,]” and that “[i]t is unclear . . . how much discretion a judge has to grant an untimely motion to disqualify”).

## **2. All Grounds to Be Included and Affidavit**

“In any motion under [\[MCR 2.003\]](#), 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.” [MCR 2.003\(D\)\(2\)](#).

## **3. Ruling**

### **a. Court Other Than Supreme Court**

“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.” [MCR 2.003\(D\)\(3\)\(a\)](#). See *People v Bunkley*, 501 Mich 1085 (2018) (“[b]ecause defendant appears to have made a request under [MCR 2.003\(D\)\(3\)\(a\)\(i\)](#), the chief judge was required to decide the motion de novo”).

**Standard of Review on Appeal.** “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, 647 (2014) (quotation marks and citation omitted).

## b. Supreme Court

“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.” [MCR 2.003\(D\)\(3\)\(b\)](#).

“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.” [MCR 2.003\(D\)\(3\)\(b\)](#).

“[A]n unconstitutional failure to recuse [in appellate proceedings involving multimember courts] constitutes structural error even 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 v Pennsylvania*, 579 US 1, 14 (2016) (quotation marks and citation omitted). “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 claims to a court unburdened by any possible temptation not to hold the balance nice, clear and true between the State and the accused.” *Id.* at 16 (quotation marks and citation omitted).

#### **4. If Disqualification Motion Is Granted**

##### **a. Court Other Than Supreme Court**

“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.” [MCR 2.003\(D\)\(4\)\(a\)](#).

##### **b. Supreme Court**

“In the Supreme Court, when a justice is disqualified, the underlying action will be decided by the remaining justices of the Court.” [MCR 2.003\(D\)\(4\)\(b\)](#).

### **G. 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 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.” [MCR 2.003\(E\)](#). If the judge is willing to participate in the proceedings and the parties waive disqualification, the court should enter a waiver of disqualification. See SCAO Form MC 272, *Waiver of Disqualification*.

In addition, “the failure to follow proper procedure in requesting disqualification constitutes a waiver[.]” *Davis v Chatman*, 292 Mich App 603, 615 (2011) (defendant “waived the issue of disqualification” when he “failed to submit an affidavit as required by [MCR 2.003\(D\)](#) when requesting the court’s disqualification”), citing *Law Offices of Lawrence Stockler, PC v Rose*, 174 Mich App 14, 22-23 (1989) (having failed to request that the chief judge review the trial judge’s denial to disqualify

under [MCR 2.003\(D\)\(3\)\(a\)\(i\)](#),<sup>10</sup> the plaintiff “waived any claim of disqualification”).

## H. Sanctions for Filing Frivolous Motion to Disqualify

“Sanctions for the filing of a frivolous motion to disqualify must be evaluated under [[MCR 1.109](#)].” *Home-Owners Ins Co v Andriacchi*, 320 Mich App 52, 76 n 6 (2017). “If the trial court finds a violation of [[MCR 1.109](#)], it must ‘impose . . . an appropriate sanction.’” *Home-Owners Ins Co*, 320 Mich App at 79, quoting [MCR 1.109\(E\)\(6\)](#).<sup>12</sup> (vacating in part and remanding for “[t]he trial court [to] decide [the plaintiff’s] motion for sanctions, articulating on the record or in a written opinion the basis of its ruling,” where “the trial court abused its discretion by refusing to award sanctions” after finding the plaintiff’s “motion to disqualify the trial judge was frivolous under . . . [[MCR 1.109](#)]”).

### *Part II: Fact-Specific Examples (Ethics Opinions and Caselaw)*

Under this Part, the following sections contain fact-specific discussions.

- [Section I](#), Ethics Opinions: Disqualification Required
- [Section J](#), Ethics Opinions: Disqualification Not Necessarily Required
- [Section K](#), Caselaw: Disqualification Required
- [Section L](#), Caselaw: Disqualification Not Necessarily Required

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<sup>10</sup> Formerly [MCR 2.003\(C\)\(3\)\(a\)](#).

<sup>11</sup> Formerly [MCR 2.114](#).

<sup>12</sup> Formerly [MCR 2.114\(E\)](#).

Alternatively, fact summaries are included in the table below.<sup>13</sup> Simply click on the blue text to read more about the situation described

Factual Scenario	Was Disqualification Required Under Facts Presented?
<b>Financial Interest in Case</b>	
<a href="#">Judge was also the mayor and was indirectly compensated from fines collected by court.</a>	Yes
<a href="#">MSC Justice had an economic interest in the matter.</a>	Yes
<b>Judge's Statements or Actions During Case at Hand</b>	
<a href="#">Judge made negative comments about a party's case.</a>	No
<a href="#">Judge found a party in contempt.</a>	No
<a href="#">Certain judicial rulings.</a>	No
<a href="#">Judge referred to a party by a nickname and suggested that the party had no defense.</a>	No
<a href="#">Judge terminated a party's parental rights.</a>	No
<b>Personal Feelings About Attorney or Party</b>	
<a href="#">Lawyer was being hostile toward the judge.</a>	No
<a href="#">Judge was a target of personal abuse or criticism from a party to the case.</a>	Yes
<b>Personal Relationship With Attorney, Judicial Officer, Party, or Witness</b>	
<a href="#">Party or attorney was cohabiting with the judge.</a>	Yes
<a href="#">Lawyer and his or her spouse both served as judicial officers.</a>	Yes
<a href="#">Employer of the judge's spouse appeared before the judge as a witness.</a>	No

<sup>13</sup>These factual scenarios are intended to provide examples of what actually occurred in each situation and the disqualification outcome; each disqualification situation is unique, and disqualification may or may not be required depending on the facts in each individual case.

Judge and the lawyer were opposing parties in the past.	No
Judge was “personally acquainted” with an advocate or party.	No
Judge being sued in an unrelated matter, and current matter involves the lawyer for the judge or the judge’s opponent.	No
Judge sued after present matter filed.	No
MSC Justice was related to an attorney in the matter.	Yes
MSC Justice had personal relationship with a party.	Yes
Judge lost civil rights suit brought by litigant.	Yes
<b>Prior Involvement in Case</b>	
Judge was the former prosecutor in the case.	Yes
Judge reviewed on appeal a case the judge had formerly presided over.	Yes
<b>Professional Relationship With Attorney, Judicial Officer, Party, or Witness</b>	
Lawyer appearing before the judge also represented the judge or the judge’s former law firm in pending litigation.	Yes
Police officer who was a probation officer with the judge’s court was also a witness in the case.	No
Judge from the same court was a witness in the case.	No
Chief judge as the “employer” of all individuals working for the court.	No
Judge’s appointee appeared before the judge as an advocate.	No
Judge served on the Attorney Discipline Committee, and lawyer who faced the Committee appeared in front of the judge.	No
Plaintiff’s firm hired to renovate courthouse.	No
Party previously fundraised for the judge.	No

## I. Ethics Opinions: Disqualification Required

State Bar of Michigan Ethics 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. *Adair v Michigan*, 474 Mich 1027, 1039 n 13 (2006). The ethics committee has required judicial disqualification in a variety of circumstances:<sup>14</sup>

#### Personal Relationship With Attorney, Judicial Officer, Party, or Witness

- **Party or attorney was 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 \(July 21, 1989\)](#).

- **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.” *Id.*

#### Professional Relationship With Attorney, Judicial Officer, Party, or Witness

- **Lawyer appearing before the judge also represented the judge or the judge’s former law firm in pending litigation.**

“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 \(June 26, 1991\)](#).

## J. Ethics Opinions: Disqualification Not Necessarily Required

State Bar of Michigan Ethics 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. *Adair v Michigan*, 474 Mich 1027,

<sup>14</sup>In addition to the grounds set out in [MCR 2.003\(C\)](#), and if the parties have not waived disqualification under [MCR 2.003\(E\)](#).

1039 n 13 (2006). The ethics committee has opined that some circumstances do not necessarily require judicial disqualification:

### Personal Feelings About Attorney or Party

- **Lawyer was 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 \(November 1, 1991\)](#).<sup>15</sup>

### Personal Relationship With Attorney, Judicial Officer, Party, or Witness

- **Employer of the judge’s spouse appeared before the judge as a witness.**

“Absent actual bias, a judge is not disqualified from presiding in a matter in which the employer of the judge’s spouse is a witness or presents reports, when the work assignment of the judge’s spouse does not involve participation in the preparation of the testimony or the reports.” [State Bar of Michigan Ethics Opinion JI-62 \(December 12, 1992\)](#).

- **Judge and the lawyer were 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 \(July 24, 1992\)](#).

- **Judge was “personally acquainted” with an advocate or party.**

“A judge’s ‘personal acquaintance’ with an advocate or party, without more information indicating the nature of the

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<sup>15</sup> 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.” See [Section D\(1\)\(b\)\(i\)](#) for a discussion on risk of actual bias, which includes disqualification on the basis of personal abuse or criticism.

acquaintance which gives rise to a presumption of bias, is insufficient grounds for a judge's automatic recusal. Where a judge is concerned about the appearance of bias because of a personal acquaintance with a party or advocate, the judge should advise the parties and their lawyers of the judge's concerns and recuse unless asked to proceed." [State Bar of Michigan Ethics Opinion JI-44 \(November 1, 1991\)](#).

- **Judge being sued in an unrelated matter, and current matter involves the 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 \(October 3, 1991\)](#).

- **Judge sued after present matter filed.**

"A judge need not disqualify himself merely because one of the parties subsequently sues him," and "one should distinguish between a suit brought after and one brought before the present one was filed." *People v Lowenstein*, 118 Mich App 475, 486 (1982).

### **Professional Relationship With Attorney, Judicial Officer, Party, or Witness**

- **Police officer who was a probation officer with the judge's court was also a witness in the case.**

"Absent actual bias, a judge is not disqualified from presiding in a matter in which a part-time police officer who will be called as a witness is also a probation officer with the judge's court." [State Bar of Michigan Ethics Opinion JI-61 \(December 12, 1992\)](#).

- **Judge from the same court was a witness in the case.**

"Absent facts which show actual bias, a judge is not disqualified from presiding in a matter in which another judge on the presiding judge's court is a witness, (1) if the presiding

judge is not the trier of fact, or (2) if the judge/witness is not a necessary witness concerning a contested fact.” [State Bar of Michigan Ethics Opinion JI-57 \(August 24, 1992\)](#).

- **Chief judge as the “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 \(March 19, 1992\)](#).

- **Judge’s appointee appeared 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 \(October 30, 1990\)](#).

- **Judge served on the Attorney Discipline Committee, and lawyer who faced the Committee appeared in front of the judge.**

“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 \(May 17, 1990\)](#).

## K. Caselaw: Disqualification Required

### Ex Parte Communication with Prosecutor Initiated by the Judge

- **Judge violated the appearance-of-impropriety standard under Canon 2(A) by initiating communication with**

**prosecutor about deficiencies in the police investigation of the case, and therefore, should have recused herself under MCR 2.003(C)(1)(b)(ii).**

“In response to witness testimony, while presiding over defendant’s trial, the trial judge privately e-mailed [the prosecutor] expressing concern about law enforcement’s missteps in its investigation of defendant’s case specifically and asking why these missteps occurred.” *People v Loew*, \_\_\_ Mich \_\_\_, \_\_\_ (2024). “Not only did the trial judge give [the prosecutor] private access to her ear, considering the contents of her communications, one might reasonably question whether the trial judge was interested in seeing the prosecution succeed or seeing defendant convicted.” *Id.* at \_\_\_ (quotation marks and citation omitted). “For that reason, the trial judge should have known that grounds for her disqualification might have existed under MCR 2.003(C)(1)(b)(ii). Under Canon 3(C), she should have raised the issue of her disqualification *sua sponte*, and she should have recused herself.” *Loew*, \_\_\_ Mich at \_\_\_.

### Financial Interest in Case

- **Judge was also the mayor and was directly compensated from fines collected by court.**

“[T]he village mayor could not sit as judge on ‘the liquor court’ where he was directly compensated out of fines collected for violation of the state prohibition act.” *Crompton v Dep’t of State*, 395 Mich 347, 351-352 (1975), citing *Tumey v Ohio*, 273 US 510 (1927). “Even though the Mayor . . . was not personally compensated out of traffic fines, the [United States Supreme] Court held that because he was responsible for village finances he could not fairly adjudicate and impose fines for traffic offenses. Such responsibility might ‘make him partisan to maintain the high level of contribution from the mayor’s court.’” *Crompton*, 395 Mich at 352, citing *Ward v Monroeville*, 409 US 57, 60 (1972).

- **MSC Justice had an economic interest in the matter.**

In accordance with MCR 2.003(C)(1)(f), a former Michigan Supreme Court Justice disqualified herself from participating in a case due to “a vested financial interest in . . . the subject matter of [the] litigation.” *Butler v Wayne Co*, 488 Mich 1055 (2011).

### Personal Feelings About Attorney or Party

- **Judge was the target of personal abuse or criticism from a party to the case.**

“[W]here a trial judge had been insulted, slandered and vilified during trial by a defendant representing himself[,] he could not adjudicate post-judgment contempt proceedings against the defendant. The [United State Supreme] Court found that while the judge ‘was not an activist seeking combat,’ he had become ‘embroiled in a running, bitter controversy’ and was not ‘likely to maintain that calm detachment necessary for fair adjudication.’” *Crampton*, 395 Mich at 352, citing *Mayberry v Pennsylvania*, 400 US 455, 465 (1971).<sup>16</sup>

### Personal Relationship With Attorney, Judicial Officer, Party, or Witness

- **MSC Justice was related to an attorney in the matter.**

In accordance with [MCR 2.003\(C\)\(1\)\(g\)\(ii\)](#), two Michigan Supreme Court Justices have disqualified themselves from participating in a case because they were related to a party’s attorney. See *Marrocco v Oakland Macomb Interceptor Drain Drainage Dist*, 500 Mich 980 (2017); *Neal v Dep’t of Corrections*, 490 Mich 906, 909 (2011).

- **MSC Justice had a personal relationship with a party.**

In accordance with [MCR 2.003\(C\)\(1\)\(b\)](#), one Michigan Supreme Court Justice has recused herself from a case “based on a personal relationship with one of the plaintiffs which, in [her] judgment, [gave] rise to an appearance of impropriety.” *Neal*, 490 Mich at 909.

- **Judge lost civil rights suit brought by litigant.**

“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. *Crampton*, 395 Mich at 353, citing *Johnson v Mississippi*, 403 US 212, 215-216 (1971).

### Prior Involvement in the Case

<sup>16</sup>In *Mayberry*, 400 US at 463, the United States Supreme Court noted that “[g]eneralizations are difficult,” and that “[i]nstant treatment of contempt where lawyers are involved may greatly prejudice their clients but it may be the only wise course where others are involved.” The Court declined to “say that the more vicious the attack on the judge the less qualified he is to act,” and noted that “[a] judge cannot be driven out of a case.” *Id.* “Where, however, he does not act the instant the contempt is committed, but waits until the end of the trial, on balance, it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place.” *Id.* at 463-464.

- **Judge was the former prosecutor in the case.**

“[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 v Pennsylvania*, 579 US 1, 8 (2016). “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 9, 11. In addition, there is “a risk that the judge would be so psychologically wedded to his or her previous position that the judge would consciously or unconsciously avoid the appearance of having erred or changed position.” *Id.* at 9 (quotation marks and citation omitted). Finally, “the judge’s own personal knowledge and impression of the case, acquired through his or her role in the prosecution, may carry far more weight with the judge than the parties’ arguments to the courts.” *Id.* (quotation marks and citation omitted). See also *Crampton*, 395 Mich at 347<sup>17</sup> (“officials who are entrusted with responsibility for arrest and prosecution of law violators [cannot] sit as adjudicators in a law enforcement dispute between a citizen and a police officer” because “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable”).

- **Judge reviewed on appeal a case the judge had formerly presided over.**

“The circuit court judge committed an error when he reviewed on appeal, as a circuit judge, decisions that he rendered while acting as a district court judge.” *People v Ward*, 501 Mich 949 (2018).

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<sup>17</sup> Although this case involved a law enforcement officer who sat on an advisory board that reviewed the defendant’s appeal, and not a trial judge, the Court analyzed the facts as a disqualification issue.

## L. Caselaw: Disqualification Not Necessarily Required

### Professional Relationship With Attorney, Judicial Officer, Party, or Witness

- **Plaintiff's firm hired to renovate courthouse.**

There was no appearance of impropriety where the plaintiff's firm was hired to renovate the courthouse where the instant case was being adjudicated because "[n]one of the four exceptions to the actual-bias requirement [was] present in the instant case[.]" *Gates v Gates*, 256 Mich App 420, 440-441 (2003), citing *Crampton v Dep't of State*, 395 Mich 347, 351 (1975).

- **Party previously fundraised for the judge.**

"[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." *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 600 (2001), citing *Anson v Barry Co Drain Comm'r*, 210 Mich App 322, 327 (1995).

### Judge's Statements or Actions During the Case at Hand

- **Judge made negative comments about a party's case.**

"The judge . . . conducted the extensive jury trial in a temperate and fair manner," and the "[p]laintiff . . . failed to meet his heavy burden of demonstrating that [the j]udge . . . was biased" despite the judge's "statement that he would not consider removing the individual defendants as [corporate] officers . . . in keeping with [the disinterested person's<sup>18</sup>] report that removal was not in the corporation's best interests," "comment that plaintiff's entire case might be dismissed . . . based on [the disinterested person's] report, which concluded that the vast majority of plaintiff's claims were unfounded," and "warn[ing] all parties at various times that they should seek settlement because no one would be

<sup>18</sup> The disinterested person was a court-appointed attorney assigned to investigate whether plaintiff's suit was in the best interests of the corporation. *Kern v Kern-Koskela*, 320 Mich App 212, 219 (2017).

happy with the outcome.” *Kern v Kern-Koskela*, 320 Mich App 212, 232 (2017).

- **Judge found a party in contempt.**

“The trial judge has authority to manage proceedings to achieve orderly disposition of cases,” and “[t]he trial judge’s comments to 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 v Simmons-Butler*, 308 Mich App 195, 228 (2014). 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. Moreover, “that defendant was found in contempt and was ordered to jail does not indicate bias” where “defendant intentionally violated the court’s parenting order, hid the children from plaintiff, and refused to appear for a show cause hearing.” *Id.* 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.

- **Certain judicial rulings.**

“[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*, 256 Mich App at 440 (quotation marks and citations omitted). See also *People v Roscoe*, 303 Mich App 633, 647 (2014) (“defendant . . . failed to prove that judicial disqualification was warranted under [MCR 2.003\(C\)\(1\)\(b\)](#)” even though “the trial judge incorrectly applied the forfeiture-by-wrongdoing rule”); *Armstrong*, 248 Mich App at 597-598 (granting summary disposition did not demonstrate actual bias toward defendants).

- **Judge referred to a party by a nickname and suggested that the party had no defense.**

Even where “the trial judge . . . refer[red] to defendant on one occasion as ‘Mr. Pro Se,’” and suggested that he had no

defense, “the record [did not] reflect[] a showing of actual bias or prejudice[.]” *People v Gomez*, 229 Mich App 329, 331 (1998).

- **Judge terminated a party’s parental rights.**

Terminating a respondent’s parental rights does not establish a valid basis or bias or impartiality. *In re Hamlet (After Remand)*, 225 Mich App 505, 524-525 (1997), overruled on other grounds by *In re Trejo*, 462 Mich 341, 354 n 10 (2000).<sup>19</sup> In *Hamlet*, there was no evidence indicating that the judge harbored a deep-seated antagonism toward the defendant-prisoner, and in fact, the evidence showed that the court personally helped the defendant participate in counseling and educational sessions offered by the prison. *Id.* at 524.

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<sup>19</sup> For more information on the precedential value of an opinion with negative subsequent history, see our [note](#).

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