

Gavel to Gavel

A review of state legislation affecting the courts

July 2009

Special Edition

Special Edition: Judicial Recusal Legislation

The U.S. Supreme Court's recent decision in *Caperton v. A.T. Massey Coal Co.* contended with the issue of recusal and when a jurist's refusal to do so was a due process violation. Coupled with the recent update to the ABA Model Code of Judicial Conduct, several state judiciaries have begun to examine or reexamine their recusal standards.

State legislatures have not been idle either. At least 17 states have examined issues surrounding the disqualification of judges from sitting on cases due to contributions to their campaigns or for other reasons. This special edition of *Gavel to Gavel* examines the legislation, sorted by what stage in the legislative process the bills reached.

Law

California AB 1322 (2005) Existing law set forth the grounds for disqualification of a judge, including, but not limited to, the judge has a current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral or is participating in, or, within the last 2 years has participated in, discussions

regarding such prospective employment or service, and specified conditions apply. The 2005 law adds to those grounds for disqualification when the judge has been engaged in employment or service as a dispute resolution neutral, and would modify the conditions under which these grounds for disqualification apply. New law defines "participating in discussions" for purposes of these provisions.

Colorado HB 1193 (2008) For both district court and county court proceedings, the 2008 law specifies that a judge shall recuse himself or herself from presiding over a case in which a judge or former judge of the same district or county court is a party, should a party file a motion requesting that the judge appointed to preside over the case recuse himself or herself from the case. The chief justice of the Colorado Supreme Court is required to appoint a presiding judge in such cases.

Colorado SB 54 (2008) Provides that a judge being evaluated by a judicial performance commission may not recuse from a case solely on the basis that an attorney, party, or witness is a member of the commission.

Georgia HB 221 (2009) Provides that no writ of mandamus or writ of prohibition to compel the removal of a superior court judge shall issue where no motion to recuse



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has been filed in a timely manner or where a motion to recuse has been denied after assignment to a separate judge for hearing.

Georgia HB 170 (2005) Specifically provides that the denial of a criminal defendant's or prosecutor's motion to recuse may be subject to interlocutory appeal by the movant.

Louisiana HB 1386 (2008) Prior law provided that a judge of any court, trial or appellate, shall be recused when he was a witness in the cause. New law provides that a judge of any court, trial or appellate, shall be recused when he: (1) Is a witness in the cause; (2) Has been employed or consulted as an attorney in the cause or has previously been associated with an attorney during the latter's employment in the cause and the judge participated in representation in the cause; (3) Is the spouse of a party or of an attorney employed in the cause or the judge's parent, child, or immediate family member is a party or attorney employed in the cause; or (4) Is biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys or any witness to such an extent that he would be unable to conduct fair and impartial proceedings. Prior law provided that a judge of any court, trial or appellate, may be recused when he: (1) Had been employed or consulted as an attorney in the cause, or had been associated with an attorney during the latter's employment in the cause; (2) At the time of the hearing of any contested issue in the cause, had continued to employ, to represent him personally, the attorney actually handling the cause (not just a member of that attorney's firm), and in that case the employment shall be disclosed to

each party in the cause; (3) Had performed a judicial act in the cause in another court; or (4) Was the spouse of a party, or of an attorney employed in the cause; or was related to a party, or to the spouse of a party, within the fourth degree; or was related to an attorney employed in the cause; or to the spouse of the attorney, within the second degree; or (5) Was biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys to such an extent that he would have been unable to conduct fair and impartial proceedings. The new 2008 law partially retains (1) above, retains (2) and (3) above, deletes prior law in (4) and (5) above, and adds a new provision which provides that a judge of any court, trial or appellate, may be recused when he is related to: a party; the spouse of a party, within the fourth degree; an attorney employed in the cause; or the spouse of the attorney, within the second degree; or if the judge's spouse, parent, child, or immediate family member living in the judge's household has a substantial economic interest in the subject matter in controversy sufficient to prevent the judge from conducting fair and impartial proceedings in the cause.

Texas HB 763/SB 683 (2009) Clarifies provisions in SB 406 of 2007 and specifies that the presiding judge of the statutory probate courts assigns a judge to hear the case when the judge of the court recuses himself or herself, or when a motion for the recusal or disqualification of the judge is granted.

Texas SB 406 (2007) Existing law authorized a judge to recuse himself or request the presiding judge of the statutory

probate to appoint another judge to hear a recusal motion. The new 2007 law requires the presiding judge of the administrative judicial district to assign a judge to hear a recusal motion.

Vermont SB 16 (2003) Directs the creation of a committee to examine, among other things, whether sufficient procedures are in place to address recusal and disqualification of a probate judge.

Washington HB 2557 (2008) Requires a judicial officer disqualify himself or herself when a party files an affidavit that the party cannot have a fair and impartial trial by reason of the interest or prejudice of the judicial officer. Requires the affidavit be filed prior to any discretionary ruling, which does not include: arrangement of the calendar; setting of an action motion or proceeding for hearing or trial; arraignment of the accused; setting conditions of release; or setting of bail.

Passed first chamber only

Louisiana SB 277 (2008) Existing law provides that a judge in a civil case shall be recused when a witness in the cause and may when he or she: (1) Has been employed or consulted as an attorney in the cause, or has been associated with an attorney during the latter's employment in the cause; (2) At the time of the hearing of any contested issue in the cause, has continued to employ, to represent him personally, the attorney actually handling the cause (not just a member of that attorney's firm), and in this case the employment shall be disclosed to each party in the cause; (3) Has performed a judicial act in the cause in another court; (4) Is the spouse of a party, or of an attorney

employed in the cause; or is related to a party, or to the spouse of a party, within the fourth degree; or is related to an attorney employed in the cause; or to the spouse of the attorney, within the second degree; or (5) Is biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys to such an extent that he or she would be unable to conduct fair and impartial proceedings. Proposed law retains present law and adds as grounds for recusation when the judge is biased or prejudiced toward or against a witness. Approved by first chamber (Senate), approved by second chamber committee (House Judiciary), died on second chamber floor.

Montana HJR 43 (2008) Directs Legislative Council to assess whether the current processes for judicial recusal, disqualification, or impeachment are correctly written and functioning as they should and, if deficiencies are found to exist, propose remedies to correct those deficiencies. Approved by first chamber (House), tabled in second chamber committee (Senate Judiciary), failed on floor vote to take from committee.

North Carolina SB 797 (2009) Specifies a judge may disqualify for any reason that renders the judge unable to perform the duties required of the judge in the proceeding in an impartial manner. Requires any disqualification be in a written statement giving the specific reason or reasons for the disqualification. Approved by first chamber (House), approved by second chamber committee (Senate Judiciary I Committee).

Texas HB 2906/SB 1204 (2007) Deletes existing text requiring a district judge that has recused from a case to immediately certify his disqualification to the governor and requiring the governor to assign a new judge. Removes requirement that a recusal must result in a change of venue and allows regional administrative judge to assign case to another judge of the county instead. Approved by first chamber (Senate), approved by second chamber committee (House Judiciary).

Died in first chamber/legislative draft only

Alaska HB 301 & HB 486 (2005) Provides that a judge need not recuse because of a personal interest in a case if there are no other judges available to act.

Georgia HB 97 (2007) Prohibits a judge, over the objection of any opposing party, to preside, act, or serve in any case or matter when in the last previous or present election cycle such judge has accepted a campaign contribution in the amount of more than \$500.00 from a party interested in the result of the case or matter or a counsel for such party. Provides that the burden shall be on a party to provide notice, as soon as practical, to opposing counsel that such party or counsel for such party was a contributor to the judge. Requires that within ten days of receiving such notice, a party receiving such notice shall file an objection to such judge presiding, acting, or serving in the case or matter, and the judge shall recuse himself or herself under such circumstances. If no objection is filed within ten days, or if the

potential conflict is waived, the judge may preside, act, or serve in the case or matter.

Georgia HB 601 (2009) Requires a judge that is elected to such office recuse from any case: (1) If such judge failed to set up a campaign committee to accept contributions and instead directly solicited contributions from any party or attorney or law firm representing a party in a case pending before his or her court; or (2) Involving a party or his or her attorney that has made an influential action concerning a campaign of the judge presiding over the party's case during the election of such judge. It shall be the duty of any party who has made an influential action, or such party's attorney, to serve a notice on the opposing party within ten days of the filing of the last answer in a lawsuit communicating to the opposing party that an influential action may exist that could require the presiding judge to recuse himself or herself. Within ten days of receipt of such notice, opposing counsel shall have the option to move to recuse the judge from the case.

Illinois SCA 10 (2009) Provides that if a Supreme Court Judge recuses himself or herself in a particular case or matter before the Court because of an actual or potential conflict of interest, then the Judge shall notify the Clerk of the Supreme Court in writing of the recusal and a Judge of the Appellate Court shall be selected to serve as an Interim Supreme Court Judge to hear that particular case or matter until it is resolved or otherwise disposed of by the Court. Also proposes that the Interim Supreme Court Judge shall be selected in a random manner from a pool of Appellate Judges as determined by Supreme Court Rule.

Kansas HB 2619 (2009) Requires that, if a judge refuses to disqualify himself or herself after a party in a civil action files a motion for a change of judge, the party or party's attorney must assert that the assigned judge cannot afford the party a fair trial in the action. In addition, the party or party's attorney must declare, in an affidavit, the basis for the motion for disqualification. The motion would be referred to another district judge for a decision based on the merits of the party's basis for disqualification raised by the motion and the affidavit.

Louisiana HB 758 (2008) Present law requires that a judge of any court, trial or appellate, shall be recused when he or she is a witness in the cause, and provides that a judge may be recused under certain other situations which would lead to his being biased, prejudiced, or where he or she would have an interest in the cause or outcome. Proposed law repeals present law and provides that a judge shall be recused under the grounds for recusal as specifically provided by proposed law, and also provides that a judge shall be recused if he or she knows or learns by means of a timely motion that a party, a party's attorney, or a person within the third degree of relationship to either of them, or the law firm of a party's attorney has within the previous five years made any contribution to the judge's election campaign. Proposed law further provides that any adverse party may elect to waive ground for recusal based on campaign contributions, and provides procedures for recusal in any district court in which three or less district judges are elected. Present law provides for the filing of a motion to recuse and the procedure for hearing a motion to recuse. Proposed law repeals present law and provides that recusal of the judge or justice may be made upon

the written motion of any party until the time of trial or hearing, unless a party only discovers facts constituting grounds for recusation thereafter that would not have been discovered previously with due diligence, and provides that recusation of the judge may also be made on the judge's own motion sua sponte. Proposed law provides that if the judge or any other party contests the motion of any party, he or she must do so within 15 days of the filing of the motion to recuse by filing a written opposition stating the reason the recusal should not be effected, and provides that no further judicial acts take place in the matter until the issue is decided. Present law provides for the selection of a judge to try the motion to recuse. Proposed law repeals present law and provides for the selection of a panel of judges to try the motion to recuse.

Louisiana HB 769 (2008) Provides that a judge shall be recused under all grounds for recusal as provided by present law, and also provides that a judge shall be recused if he or she knows or learns by means of a timely motion that a party, a party's attorney, or a person within the third degree of relationship to either of them, or the law firm of a party's attorney has within the previous five years made any contribution to the judge's election campaign. Provides that any adverse party may elect to waive this ground for recusal and establishes procedures for recusal in any district court in which three or less district judges are elected.

Louisiana SB 278 (2008) Provides that each party in a civil action shall be entitled to a substitution or substitutions of judge for cause by verified petition, setting forth the specific cause for substitution and praying a

substitute of judge. Requires that petition be heard as soon as possible by a judge other than the judge named in the petition. Provides for substitution when any defendant in a proceeding for contempt arising from an attack upon the character or conduct of a judge occurring otherwise than in open court and the proceeding is pending before the judge whose character or conduct was impugned, fears that he will not receive a fair and impartial trial before that judge. In any such situation the application shall be by petition, verified by the applicant, and shall be filed before the trial of the contempt proceeding.

Louisiana SB 496 (2008) Retains present laws on recusal and adds as additional grounds for recusal to the bias of a judge toward or against a witness. Provides that a judge may be recused if the judge is in violation of any canon of the Code of Judicial Conduct or any other rule of the Louisiana Supreme Court.

Louisiana HB 919 (2004) Provides that a judge in a civil or criminal matter shall be recused when he or she has accepted the maximum allowable campaign contributions from a plaintiff, defendant, prosecutor, the attorney of the plaintiff or defendant, or any attorney associated with such attorney within six months of the time in which the case is filed in his court. Provides that a judge in a civil or criminal matter may be recused when he or she has accepted any campaign contribution from a plaintiff, defendant, prosecutor, the attorney of the plaintiff or defendant, or any attorney associated with such attorney within six months of the time in which the case is filed in his court.

Massachusetts SB 1807 (2009) Requires judges refer all motions to recuse to another judge assigned to hear such proceeding. Specifies instances in which a judge must disqualify himself or herself, including A) Where he or she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; (B) Where in private practice he or she served as lawyer in the matter in controversy, or a lawyer with whom he or she previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it; (C) Where he or she has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy; (D) he or she knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding; (E) 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 an interest that could be substantially affected by the outcome of the proceeding; (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

Massachusetts SB 1476 (2009) Specifies instances in which a judge must disqualify himself or herself, including cases where

his/her impartiality might reasonably be questioned and in other cases (See SB 1807 (2009) for list).

Massachusetts SB 1567 (2009) Specifies instances in which a judge must disqualify himself or herself, including cases where his/her impartiality might reasonably be questioned and in other cases (See SB 1807 (2009) for list).

Massachusetts SB 870/SB 871(2007) Requires judges, upon receiving a written motion calling for the recusal, evaluate their own conscience as to their impartiality. Requires judge signed on the face of the motion a statement that the judge considers himself or herself to be impartial and requires a copy of the signed motion be forwarded to the Chief Justice of the court to which he or she is assigned and to all parties and their attorneys of record.

Michigan HJR 16 (2009) & HJR 44 (2008) Requires Supreme Court Justice recuse were the justice has a personal bias or prejudice concerning a party or party's lawyer, personal knowledge of facts that are in dispute in the proceeding, or is themselves or has a family member who has an economic interest in the controversy or is a party in the controversy. Requires recusal were the justice made a public statement that commits or appears to commit the justice to reach a particular result or rule in a particular way. Requires a justice require where the justice knows that he or she or a person related to them is a party to the proceeding or an officer of a party to the proceeding, is acting as a lawyer in the proceeding, has more than a de minimis financial interest that could be affected by

the proceeding, or is likely to be a material witness in the proceeding

Montana LD 2027 (2009) Requires recusal by a Supreme Court Justice because of receipt of campaign contributions from a party or attorney in a case in which the Justice participates. Legislative bill draft only; no committee or chamber action.

Montana HB 229 (2007) Prohibits a judge from sitting or acting in any case or proceeding where the judge knows or learns by means of a timely motion that an attorney in the action has contributed to the judge's prior or current judicial campaign. Requires judge notify parties of contribution and permits parties to jointly waive the disqualification.

New York AB 6879 (2009) & AB 5656 (2007) & AB 79083 (2005) & AB 10455 (2003) Directs chief administrative judge establish rules and regulations requiring that immediately upon the assignment of a matter to a judge, the parties and their counsel disclose any campaign contribution made to that judge. Once the disclosure has been made, the rules and regulations shall also provide if contributions over \$500 have been made to the judge's campaign by a party or counsel to a party, the judge shall disqualify himself or herself upon timely application made by a party who has made no contribution to the campaign. Compels any attorney or counselor appearing in any matter before a judge disclose campaign contributions they made over \$500 to the judge in the last five years.

New York AB 4092 (2007) & AB 3150 (2005) & AB 786 (2003) Includes as an interest which disqualifies a judge from

sitting as a judge or taking part in the decision of an action claim matter or proceeding the principal interest of a single issue political party which has designated the judge as its candidate for any public office held after a certain date.

North Carolina SB 659 (2009) Requires judges refer motions to recuse to another judge selected by the Chief Justice.

Tennessee HB 3238/SB 3289 (2006) Authorizes judges to recuse themselves without giving a reason in matters where a minor seeks an abortion without consent of parents or guardians.

Tennessee HB 3242/SB 2780 (2006) Requires judge in civil action filed against governmental entity or official in judge's judicial district to make determination whether disqualification from the action is warranted or required within 30 days of date case is filed or assigned to judge, whichever is later.

Texas HB 4548 (2009) Requires recusal of a justice of the supreme court or judge of the court of criminal appeals based on political contributions in the preceding four years totaling \$1,000 or more from a party to the case; an attorney of record in the case or the law firm of the attorney of record; the managing agent of a party to the case; a member of the board of directors of a party to the case or from a general purpose committee established or administered by a person who is a party to the case. Requires a party filing any pleading before the supreme

court or the court of criminal appeals to disclose any contributions made in the preceding four years by certain persons or entities that are parties or associated with parties.

West Virginia HJR 104 (2008) Creates a judicial commission made up of active and retired judges, nominated by the governor and confirmed by the Senate, to rule on and make determinations on the recusal of judges in a judicial proceeding.

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