

THE JUDICIARY FACTOR: ELECTION, BIAS, TEMPERAMENT AND THEIR EFFECT ON CLAIMS

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I. JUDICIAL ELECTION PROCESS

A. Overview

1. *Elected Judges:* Since 1851, the State of Ohio has elected judges. Voters rejected a proposal in 1987 to return to an appointive system. (39 states elect judges.)
2. *Campaign Contributions:* A 2006 study by the *New York Times* found that Supreme Court of Ohio justices voted in favor of non-lawyer/law firm campaign contributors 70% of the time. The study did not find a significant relationship between contribution from lawyers or law firms and outcomes of cases. Currently, a Supreme Court of Ohio justice campaign costs approximately \$2 million.
3. *Canon 4 of the Ohio Code of Judicial Conduct:* A judge or judicial candidate shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.

B. November 2012 Election Results Increase Calls for Judicial Reform

1. *Supreme Court of Ohio:*
 - a. “Highly Recommended” Justices Defeated:
 - i. *Republican Justice Robert Cupp:* Defeated by William O’Neill, a former appellate judge.
 - ii. *Democrat Justice Yvette McGee Brown:* Failed to retain her seat as the Supreme Court’s first black woman, losing to Butler County Common Pleas Judge Sharon Kennedy.
 - iii. *Highly Recommended:* Both Cupp and Brown received the OSBA’s highest rating of “highly recommended,” while Kennedy received a “not recommended” and O’Neill

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received a “recommended.” (Larkin, Brent, “Voters’ Misjudgments on Judges Cry Out for a Method that Involves Merit,” *The Plain Dealer*, November 24, 2012.)

2. *Cuyahoga County Common Pleas Court*: A significant number of voters opted for Cassandra Collier-Williams over Judge Joan Synenberg, a Republican, even though Judge Synenberg was one of only two judicial candidates to receive a perfect score of 4.0 from *Judge4Yourself*. Judge Synenberg has been appointed back to a vacant seat on the Cuyahoga County Common Pleas Court.

C. Reasons Behind Election Results

1. *Voter Drop-Off*: Voter drop-off in Franklin County for the 2012 elections ranged from 32 percent to 54 percent. 48 percent of Franklin County voters did not vote for any candidates for Common Pleas Court; 46 percent did not vote in Court of Appeals races; and 28 percent did not vote for any Supreme Court candidate. (Rogovin, Richard, “Retention Ballot Would Improve Election of Judges,” *The Columbus Dispatch*, March 28, 2013.)
2. *Unopposed Candidates*: 90 judges in 31 percent of all judicial races in Ohio were unopposed. Over 60 percent of races were unopposed for Common Pleas courts and 77 percent of races were unopposed for County Courts. (http://judgepedia.org/index.php/Ohio_judicial_elections_2012.) This could signal that the cost of challenging an incumbent has become too high. (Rogovin, Richard, “Retention Ballot Would Improve Election of Judges,” *The Columbus Dispatch*, March 28, 2013.)
3. *Name Recognition – The “McCafferty Effect”*:
 - a. Cuyahoga County: “Of the 56 judges in Cuyahoga County Common Pleas Court and the 8th Ohio District Court of Appeals, 26 have Irish surnames and 13 are Italian. Of the Italian names, five have the same last name and four others have last names that are virtually interchangeable. Of the Irish-surnamed judiciary, seven begin with ‘Mc’ and five others share one last name, while another three judges have an identical name.” (Barnhizer, David, “Consider Merit Screening for Our Judicial Candidates,” *The Plain Dealer*, January 2, 2011.)
 - i. In the November 2012 election, Judge Robert McClelland was opposed by Cullen Sweeney (which is a well known surname in Cuyahoga County). Cullen Sweeney, however, had only become a Sweeney eight years prior. Originally

named Cullen Goretzke, Sweeney took his wife's maiden in 2004. He denied that the name change had anything to do with his judicial campaign. (Larkin, Brent, "Cuyahoga County's Judicial Name Game Sets a New Mark for Cynicism," *The Plain Dealer*, September 22, 2012.)

ii. In 2004, judicial candidate Scott Ronald Miller began publicly holding himself out as Scott "Russo" Miller in an attempt to effect a common law change of his name. At the time, Russo was the surname of the county auditor and five county judges. When Miller ran for the common pleas bench, the board of electors struck the purported middle name from the ballot, allowing him only to appear as "Scott Miller." Miller appealed the matter to the Supreme Court of Ohio, which unanimously affirmed the ruling of the board of elections. *See State ex rel. Miller v. Cuyahoga Cty. Bd. of Elections*, 103 Ohio St.3d 477, 2004-Ohio-5532, 817 N.E.2d 1.

b. Supreme Court of Ohio: The candidates who won seats on the Supreme Court of Ohio in the 2012 election all have Irish-sounding names – Kennedy, O'Neill, and O'Donnell. They join a court whose chief justice is O'Connor. (Engel, Pamela and Jim, "Ohio Supreme Court: New Rules Sought for Justices' Campaigns," *The Columbus Dispatch*, November 13, 2012.)

D. Potential Reforms

1. *Retention Elections*:

a. Proposal of Chief Justice Maureen O'Connor: System where candidates with excellent credentials are appointed to the state's appellate courts and later face retention elections, in which voters would then decide whether to keep them there. The proposal applies only to appellate judges, including the Supreme Court of Ohio. (Larkin, Brent, "Voters' Misjudgments on Judges Cry Out for a Method that Involves Merit," *The Plain Dealer*, November 24, 2012.) Specific ideas for the proposal, include:

- i. Increasing the basic qualifications for serving as a judge;
- ii. Lengthening judges' terms;
- iii. Change Ohio law so that judicial races are not always at the bottom of the ballot;

- iv. Hold judicial elections in odd-numbered years so they are not overshadowed by other state and federal races;
- v. Require the advice and consent of the Ohio Senate for gubernatorial appointments to the Supreme Court of Ohio;
- vi. Set up nonpartisan nominating commissions for gubernatorial appointments to fill judicial vacancies;
- vii. Eliminate party affiliation on the ballot in judicial primary elections; and
- viii. Expand the use of cameras in courtrooms and start a statewide judicial voter guide.

(Feran, Tom, "Ohio Chief Justice Maureen O'Connor Proposes End to Partisan Primaries as Part of Judicial Election Reform," *The Plain Dealer*, May 9, 2013; "Chief Justice O'Connor Announces Plan to Strengthen Judicial Elections," *CNO Staff Report*, May 9, 2013.)

- b. The Retention-Ballot: 24 states use the retention ballot. (Rogovin, Richard, "Retention Ballot Would Improve Election of Judges," *The Columbus Dispatch*, March 28, 2013.)
 - c. Reduced Cost: According to the American Judicature Society, the total cost of retention-ballot elections from 2001-2009 was only 1 percent of the total cost of other judicial elections. (Rogovin, Richard, "Retention Ballot Would Improve Election of Judges," *The Columbus Dispatch*, March 28, 2013.)
 - d. Campaign Advertising: Retention elections may also allow voter education groups to make a larger difference, as they will not have to compete with campaign advertising. (Rogovin, Richard, "Retention Ballot Would Improve Election of Judges," *The Columbus Dispatch*, March 28, 2013.)
2. *Nonpartisan Primaries*: Cuyahoga County Common Pleas Judge Mike Donnelly is advocating that the Ohio legislature to change the system to have judicial candidates run in nonpartisan primaries. (Larkin, Brent, "Voters' Misjudgments on Judges Cry Out for a Method that Involves Merit," *The Plain Dealer*, November 24, 2012.)

3. *Screening Committees:* Several states rely on recommendations of bipartisan committees evaluating the merits of judicial candidates. (Barnhizer, David, “Consider merit screening for our judicial candidates,” *The Plain Dealer*, January 2, 2011.)

E. Voter Education Groups

1. *Judge4Yourself:*
 - a. Judge4Yourself is a service of the Judicial Candidates Rating Coalition that is made up of the Norman S. Minor Bar Association, the Ohio Women’s Bar Association, the Cuyahoga Criminal Defense Lawyers Association, and the Cleveland Metropolitan Bar Association.
 - b. Rates judges based on four qualities: (1) integrity; (2) judicial temperament; (3) diligence; and (4) professional competence.
 - c. In 9 of the 11 contested races for judge in Cuyahoga County, voters chose candidates who Judge4Yourself.com organizations rated good or excellent. (“Informed Voters Make a Difference,” *Judge4Yourself*, <http://www.judge4yourself.com>.)
2. *Taskforce on Judicial Excellence:*
 - a. Launched in June 2010, this Cleveland Metropolitan Bar Association (CMBA) initiative comprised of experienced local attorneys representing a wide spectrum of practices that will study the strengths and weaknesses of the system through which Ohioans elect their judges and recommend improvements.
 - b. The group posts public forums online that explore electoral practices and procedures.
 - c. On May 13, 2013, the CMBA issued a press release announcing that it has begun conducting Interim Judicial Reviews. “The purpose of the reviews is to provide confidential feedback from local attorneys to judges in Cuyahoga County and enhance the existing *Judge4Yourself* process, which rates the judges each election cycle.” Feedback from the reviews will be provided to the judiciary and to *Judge4Yourself*.

II. BIAS, DISQUALIFICATION, AND RECUSAL

A. Ohio Code of Judicial Conduct

1. *Rule 2.4 – External Influences on Judicial Conduct*
2. *Rule 2.11 – Disqualification*
3. *Comments to Rule 2.11:*
 - a. Campaign Contributions: A judge’s knowledge that a lawyer, firm, or party contributed to the judge’s election campaign does not, by itself, disqualify the judge. (Official Comment 1)
 - b. Relative of Judge: The fact that a lawyer in a proceeding is affiliated with the firm in which a relative of the judge is affiliated does not by itself disqualify the judge. Disqualification is required, however, if the judge’s impartiality might reasonably be questioned or if the judge knows that the relative has an interest that could be substantially affected by the proceeding. (Official Comment 4)
 - c. Exception: An exception is made for matters requiring immediate action. In such an instance, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable (Official Comment 3)

B. Affidavits of Disqualification

Affidavits of Disqualification were created by the legislature as a statutory vehicle, codified at R.C. 2701.03, by which a litigant or attorney may request the Chief Justice of the Supreme Court to prevent a common pleas, probate, or court of appeals judge from hearing a specific case. Affidavits of Disqualification are not applicable to Court of Claims, municipal or county court judges, or to magistrates or referees.

1. *Requirements for Affidavits of Disqualification*: The Affidavit must be filed with the Supreme Court of Ohio no less than seven days prior to the day on which the next hearing in the proceeding is scheduled and must include:
 - a. The specific allegations on which the claim of interest, bias, prejudice, or disqualification is based and the facts to support each of those allegations or, in relation to an affidavit filed against a

judge of a court of appeals, a specific allegation that the judge presided in the lower court in the same proceeding and the facts to support that allegation;

- b. The jurat of a notary public or another person authorized to administer oaths or affirmations;
- c. A certificate indicating that a copy of the affidavit has been served on the judge and on all other parties or their counsel; and
- d. The date of the next scheduled hearing in the proceeding or, if there is no hearing schedule, a statement that there is no hearing scheduled. *See* R.C. 2701.03(B).

2. *Procedure for Affidavits of Disqualification:*

- a. Once the affidavit is filed, the judge against whom the affidavit is filed is deprived of any authority to preside in the proceeding until the Chief Justice of the Supreme Court, or a justice of the Supreme Court designated by the Chief Justice, rules on the affidavit. R.C. 2701.03(D)(1).

An exception is recognized in the following situations:

- i. the affidavit was not timely filed;
 - ii. the judge determines that the matter to be heard does not affect the substantive rights of a party; or
 - iii. in domestic relations and juvenile court proceedings.
- b. If the Chief Justice of the Supreme Court, or any justice of the Supreme Court designated by the Chief Justice, determines that the interest bias, prejudice, or disqualification alleged in the affidavit exists, the Chief Justice or the designated justice shall issue an entry that disqualifies the judge from presiding in the proceeding and either order that the proceeding be assigned to another judge of the court of which the disqualified judge is a member, to a judge of another court, or to a retired judge. R.C. 2701.03(E).

3. *Exclusive Means:* R.C. 2701.03 provides the exclusive means by which a litigant can assert a common pleas judge is biased or prejudiced. Thus, an appellate court clearly lacks any authority to pass upon the disqualification of a common pleas court judge or to void the judgment of a trial court on that basis. *Holmes Cty. Bd. of Comm'rs v. McDowell*, 169 Ohio App.3d

120, 2006-Ohio-5017, 862 N.E.2d 136; *Beer v. Griffith*, 54 Ohio St.3d 440, 561 N.E.2d 926 (1978).

C. Disqualification Decisions

1. *Definition of Bias or Prejudice:* Disqualification is necessary where impartiality might reasonably be questioned, or where the appearance of bias, prejudice, or impropriety reasonably exists.

The terms “biased” or “prejudiced,” when used in reference to a judge before whom a case is pending, implies a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts. *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956).

2. *Disqualification Decisions:*

- a. Where a judge’s impartiality might reasonably be questioned or the judge has a personal bias or prejudice toward a party or witness. Bd. of Comm’s on Grievances and Discipline, Advisory Opinion 91-13.
- b. To avoid an appearance of racial bias. *Bolding v. Dublin Local Sch. Dist.*, 77 Ohio St.3d 1258, 674 N.E.2d 365 (1996).
- c. Where a judge is related within the third degree to a party, lawyer, or a material witness in the proceeding. Bd. of Comm’s on Grievances and Discipline, Advisory Opinion 89-19.
- d. Where the judge is a party in a pending lawsuit and the judge’s attorney represents a party in an action pending before the judge. The necessity for recusal lasts as long as there is an attorney-client relationship with the judge. Bd. of Comm’s on Grievances and Discipline, Advisory Opinion 89-34.
- e. Where the judge owns stock in an entity that is a party to the proceeding. Bd. of Comm’s on Grievances and Discipline, Advisory Opinion 91-14. *But see, In re: Disqualification of Lavrich*, 74 Ohio St.3d 1216, 657 N.E.2d 1330 (1990) (spouse’s ownership of minute percentage of stock of corporate party does not require disqualification).

- f. Where a lawyer in the proceeding rents office space from the judge or the judge's spouse. Bd. of Comm's on Grievances and Discipline, Advisory Opinion 91-8.
 - g. Where a party to a proceeding is represented by a newly elected judge's former law partner, when the judge is still receiving income collected from accounts receivable of the former partnership. Bd. of Comm's on Grievances and Discipline, Advisory Opinion 95-3.
 - h. Where a judge initiated an *ex parte* conversation with an attorney that included substantive matters. *In re: Disqualification of Floyd*, 101 Ohio St.3d 1215, 2003-Ohio-7354, 803 N.E.2d 816.
 - i. Where there is a significant likelihood that the judge will be called as a witness. *In re: Disqualification of Bond*, 94 Ohio St.3d 1221, 2001-Ohio-4102, 763 N.E.2d 593.
3. *Disqualification of All Judges:* There are instances where the disqualification of all judges of a particular court has been deemed appropriate. In these situations, a visiting or retired judge is normally appointed for the proceeding. Specific instances where all judges of a court have been disqualified include:
- a. Where a county commissioner is a party to the proceeding. *In re: Corrigan*, 110 Ohio St.3d 1217, 2005-Ohio-7153, 850 N.E.2d 720.
 - b. Where a court administrator is a party to the proceeding. *State v. Fautenberry*, 77 Ohio St.3d 1252, 674 N.E.2d 360 (1996).
 - c. Where a judge is a party to a proceeding. *Stokes v. Plain Dealer Publishing Co.*, 74 Ohio St.3d 1233, 657 N.E.2d 1342 (1991).
 - d. Where county funds related to the court's budget are at issue. *State ex rel. Jones v. McDonald*, 77 Ohio St.3d 1235 (1996).
4. *Judicial Disqualification Unnecessary:*
- a. Where a party to or lawyer in the underlying proceeding campaigned for or against the judge. *In re: Disqualification of Osowick*, 117 Ohio St.3d 1237, 2006-Ohio-7224, 884 N.E.2d 1089.
 - b. Where an incumbent judge's campaign opponent represents a party to a proceeding before the incumbent judge, unless the judge's

impartiality might reasonably be questioned. Bd. of Comm's on Grievances and Discipline, Advisory Opinion 87-023.

- c. Where one of the parties has appeared before the judge as an attorney. *In re: Disqualification of Panagis*, 74 Ohio St.3d 1213, 657 N.E.2d 1328 (1989).
 - d. Where a lawyer in the proceeding is a member of the judge's campaign committee or was co-chairman of a fundraiser for the judge. Bd. of Comm's on Grievances and Discipline, Advisory Opinion 92-9; *State v. Ahmed*, 117 Ohio St.3d 1239, 2006-Ohio-7225, 884 N.E.2d 1091.
 - e. Where a newspaper that endorsed the judge is a party to the proceeding. *Oakar v. Plain Dealer Publishing Co.*, 74 Ohio St.3d 1273, 657 N.E.2d 1368 (1995).
 - f. Where a friendship exists between the judge and a lawyer or witness in the proceeding. *In re: Disqualification of Ward*, 100 Ohio St.3d 1211, 2002-Ohio-7467, 798 N.E.2d 1; *State v. Kehl*, 81 Ohio St.3d 1215, 1997-Ohio-27, 688 N.E.2d 517.
 - g. Where the judge is affiliated with a religious organization that is a party to the proceeding. *Herakovic v. Catholic Diocese of Cleveland*, 101 Ohio St.3d 1223, 2003-Ohio-7357, 803 N.E.2d 822.
5. *Consent*: A party may be deemed to have consented to the participation of the judge where, in the absence of extraordinary circumstances, lengthy proceedings have taken place before the judge without objection of any party. *In re: Disqualification of Valen*, 73 Ohio St.3d 1204, 652 N.E.2d 793 (1991).

6. *Recusal of a Supreme Court of Ohio Justice*:

Rule 14.6 of the Rules of Practice of the Supreme Court of Ohio, which became effective on April 4, 2011, allows a party to request the recusal of a justice. The request must be submitted to the Supreme Court Clerk of Court in letter form and must include an affidavit setting forth the facts upon which the request for recusal is based. The justice is then required to file a response indicating whether he or she will recuse.

This rule also enables a justice to self-disclose if the justice believes there to be a basis for disqualification. Parties have 15 days from the time of the self-disclosure to waive the disqualification.

D. Example: Judge James Burge

A Lorain County prosecutor, Anthony Cillo, has asked the Supreme Court of Ohio to disqualify Common Pleas Judge James Burge from all cases he prosecutes, claiming the Judge could “be perceived as biased and prejudiced concerning a party, and because Judge’s impartiality might reasonably questioned.”

There are apparently several reasons why Cillo seeks Judge Burge’s disqualification. Cillo claims that he was told that the Judge stated to another prosecutor that he already had an opinion on one of Cillo’s pending cases involving a death row inmate. Judge Burge also claims that Cillo is linked to Judge Burge’s review by the Office of Disciplinary Counsel regarding rulings he made in the Head Start molestation case. Cillo claims that since Judge Burge apparently believes Cillo is involved in the disciplinary proceedings against him and also that Cillo lied to disciplinary counsel, the Judge may be biased against him.

Judge Burge has opposed the prosecutor’s request, stating via affidavit that he views him only as a “capable trial attorney that is always prepared, organized, technically sound, credible and dedicated to his cause.”

(Remington, Kaylee, “Judge Burge Answers to Cillo’s Bid to Remove Him From Cases,” *The Morning Journal*, April 17, 2013; Remington, Kaylee, “Anthony Cillo Submits Affidavit in Burge Case,” *The Morning Journal*, May 9, 2013.)

III. EFFECT ON CLAIMS: WHAT DO YOU DO IF YOU END UP IN AN UNDESIRABLE COURTROOM?

A. Removal to Federal Court

1. Federal Jurisdiction:

- a. Federal Question: The plaintiff’s claims arise under federal law. 28 U.S.C. § 1441(a); 28 U.S.C. § 1331.
- b. Diversity of Citizenship: Complete diversity exists among the parties and the amount in controversy exceeds \$75,000. 28 U.S.C. § 1441(a); 28 U.S.C. § 1332.

2. Procedure:

- a. 30 days: A defendant must file a notice of removal within 30 days of receiving the complaint. 28 U.S.C. § 1446.
 - b. Notice of Removal – District Court: The defendant must file a notice of removal that establishes the grounds for removal in the applicable federal district court. 28 U.S.C. § 1446.
 - c. Notice of Removal – State Court: The defendant must notify the state court of the removal. 28 U.S.C. § 1446(d).
3. For more information regarding removal, see “To Remove or Not to Remove: Federal Court, Venue, and Other Jurisdictional Considerations” by Shane A. Lawson, Esq., also contained on this CD.

B. Commercial Docket

1. *Permanent Rules*: The Supreme Court of Ohio adopted permanent rules that govern the establishment and operation of commercial dockets in Ohio. These dockets are used to resolve business-related disputes quickly and provide more consistency to the litigation process by judges developing expertise in this area. The permanent rules are effective June 1, 2013, and are set forth at Rules 49 through 49.12 of the Rules of Superintendence.
2. *Cases Eligible for Commercial Docket*: Sup.R. 49.05 outlines the types of cases that are eligible for litigation in the commercial docket.
3. *Cases Excluded from the Commercial Docket*: Sup.R. 49.06, on the other hand, lists the case types that are specifically excluded from the scope of the commercial docket.
4. *Procedure*:
 - a. Party filing suit: If the case is eligible for the commercial docket, the attorney filing suit shall include with the initial pleading a notification that it is a commercial docket case. Sup.R. 49.07(A).
 - b. Other party: If the attorney bringing the suit does not designate it as a commercial docket case, an attorney representing any other party shall file a motion to transfer the case to the commercial docket with its first responsive pleading and provide copies of the motion to the court’s administrative judge. Sup.R. 49.07(B).
 - c. The court: If the case is eligible for the commercial docket, but none of the parties’ attorneys designate it as such, the assigned

non-commercial docket judge shall *sua sponte* request the administrative judge to transfer the case to the commercial docket. If the judge's request is more than 120 days after suit was filed, assignment to the commercial docket is at the discretion of the commercial docket judge to whom the case would be assigned. Sup.R. 49.07(C).

- e. Mistaken commercial docket assignment: If a case is mistakenly assigned to the commercial docket, the commercial docket shall transfer the case to the non-commercial docket *sua sponte* or on the motion of any party. Sup.R. 49.07(D),

C. Alternate Dispute Resolution

- 1. *Arbitration or mediation.*