

## AJS Hawaii Chapter

### Report of the Special Committee on the Judiciary, Lawyers and the Issue of Conflicts in the Judicial System Concerning Survey on Judicial Recusal and Disqualification

#### Introduction

In June 2006, the Hawaii Chapter of the American Judicature Society convened a special committee to consider conflicts issues in the judicial system. The 15-member committee included five judges from different Hawaii courts.<sup>1</sup>

In its initial meetings the committee began to examine a series of questions related to judicial conflicts and disqualification. The committee wished to explore topics such as:

- Whether existing disqualification rules and procedures adequately serve the interests of litigants and the public.
- How frequently judges are removed from cases or motions.
- What proportion of removals results from disqualification motions, and what proportion is initiated by the judges.
- The most frequent reasons for judicial recusal or disqualification.
- Whether existing disqualification standards provide adequate guidance to judges.
- Whether judges routinely apply personal standards or practices, in addition to formal disqualification rules.
- Whether filing a disqualification motion is likely to have a negative effect on parties or their lawyers.
- Whether judges, lawyers and litigants believe that judges' personal relationships and biases affect judicial decisions.

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<sup>1</sup> The committee also included seven attorneys and three community leaders. The five judges serve on the Hawaii Supreme Court, the Hawaii Intermediate Court of Appeals, the United States District Court for the District of Hawaii, the Hawaii First Circuit Court, and the Hawaii District Court (First Circuit). Other members of the committee who provided particularly useful perspectives included the chair of the Hawaii Judicial Conduct Commission, the Chief Disciplinary Counsel of the Hawaii Office of Disciplinary Counsel, and a member of the ABA Standing Committee on Ethics and Professional Responsibility.

- Whether attorneys and litigants seek disqualification for inappropriate reasons.

The committee quickly discovered that available information on these topics was largely anecdotal. The committee therefore decided to survey all Hawaii judges to seek more direct information about recusal practices and related topics.

This report summarizes the survey results. The report consists of five parts and two exhibits. Part A presents survey highlights. Part B provides background concerning judicial disqualification rules. Part C discusses survey procedures, caveats, and terminology. Part D is a textual summary of survey responses. Part E sets forth brief conclusions.

Exhibit 1 presents the data received in response to each survey question, with a more detailed analysis of the results. Exhibit 2 is a copy of the survey submitted to judges.

#### A. Survey Highlights.

The 108 survey responses (representing a 78% response rate) indicate Hawaii judges do not view judicial conflicts or disqualification rules as significant problems.

These issues do not arise frequently. Most responding judges remove themselves, or are disqualified by motion, less than five times per year. Removals almost always result from a judge's own initiative. The most common factors underlying judges' decisions to remove themselves are close relationships with an attorney, party, or witness.

Overall, disqualification motions are infrequent. More than two-thirds of all responding judges reported they had dealt with *no* disqualification motions in the last five years. However, 54% of responding full-time *trial judges* faced at least one disqualification motion in the last five years.

The responses showed that when disqualification motions are filed, they are quite likely to include claims of bias or prejudice. Nonetheless, judges do not believe filing a disqualification notice has a negative effect on the case, litigant or attorney. In fact, more than 91% of responding judges said that they did not know of a case in which a disqualification motion had a negative impact on the case.

The vast majority of judges (95%) believe existing statutes, rules and decisions provide adequate guidance in the area of recusals and disqualifications. Nonetheless, a substantial number of judges report they use personal standards or practices to supplement published rules. In fact, 70% of appellate judges who responded, and 41% of trial judges, said they had such practices.

The responding judges felt they and their peers made appropriate recusal decisions; over 80% disagreed with the statement that judges did not recuse themselves when they should. On the other hand, judges were split as to whether judges recuse themselves when they should not.

Despite numerous factors indicating judicial conflicts do not pose significant problems, a majority of respondents agreed that litigants and attorneys feel that a judge's personal relationships and biases affect judicial decisions. That perception was consistent with other survey results indicating that when the rare disqualification motion is filed, it likely includes claims of personal bias or prejudice concerning a party or lawyer. These results are significant, even though they involve a very small number of cases, because participants' belief that they have a fair, unbiased judge is essential to public trust in the judicial system.

Finally, there was no uniform view as to whether attorneys and litigants misuse disqualification procedures by seeking disqualifications for inappropriate reasons.

Additional details of these results are discussed below in Part D and in Exhibit 1.

#### B. Background: Codes of Judicial Conduct and Disqualification Rules.

All state and federal judges must follow strict disqualification rules. The basic purpose of those rules is to assure impartiality.

The primary source of disqualification rules for Hawaii state judges is the Revised Code of Judicial Conduct adopted by the Hawaii Supreme Court.<sup>2</sup> The Hawaii Code of Conduct closely follows the 1990 version of the American Bar Association's Model Code of Judicial Conduct.<sup>3</sup> Hawaii also has a disqualification statute.<sup>4</sup> Federal

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<sup>2</sup> The Hawaii Code of Conduct is available at: [http://www.courts.state.hi.us/page\\_server/LegalReferences/271A7DD039E757A8EAE7AD4B72.html](http://www.courts.state.hi.us/page_server/LegalReferences/271A7DD039E757A8EAE7AD4B72.html).

<sup>3</sup> In February 2007, the American Bar Association approved a revised version of its Model Code of Judicial Conduct. Disqualification rules are set out as Rule 2.12 of the 2007 code. The revised code is currently being considered for possible adoption by Hawaii courts. The 2007 version does not make fundamental changes to existing disqualification provisions. The primary substantive changes to the ABA's disqualification rules are the addition of explicit disqualification requirements if (1) the judge previously presided over the proceeding in another court, or (2) the judge served in government employment, and in that capacity participated as a lawyer or advisor concerning the proceeding, or expressed an opinion concerning the merits of the particular case. Explanatory materials and comparisons between the 1990 and the 2007 versions of the ABA Model Code are available at: [http://www.abanet.org/judicialethics/approved\\_MCJC.html](http://www.abanet.org/judicialethics/approved_MCJC.html).

<sup>4</sup> Section 601-7, Hawaii Revised Statutes, precludes a judge from sitting in a case in which a relative within the third degree is counsel, or is interested as a plaintiff or defendant, or in which the judge has a direct or indirect financial interest. Judges are also precluded from hearing cases in which they have acted as attorneys, and from hearing appeals from decisions rendered by that judge. In addition, the statute compels disqualification whenever a party files an affidavit that the judge has a personal bias or prejudice against the party or in favor of his opponent. The affidavit must state the facts and reasons for the belief that such bias or prejudice exists. The Hawaii courts have held that a judge must accept the facts stated in the affidavit as true, and the judge's only function is to determine whether those facts sufficiently establish personal bias or prejudice. The focus on allegations of personal bias or prejudice in this affidavit

judges are governed by the Code of Conduct for United States Judges,<sup>5</sup> which is based on the ABA Model Code and is therefore very similar to the Hawaii Code of Conduct. Federal judges are also subject to a disqualification statute, 28 U.S.C. §455.

Canon 3 of the codes requires that “a judge shall perform the duties of judicial office impartially and diligently.” Section 3E(1) of the Hawaii Code of Conduct, and Canon 3C(1) of the Federal Code of Conduct, deal with disqualification. Each states: “A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned . . . .”

The codes then set forth non-exclusive lists of situations in which judges must disqualify themselves. For example, Section 3E(1)(a) requires disqualification if a judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of evidentiary facts. The other three examples involve service by the judge (or lawyers with whom the judge previously practiced) as a lawyer in the controversy; material interests of the judge or family members in the subject matter of the controversy, or material interests (e.g., stock ownership) in a party to the proceeding; and various types of involvement in the proceedings or controversy by the judge’s spouse or certain relatives or in-laws.

Both the Hawaii and ABA codes emphasize that the specific situations listed in Section 3E(1) are only examples. The official comment states: “Under this rule, *a judge is disqualified whenever the judge’s impartiality might reasonably be questioned*, regardless whether any of the specific rules in Section 3E(1) apply.” [Emphasis added.] Hence, these disqualification standards compel judges to consider situations beyond those explicitly identified by the rules. In addition, judges must disclose information about marginal situations. The comments state: “A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.”

The judicial codes of conduct require a judge to take the initiative to disqualify himself or herself when the situation warrants such action. However, parties may also raise disqualification issues, either informally or by filing motions to disqualify. The parties’ right to file disqualification motions does not relieve judges from primary responsibility for addressing disqualification issues. This is made plain by one of the comments to the revised ABA Code: “A judge’s obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify has been filed.”

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process may be one reason that personal bias or prejudice appears to be a common ground for judicial disqualification motions. See Part D, paragraph 8.

<sup>5</sup> Available at: <http://www.uscourts.gov/guide/vol2/ch1.html>.

### C. Survey Procedures, Caveats and Terminology.

Procedures. The committee mailed the survey to all 139 Hawaii-based federal and state judges in early December 2006. Recipients included the five justices of the Hawaii Supreme Court; the six judges of the Hawaii Intermediate Court of Appeals; one judge of the United States Court of Appeals for the Ninth Circuit; 33 judges serving in Hawaii Circuit Courts (Hawaii's courts of general jurisdiction); and 36 full-time judges of Hawaii District Courts or District Family Courts. (The Hawaii District Courts are the first tier of state trial courts. They have limited civil and criminal jurisdiction, and do not conduct jury trials.<sup>6</sup>) In addition, the survey was mailed to 48 per diem (part-time) state judges.<sup>7</sup> Ten federal trial judges (four active district judges, two senior district judges, three magistrate judges, and one bankruptcy judge) received the survey. One hundred eight state and federal judges responded, or 78% of those surveyed.

The survey was drafted by the committee. It was administered and the results were compiled by the Center on the Family of the University of Hawaii, under the direction of Dr. Sylvia Yuen, a committee member.<sup>8</sup> All information was collected anonymously. However, the survey asked respondents whether they were trial or appellate judges, whether they were full-time or per diem judges, and how many years they had served as judges. This information makes it possible to compare responses from various categories of judges.

Caveats. This report should be read with several caveats. First, the survey results are subjective. The responses reflect judges' opinions, impressions and recollections, rather than statistics obtained from administrative records. Second, the survey results showed that a substantial minority of judges participate in automatic recusal systems, under which judges inform court personnel in advance that certain matters should not be assigned to them. In some automatic recusal systems, judges do not know cases have been assigned to others because of these advance designations. Hence, responses from judges participating in those systems may not reflect all recusals.

Third, judges included in the survey had a very broad range of responsibilities and experience. Different courtroom responsibilities and environments

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<sup>6</sup> State district courts have exclusive jurisdiction over traffic infractions, certain landlord-tenant cases, small claims cases, and non-jury civil cases involving under \$10,000. They share jurisdiction with state circuit courts for civil cases involving \$10,000 to \$20,000, for criminal offenses punishable by imprisonment up to one year, for cases involving violations of county ordinances, and for petitions for restraining orders or injunctions against harassment. State circuit courts conduct all jury trials, have exclusive jurisdiction in probate, guardianship and criminal felony cases, and in civil cases involving more than \$20,000. State circuit courts also hear misdemeanor violations transferred from district court for jury trials.

<sup>7</sup> Per diem judges serve as state district court judges and state family district court judges. They serve no more than 10 days per month. Unlike full-time judges, per diem judges are allowed to practice law, though they may not practice in district court or family court if they serve on those courts. Per diem judges are not subject to some portions of the judicial code of conduct, such as those that preclude participation in businesses or on certain boards of directors.

<sup>8</sup> Among other responsibilities, the Center on the Family conducts research and publishes data concerning family issues. As a result, it regularly prepares surveys and analyzes the resulting data. The committee is very grateful to Dr. Yuen and the Center on the Family for the expertise they lent to this project.

can obviously lead to different disqualification issues. The detailed survey results in Exhibit 1 include comparative data as to responses received from all participants, from appellate judges, from trial judges, from full-time judges, and from per diem judges. Exhibit 1 also compares responses from judges with different levels of experience. Parts A and D of this summary generally do not discuss comparative data, primarily because all groups of judges tended to provide similar responses. However, Exhibit 1 notes several instances in which there were significant variations among different groups of judges.

Finally, it is important to understand the survey's use of percentages. Most data in Exhibit 1 are presented as percentages of responses *to that question*. Because all questions did not apply to all judges, there is considerable variation in the number of underlying responses. For example, the percentages presented for Question 8a are based on 108 responses, while the percentages presented for Question 8c involve a subset of only 39 responses. Hence, an identical percentage reported for Questions 8a and 8c would represent two substantially different portions of the total survey pool.

Terminology. The judicial codes of conduct use the term “disqualification” regardless of whether a judge’s removal is initiated by the judge or results from a motion by one of the parties. However, judges and lawyers often use “recusal” to mean situations in which judges remove themselves *sua sponte*, and “disqualification” to mean situations in which judges are removed as a result of a motion or a similar proceeding.

The terminology in the survey follows the latter approach. It uses “recusal” to mean removal on the judge’s own initiative, “disqualification” to mean removal due to a disqualification motion, and “removal” to cover both recusal and disqualification.

#### D. Summary of Survey Results.

Part D is a textual summary of the detailed data included in Exhibit 1. The summary is organized in the order of survey questions.

##### 1. Response Rates; Judicial Caseload.

Page 1 of Exhibit 1 presents key information as to the number of surveys distributed, and responses received, from various groups of judges. The overall response rate of the survey was 78% (108 responses out of 139 judges surveyed).

Exhibit 1 includes data for several categories of respondents, and relies heavily on percentages. As noted earlier, the percentages presented for each question are based on the number of responses to that particular item. However, in some cases it is helpful to keep in mind the absolute number of respondents included in each group of judges. That information is as follows:

<u>Category</u>	<u>Number of Respondents</u>
Total:	108
Unclassified:	1
Appellate judges:	10
Trial judges (includes all per diem judges):	97
Per diem judges:	40
Full-time judges (excludes per diem judges)	67
Full-time trial judges (excludes per diem and appellate judges)	57

Question 1 gathered information about respondents' annual caseloads. The median reported caseloads were 200 cases for appellate judges, and 600 cases for trial judges. These figures do not distinguish between judges serving in different courts, which obviously have dramatically different dockets. Nonetheless, the caseload statistics provide a baseline for evaluating the number of recusals and disqualifications reported by each category of judges.

## 2. Automatic Recusal.

Question 2a asked judges whether they belong to courts with automatic recusal systems. In those systems, judges can direct administrators not to assign them cases involving certain categories of litigants or attorneys, such as members of a judge's former law firm. When that occurs, the judge does not make a case-specific recusal decision, and therefore may be unaware that a particular case has been reassigned. Overall, 42% of full-time judges stated they had some type of automatic recusal process. Four appellate judges (44% of nine responding to Question 2a) reported they participated in such systems. The figures were far lower for per diem judges (13%).

Question 2b asked judges using these systems (the 33 judges who answered "yes" to Question 2a) whether they had included "automatic" recusals in their answers to subsequent questions. The responses were inconclusive.<sup>9</sup> Hence, it is not possible to tell whether automatic recusals generally were or were not included in subsequent responses.

## 3. Frequency of Removals.

Judges' responses to Question 3 indicate that removal is quite rare. For example, the median annual caseload reported by trial judges was approximately 600 cases, while their median number of annual removals was three, with a mean of five.

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<sup>9</sup> Eight of the 33 did not answer Question 2b, and the rest were almost equally divided (12-13).

Although very small in number, removal rates for appellate judges were much higher than that of trial judges. Appellate judges reported a median annual caseload of 200 cases – about one third of the median caseload reported by trial judges – but appellate judges reported eight median removals per year, with a mean of seven.

Per diem judges reported removals at a rate about half that of full-time judges. For example, median removals per year were two for per diem judges and five for full-time judges. This may reflect the fact that per diem judges generally deal with less complex cases, and preside over many cases in which parties do not use lawyers.

#### 4. Removals Due to Disqualification Motions.

The surveys indicate that very few removals result from disqualification motions. For example, the 85 trial judges who responded to Question 4 reported a range of 0-2 removals resulting from disqualification motions in a typical year. The mean value was 0.2 and the median was 0.

#### 5. Recusal.

Questions 5a and 5b dealt with recusals. Responses to Question 5a, when compared to Questions 3 and 4, confirmed that in a typical year almost all removals are due to judicial recusals. For example, 90 responding trial judges reported a median of three recusals, with a mean of five. Those median and mean figures are identical to the median and mean figures for all removals reported by trial judges in Question 3.

Question 5b asked how many recusals were *not* based on the judge's own initiative (as where a judge recuses himself after a party expresses a concern, or after a newspaper editorial calls for recusal). The judges reported very few recusals they did not initiate. Responses from 91 trial judges to Question 5b included a range of 0-5 such recusals, with a median of zero and mean of 0.2.

#### 6. Scope of Removal.

The survey showed that a removal ordinarily applies to the entire case, not just a single hearing or other proceeding. For example, in response to Question 3 trial judges reported a mean of five total removals a year, and a median of three. When asked how many removals involved entire cases (Question 6), trial judges had a mean response of four, and a median of two.

#### 7. Factors Leading to Recusal.

Question 7 asked judges to consider all cases in which they had recused themselves without a motion *during the last five years*. The judges were asked (1) to check boxes indicating *all* factors that led them to recuse themselves during that five-year period; and then (2) to rank the five most common factors that led them to recuse



themselves.<sup>10</sup> Eighty-two judges responded to this question. The two factors that received the most responses to the first question were (A) close relationships with an attorney, party or witness (cited by 62 of the 82 respondents, or 76%); and (B) involvement of the judge or a family member as a party or a lawyer, as a person with more than a *de minimus* interest in the case or in a party to the case, or as a potential material witness (cited by 41 of 82 respondents, or 50%).<sup>11</sup>

Moreover, these two factors appeared to be among the most frequent reasons for recusal. Overall, approximately 75% of the 39 judges who listed involvement of the judge or a family member as a party, etc., ranked that factor as the first or second most common reason for disqualification during the preceding five years. Similarly, among the 59 respondents who listed a close relationship with an attorney, party, or witness, 89% of them ranked that factor as the first or second most common reason for recusal during the past five years.

One element of the data concerning rankings merits attention even though it represents a fairly small number of judges. Seventeen responding judges indicated that during the last five years, one factor that led them to recuse themselves without a disqualification motion was personal bias or prejudice concerning a party or lawyer. Those judges included 10 full-time judges (out of 67 who returned surveys) and 7 per diem judges (out of 40). Further, 14 of the 17 judges who included bias as a factor listed it as the first or second most common reason for recusals without a motion.

Finally, there was a significant difference between the percentage of trial and appellate judges (11% vs. 56%), and between the percentage of per diem and full-time judges (4% vs. 22%), who listed as a recusal factor financial interests of the judge or of a family member in the case or in a party to the case. Those statistics and others suggest that appellate judges are more likely than trial court judges to face conflicts arising from ownership of stock or other financial interests in parties that participate in or are affected by the cases those judges handle.

## 8. Number and Bases of Disqualification Motions.

Questions 8a, 8b and 8c sought information about disqualification motions. Overall, about two-thirds (64%) had *no* motions to disqualify filed against them in the last five years, while one-third (36%) had such motions.<sup>12</sup> Disqualification

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<sup>10</sup> The list of recusal factors was based primarily on mandatory disqualification situations listed in Section 3E(1)(a) to (d) of the Hawaii Code of Conduct. The Hawaii Code of Conduct differs in some respects from federal provisions.

<sup>11</sup> The next four most frequently cited recusal factors for the preceding five years were: personal knowledge of disputed facts in the case (included in 37% of the 82 responses); personal bias or prejudice (22%); service by the judge or a former associate as a lawyer in the matter (22%); and financial interests in the case or a party to the case (16%). Each percentage indicates the proportion of responding judges whose five-year list included that recusal factor. Since each judge was asked to identify all such factors, those percentages total more than 100%.

<sup>12</sup> Question 8b sought information as to the number of disqualification motions filed in the last five years. The results for this question should be viewed with caution because of the high rate of missing information.

motions were generally unusual for per diem judges and appellate judges. Only 15% of per diem judges and 20% of appellate judges reported motions to disqualify in the last five years. By contrast, 49% of full-time judges (which corresponds to 54% of full-time *trial* judges) faced at least one disqualification motion in the last five years.

Question 8c applied only to the 39 judges who had experienced disqualification motions in the last five years. It asked them to identify *all* bases alleged for those motions. The most commonly cited category (64% of the 39 respondents, or 25 judges) was personal bias or prejudice concerning a party or lawyer. However, only three per diem judges reported such claims, and no appellate judges did so. This means that over a five-year period, about 39% of all participating *full-time* trial judges (i.e., 22 full-time trial judges out of the 57 who responded “yes” or “no” to Question 8a), and 73% of those *full-time* trial judges who said they had dealt with some type of disqualification motion (i.e., 22 of the 30 full-time trial judges who responded “yes” to Question 8a), faced at least one motion to disqualify in which a party claimed the judge held personal bias or prejudice concerning a party or lawyer. Those percentages suggest that when disqualification motions are filed, they are likely to involve allegations of bias or prejudice.<sup>13</sup> That suggestion is consistent with the results reported under Question 13.

#### 9. Presiding by Agreement of Parties.

Question 9 asked whether in the last five years the judge continued to preside after disclosing waivable grounds for removal.

This question relates to waiver provisions in the Hawaii Code of Conduct, the Federal Code of Conduct, and the federal disqualification statute. Section 3F of the Hawaii Code of Conduct states that a judge who is disqualified by other provisions of the rule may disclose the basis for that disqualification on the record. The rule then permits the judge to participate in the proceeding if (1) the basis for disqualification does not involve personal bias or prejudice, (2) all parties agree that the judge should not be disqualified, and (3) the judge remains willing to participate. Canon 3D of the Federal Code of Conduct and 28 U.S.C. 455(e) contain waiver provisions that are similar, but do not permit waivers if disqualification is required due to certain specific circumstances in addition to bias.

The responses indicated these state and federal waiver provisions are used, but are rare (less than three times in five years, at the median).

#### 10. Personal Practices in Addition to Applicable Rules.

Questions 10a and 10b elicited information about use of personal removal standards or practices, in addition to those set out by rules, statutes and decisions.

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<sup>13</sup> These results may also reflect the fact that Hawaii has a statutory disqualification procedure that is available only if personal bias is alleged. The statute compels disqualification if a party submits an affidavit *alleging* facts that are legally sufficient to constitute personal bias of the judge against a party. *See* Note 4.

Such standards were widespread. Seven of 10 responding appellate judges reported they had such standards, as did 51% of full-time trial judges. By contrast, only 28% of per diem judges said they had supplemental standards.

Question 10b asked those judges who had supplemental standards to describe them. Exhibit 1 lists and categorizes each response received. The largest number of supplemental practices involved recusal from cases involving a judge's friends, neighbors, or cousins, or involving entities for which the judge served as a board member.

In addition to recusal, some judges reported they made financial disclosures beyond those required by statute or code.

#### 11. Adequacy of Existing Rules.

Question 11 asked if existing rules and decisions provide adequate guidance concerning removal. The vast majority of responding judges (95% of 103 respondents) stated guidance was adequate. Their responses may seem inconsistent with the large number of judges who apply individually developed criteria to supplement published disqualification rules. However, this may simply mean that disqualification and recusal decisions require considered judgment and common sense, in addition to statutes and rules.

#### 12. Negative Effect of Disqualification Motions?

Question 12a asked judges if they knew of *any* case (whether decided by them or other judges) in which a motion to disqualify had a negative effect. The vast majority of respondents (91% of 108 responding judges) said they knew of *no* such cases. There were no significant differences in the response rate between trial and appellate judges, or between full-time and per diem judges.

Question 12b asked those who knew of such negative effects to identify all negative effects that occurred. Multiple responses were permitted. Only ten judges responded. Five responses said that the negative effects included significant delay of the case, and four said that negative effects included irritating the judge.

The judges were also asked, in Question 12c, what *percentage* of disqualification motions they believed had a negative effect on a case, litigant, or attorney. Eighty-three judges responded. Overall, some 36% of that group said they did not know. Another 48% believed less than 1% of disqualification motions had a negative effect, and a further 10% believed that less than 5% of such motions had a negative effect.

### 13. Perceptions of Bias; Accuracy of Removal Decisions; Misuse of Disqualification Rules.

Question 13 asked judges to react to a series of seven statements, indicating in each case whether they (1) agreed or strongly agreed, (2) were neutral, or (3) disagreed or strongly disagreed. The most striking data from Question 13 concerned perceptions of bias.

Seventy-one percent of the judges indicated they agreed or strongly agreed that there is a perception *among litigants* that a judge's personal relationships and biases affect judicial decisions. Fifty-five percent of responding judges agreed or strongly agreed that *attorneys* had such perceptions. These results are quite consistent with responses to Question 8c, which showed that although disqualification motions are not filed frequently, when motions are filed they often involve claims of judicial bias. Also, 18% of 107 responding judges (and 15% to 20% of each subcategory of judges) agreed or strongly agreed there is a perception *among judges* that judges' personal relationships and biases affect judicial decisions rendered. However, 63% of 107 responding judges (including 51% to 80% of each sub-category) disagreed or strongly disagreed with the latter statement. In other words, (1) most judges believe litigants think judicial decisions are affected by judges' personal relationships and biases; (2) about half the surveyed judges believe attorneys have that perception; and (3) most judges believe other judges do not have that perception.

Other responses to Question 13 showed that 80% of responding judges disagreed or strongly disagreed that judges do not recuse themselves when they should. Conversely, judges were split as to whether judges recuse themselves when they should not (a concern because unnecessary recusal can increase cost and delays, and burden other judges).

Finally, there was no uniform conclusion as to whether attorneys and litigants abused disqualification rules by seeking disqualifications for inappropriate reasons. Forty percent of the responding judges were neutral on this topic, while 32% agreed and 28% disagreed.

#### E. Conclusion.

One aim of this survey was to find out whether judicial conflict and removal issues constitute significant problems for Hawaii's judges and courts. Based on the survey results, the answer is no. In almost all respects the survey results are positive.

The results show Hawaii judges take removal issues very seriously, and clearly give those situations careful thought. Judges themselves initiate most removals, and disqualification motions are infrequent. When removal questions do arise, judges believe existing rules and decisions give them adequate guidance, although many judges choose to supplement the published rules with personal standards (which may or may not be communicated to litigants and their attorneys). The survey did not reveal any

widespread concerns that attorneys misuse disqualification rules to engage in “judge shopping” or other inappropriate practices. Most important, the responding judges believe that they and their peers remove themselves from cases when they should.

The survey also provides basic information about the most common reasons for recusal or disqualification. The responses to Question 7 show that the factors most likely to cause judges to recuse themselves are prior relationships with attorneys, parties or witnesses. The responses to Question 8 show that when litigants file disqualification motions, those motions are likely to include claims of bias. These responses from Hawaii’s judges are similar to results in other states.<sup>14</sup>

The survey responses certainly identify opportunities for improvement or further inquiry. For example, it is troubling that a substantial number of Hawaii judges think litigants believe decisions are affected by judges’ personal relationships and biases. Similarly, even though judges are generally comfortable with the rules and decisions that guide removal, those rules can clearly be improved.<sup>15</sup> Notwithstanding those and other legitimate concerns, the fundamental message of the survey is clear: In the view of Hawaii’s judges, existing removal and disqualification practices work.

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Respectfully submitted,

AJS Hawaii Chapter  
Special Committee on the Judiciary,  
Lawyers and the Issue of Conflicts in the  
Judicial System

November 28, 2007

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<sup>14</sup> In 1995, the American Judicature Society conducted an extensive empirical study that examined how judges addressed disqualification issues. Researchers submitted questionnaires to 972 state judges in three states (Nebraska, New Hampshire and Ohio). The AJS survey revealed that the most common bases for judges’ decisions to disqualify themselves are relationships with parties, witnesses or attorneys. The second most common reason for recusal identified in the AJS survey were allegations (whether accurate or not) of bias or prejudice. Jeffrey M. Shaman and Jona Goldschmidt, Judicial Disqualification: An Empirical Study of Judicial Practices and Attitudes (American Judicature Society 1995), at 51-54.

<sup>15</sup> See, e.g., these responses to Question 11b: “[Hawaii] Statute conflicts with judicial ethics rules. The word ‘shall’ [used] in the statute [applies even] when facts presented are incorrect or false.” “Canon [3] does not provide sufficient guidance regarding the kinds of situations that present the appearance of impropriety. For example does it appear to be improper to sit on a case where the judge’s own insurance company is a party?” “Procedures and bases for disqualification are not clear.” Similarly, the 1995 AJS survey discussed in the preceding footnote concluded (at page 2) that the 1990 version of the Model Code of Judicial Conduct “should be amended so as to provide judges with more examples of factual situations where disqualification is required, optional, or unnecessary. In particular, the areas of personal relationships and potential bias are in serious need of clarification.” The 2007 revision of the ABA Model Code includes limited changes. See Note 4.

## SURVEY ON RECUSAL AND DISQUALIFICATION: RESULTS

### SURVEY AND RESPONDENTS

- Developed by Special Committee on the Judiciary, Lawyers, and Issue of Conflicts in the Judicial System
- Mailed to all judges in Hawaii on December 2, 2006
- Reminder notice sent on February 17, 2007
- 139 surveys sent, 108 responded: 78% response rate
- Among respondents: 97 (91%) were trial judges, 10 (9%) were appellate judges, with no data for 1 respondent
- Among respondents: 40 (37%) were per diem judges, 67 (63%) were full-time judges, with no data for 1 respondent
- Among respondents who are trial judges: 35% with 0-5 years, 25% with 6-10 years, and 38% with more than 10 years of service as trial judge
- About one-third of respondents belong to court *with* automatic recusals, while two-thirds belong to court *without* automatic recusals.

Total Surveyed	No. Responded	Response Rate	
139	108	78%	
Trial Judges	Appellate Judges	Total Judges	Missing Information
97 (91%)	10 (9%)	107 (100%)	1
Per diem Judges	Full-time Judges	Total Judges	Missing Information
40 (37%)	67 (63%)	107 (100%)	1
Service as a Trial Judge			
0-5 Years	6-10 Years	More than 10 years	Total
35 (35%)	24 (25%)	38 (40%)	97 (100%)
Belong to a Court Which Has Automatic Recusals			
Yes	No	Total	Other <sup>a</sup>
33 (31%)	74 (69%)	107 (100%)	1

<sup>a</sup> One respondent belonged to a court that has automatic recusals, but recently joined a court that does not have automatic recusal.

1. What is the total number of different cases assigned to or handled by you in a typical year? If you are an appellate judge, include in your total all cases in which you are assigned to sit as a member of an appellate panel.

- **All judges: mean number of cases assigned or handled in typical year: 1335.**
- **Significant difference between trial (mean number of cases = 1461) and appellate judges (mean number of cases = 284).**
- **No significant differences between per diem vs. full-time judges and years of service as trial judge.**

	No. of respondent	Range	Mean	Median
All <sup>b</sup>	84	1 - 8,000	1335	500
Trial Judge	75	1 - 8,000	1461*	600
Appellate Judge	9	143 - 600	284*	200
Per diem Judge	25	1 - 7,500	1851	1000
Full-time Judge	58	120 - 8,000	1067	500
Service as a Trial Judge				
0-5	24	1 - 7,200	1845	1100
6-10	21	50 - 8,000	1457	500
More than 10 years	30	120 - 7,500	1157	525

<sup>b</sup> Information is missing for 18 cases; 5 more cases are excluded from analysis as they have extreme values: 20,000 (2), 25,000 (1), 30,000 (1) and 50000 (1); for one (1) case the response is "9999" and thus, excluded from the analysis

\* Difference in means between groups is significant at  $p=0.006$  (Mann-Whitney U test)

2a. Do you belong to a court that has a system for automatic recusals? That is, are you able to instruct the court clerk or other administrator ahead of time not to assign cases involving certain persons or parties to you, so that you never make case-specific recusal decisions in such cases?

- **All judges: about two-thirds (69%) do *not* belong to court with system for automatic recusals, while about one-third (31%) do.**
- **Significant difference between per diem and full-time judges: while higher percentages of both types of judges indicated *no* rather than *yes*, a higher proportion of the full-time judges responded *yes*.**
- **No significant differences between trial vs. appellate judges and years of service as trial judge.**

	No. of respondent	Yes (%)	No (%)
All	107	31	69
Trial Judge	97	30	70
Appellate Judge	9	44	56
Per diem Judge	40	13*	87*
Full-time Judge	66	42*	58*
Service as a Trial Judge			
0-5	35	14	86
6-10	24	42	58
More than 10 years	38	37	63

\* Differences between groups are significant at  $p = 0.01$  (Test of difference between column proportions)

2b. If you answered “no,” skip to question #3. If you answered “yes,” your responses to the remaining questions need not include the automatic recusals unless, in spite of your automatic recusals, cases were mistakenly assigned to you and you therefore made case-specific recusal decisions in those matters. If you are able to estimate the number of cases in which you have been bypassed through any automatic recusal system, you may include those cases in your answers, making it clear here that you are doing so.

Including automatic recusals in responses	12 (48%)
Not including automatic recusals in responses	13 (52%)
Total	25 (100%)



3. In a typical year, how many times are you removed from matters assigned to or handled by you?

- **All judges: very few times removed in a typical year (mean = 5 times)**
- **Significant difference between per diem and full-time judges (means of 3 vs. 6 times), but note small numbers**
- **No significant differences between trial vs. appellate judges and years of service as trial judge.**

	No. of respondent	Range	Mean	Median
All	102	0-50	5	3
Trial Judge	92	0-50	5	3
Appellate Judge	10	0-17	7	8
Per diem Judge	35	0-20	3*	2
Full-time Judge	66	0-50	6*	5
Service as a Trial Judge				
0-5	32	0-50	7	3
6-10	23	0-15	4	3
More than 10 years	37	0-15	4	3

\* Difference in means between groups is significant at  $p=0.03$  (Mann-Whitney U Test)

4. In a typical year, how many times do these removals result from disqualification motions?

- **All judges: very few removals result from disqualification motions in typical year—mean = less than 1.**
- **No significant differences between trial vs. appellate judges, per diem vs. full-time judges, and years of service as judge.**

	No. of respondent	Range	Mean	Median
All	95	0-2	0.1	0.0
Trial Judge	85	0-2	0.2	0.0
Appellate Judge	9	0	0.0	0.0
Per diem Judge	34	0-2	0.1	0.0
Full-time Judge	61	0-2	0.2	0.0
Service as a Trial Judge				
0-5	29	0-2	0.2	0.0
6-10	19	0-1	0.2	0.0
More than 10 years	37	0-2	0.2	0.0

5a. In a typical year, how many times do these removals result from recusals?

- **All judges: very few removals result from recusals in typical year, , and recusal results correspond to total removals reported in Question 3 (in each case, mean = 5)**
- **No significant differences between trial vs. appellate judges, per diem vs. full-time judges, and years of service as trial judge.**

	No. of respondent	Range	Mean	Median
All	101	0-49	5	3
Trial Judge	90	0-49	5	3
Appellate Judge	10	0-17	7	7
Per diem Judge	34	0-20	3	2
Full-time Judge	67	0-49	6	4
Service as a Trial Judge				
0-5	31	0-49	7	3
6-10	22	0-15	3	1
More than 10 years	37	0-15	4	3

5b. In a typical year, how many of your recusals were *not* based solely on your own initiative? (Examples: A party expresses a concern without bringing a motion, and you recuse yourself. A newspaper editorial calls for your recusal.)

- **All judges: very few recusals not based solely on own initiative in typical year—mean = less than 1.**
- **No significant differences between trial vs. appellate judges, per diem vs. full-time judges, and years service as trial judge.**

	No. of respondent	Range	Mean	Median
All	101	0-5	0.2	0.0
Trial Judge	91	0-5	0.2	0.0
Appellate Judge	9	0	0.0	0.0
Per diem Judge	36	0-1.5	0.1	0.0
Full-time Judge	65	0-5	0.3	0.0
Service as a Trial Judge				
0-5	31	0-3.5	0.2	0.0
6-10	22	0-1	0.2	0.0
More than 10 years	37	0-5	0.3	0.0

6. How many removals involved entire cases, as opposed to removals only from portions of cases? (For instance, you might remove yourself only with respect to a disqualification motion or a motion to intervene brought by someone with whom you have a close personal relationship.)
- **All judges: data indicate almost all removals affect the entire case (mean for Question 3 (total removals) = 5; mean for Question 6 = 4).**
  - **Significant difference between per diem (mean = 3) and full-time (mean = 5) judges, but note small numbers**
  - **No significant differences between trial vs. appellate judges and years of services as trial judge.**

	No. of respondent	Range	Mean	Median
All	100	0-27	4	2
Trial Judge	90	0-27	4	2
Appellate Judge	9	0-17	7	6
Per diem Judge	34	0-10	3*	2
Full-time Judge	66	0-27	5*	4
Service as a Trial Judge				
0-5	30	0-27	5	3
6-10	22	0-11	3	1
More than 10 years	38	0-15	4	3

\* Difference in means between groups is significant at  $p=0.02$  (Mann-Whitney U Test)

7. With respect to cases from which you recused yourself without a motion in the past five years, please complete the following in two ways. In the first column, “Factors,” check *all* the items that caused you to recuse yourself. In the second column, “Rank,” rank the five most common factors (or fewer, if fewer than five factors have influenced you) that have influenced your decisions, with “1” being the most common.
- **Factors for recusals that received most checks from 82 judges (trial or appellate judge, per diem or full-time judge) who recused themselves without a motion in the past five years: *close relationship with an attorney, party, or witness in matter (75% – 89%), you or family member were/was a party, officer, director, or trustee of a party, lawyer in case, person with more than a de minimus interest, or likely to be a material witness (46% – 67%), and personal knowledge of disputed facts in case (32% - 39%, except for appellate judges who had you or a family member had a financial interest in the case or in a party in the case as the recusal factor with third highest percentage.***
  - **Significant difference between trial vs. appellate judges (11% vs. 56%) and per diem vs. full-time judges (4% vs. 22%) in recusal factor *you or a family member had a financial interest in the case or in a party in the case.***
  - **Of the respondents who identified *close relationship with an attorney, party, or witness in matter* as a factor for recusal, more than half (58%) ranked it as the first factor; of those who identified *you or family member were/was a party, officer, director, or trustee of a party, lawyer in case, person with more than a de minimus***

*interest, or likely to be a materials witness as a factor for recusal, 44%-52% ranked it as the first factor for recusal.*

Factors for Recusal	All <sup>c</sup> (%) (N=82)	Type of Judge (%)		Type of Judge (%)	
		Trial Judge (N=72)	Appellate Judge (N=9)	Per diem Judge (N=28)	Full-time Judge (N=54)
Personal bias or prejudice concerning a party or lawyer	22	22	22	25	20
Personal knowledge of disputed facts in case	37	39	22	32	39
You or a family member were/was: a party, or an officer a director, or a trustee of a party; a lawyer in the case; a person with more than a <i>de minimus</i> interest that could be affected by the case; or someone likely to be a material witness.	50	49	67	46	52
You or a family member had a financial interest in the case or in a party in the case	16	11***	56***	4*	22*
You made a public statement (other than in a judicial decision) that committed or appeared to commit to reach a particular result related to the case	1	1	0	0	2
You were a lawyer in the controversy or associated with a lawyer who participated substantially in the matter during such association	22	22	22	21	22
You were in public employment and in that capacity participated as a lawyer or advisor concerning the case or expressed an opinion on the merits of the case	9	8	11	4	11
You were a material witness concerning the matter	0	0	0	0	0
You previously presided as a judge in the case in another court	5	4	11	4	6
You had a close relationship with an attorney, party, or witness in the matter.	76	75	89	71	78
Your impartiality might reasonably be questioned for reasons not set forth in the above choices	13	13	22	7	17
Other	11	8	22	7	13

<sup>c</sup> Multiple answers acceptable

\* Difference between groups is significant at p=0.05 (Test of difference between column proportions)

\*\*\* Difference between groups is significant at p=0.001 (Test of difference between column proportions)



Factors for Recusal	All				Per diem Judge				Full-time Judge			
	N <sup>d</sup>	Rank 1 (%)	Rank 2 (%)	Rank 3+ (%)	N	Rank 1 (%)	Rank 2 (%)	Rank 3+ (%)	N	Rank 1 (%)	Rank 2 (%)	Rank 3+ (%)
concerning the matter												
You previously presided as a judge in the case in another court	4	25	50	25	1	0	100	0	3	33	33	33
You had a close relationship with an attorney, party, or witness in the matter.	59	58	31	11	19	58	37	5	40	58	28	14
Your impartiality might reasonably be questioned for reasons not set forth in the above choices	10	20	30	50	1	100	0	0	9	11	33	56
Other	8	38	25	37	2	100	0	0	6	17	33	50

<sup>d</sup>Ranking is applicable for cases responding “Yes” to that factor. Because of small sample size, information is not presented for trial and appellate judges

8a. Have any motions to disqualify you been filed in the last five years?

- **All judges: About two-thirds (64%) had *no* motions to disqualify them in last 5 years, while one-third (36%) had motions.**
- **Significant difference between per diem and full-time judges (15% vs. 49% with motions and 85% vs. 51% without motions).**
- **No significant differences between trial vs. appellate judges and years of service as judge.**

	No. of respondent	Yes (%)	No (%)
All	108	36	64
Trial Judge	97	37	62
Appellate Judge	10	20	80
Per diem Judge	40	15***	85***
Full-time Judge	67	49***	51***
Service as a Trial Judge			
0-5	35	37	63
6-10	24	29	71
More than 10 years	38	42	58

\*\*\* Differences between groups are significant at p=0.001 (Test of difference between column proportions)

8b. If you answered “no,” skip to question #9. If you answered “yes,” how many such motions were filed in the last five years?

- **All judges: of the 22 respondents who had motions filed in last five years and responded to this question, the mean number of motions = 3, with range of 1 to 10 motions filed.**
- **No significant differences between trial vs. appellate judges, per diem vs. full-time judges, and years of service as trial judge.**

	No. of respondent	Range	Mean	Median
All <sup>e</sup>	22	1-10	3	2
Trial Judge	20	1-10	3	2
Appellate Judge	1	0	0	0
Per diem Judge	4	1-3	2	1
Full-time Judge	18	1-10	3	2
Service as a Trial Judge				
0-5	6	1-4	2	2
6-10	5	1-10	3	2
More than 10 years	9	1-8	3	2

<sup>e</sup> This question is eligible for 39 respondents who answered “yes” to question 8a. However, only 22 respondents answered this question and information is missing for 17 respondents.

8c. Check *all* bases for the motions (multiple answers acceptable):

- **Of the motions filed to disqualify judges in the last five years, the major bases for the motion was *personal bias or prejudice concerning a party or lawyer* (64% of all judges, 69% of trial judges, 50% of per diem judges and 67% of full-time judges checked this item).**

Bases for the Motions	All (%) (N=39)	Type of Judge (%)		Type of Judge (%)	
		Trial Judge (N=36)	Appellate Judge (N=2)	Per diem Judge (N=6)	Full-time Judge (N=33)
Personal bias or prejudice concerning a party or lawyer	64	69	0	50	67
Personal knowledge of disputed facts in case	3	3	0	0	3
You or a family member were/was: a party, or an officer a director, or a trustee of a party; a lawyer in the case; a person with more than a <i>de minimus</i> interest that could be affected by the case; or someone likely to be a material witness.	8	8	0	0	9
You or a family member had a financial interest in the case or in a party in the case	0	0	0	0	0
You made a public statement (other than in a judicial decision) that committed or appeared to commit to reach a particular result related to the case	0	0	0	0	0
You were a lawyer in the controversy or associated with a lawyer who participated substantially in the matter during such association	3	3	0	17	0
You were in public employment and in that capacity participated as a lawyer or advisor concerning the case or expressed an opinion on the merits of the case	5	6	0	0	6
You were a material witness concerning the matter	0	0	0	0	0
You previously presided as a judge in the case in another court	0	0	0	0	0
You had a close relationship with an attorney, party, or witness in the matter.	15	17	0	17	15
Your impartiality might reasonably be questioned for reasons not set forth in the above choices	13	13	0	0	15
Other	15	8	100	17	15



9. State the number, if any, of matters over which you have presided in the last five years with the parties' agreement, after you disclosed waivable grounds for your removal.

- **All judges: number of matters presided over in last five years with parties' agreement after disclosure is small (mean = 6).**
- **Significant difference between trial vs. appellate judges (means of 6 vs. 2)**
- **No significant differences between per diem and full-time judges and years of service as judge.**

	No. of respondent	Range	Mean	Median
All	102	0-100	6	3
Trial Judge	91	0-100	6*	3
Appellate Judge	10	0- 10	2*	0
Per diem Judge	35	0- 25	4	2
Full-time Judge	66	0-100	6	3
Service as a Trial Judge				
0-5	32	0- 25	4	2
6-10	23	0- 30	6	3
More than 10 years	36	0-100	8	4

\* Difference in means between groups is significant at p=0.04 ((Mann-Whitney U test)

10.a. Do you have any personal standards or practices concerning recusals or disclosure of possible recusal considerations? These may be (a) practices that augment applicable rules or statutes, making your own recusal criteria more stringent than required by statute or code; (b) practices that you believe implement more concretely general statutes or codes; or (c) simply your own practices.

- **All judges: More judges *do not* have (56% vs. 44% who do) personal standards or practices concerning recusals or disclosure of possible recusal considerations.**
- **Significant difference between per diem (higher percentage *do not* have-72% vs. 28%) vs. full-time judges (higher percentage *have*—54 % vs. 46%).**
- **No significant differences between trial vs. appellate judges and years of service as judge.**

	No. of respondent	Yes (%)	No (%)
All	107	44	56
Trial Judge	96	41	59
Appellate Judge	10	70	30
Per diem Judge	39	28*	72*
Full-time Judge	67	54*	46*
Service as a Trial Judge			
0-5	34	32	68
6-10	24	54	46
More than 10 years	38	40	60

\* Differences between groups are significant at p=0.05 (Test of difference between column proportions)

10.b. If you answered “no,” skip to question 10. If you answered “yes,” please describe those personal standards or practices below. (Examples: You may (a) routinely recuse yourself from cases involving attorneys with whom you have had lunch or dinner within the last year in a setting other than a bar function, convention, wedding, or other very large social event; (b) routinely recuse yourself from cases involving neighbors, cousins, or member of boards on which you currently serve; and/or (c) disclose certain relationships or financial interests beyond what is required by statute or code.)

- **Among judges with personal standards or practices, the largest number of standards/ practices contained references to recusal from cases involving friends, neighbors, cousins, or board affiliation (23 citations), followed by disclosures regarding relationships (15 citations), and recusals from cases involving attorneys (12 citations).**

**A. Disclose any potential problem (3)**

1. As a former government attorney, I often hold Status conferences to disclose my prior employment.
2. Any potential problem is disclosed, however attenuated.
3. At beginning of proceeding explain/disclose potential conflict to all counsel & parties on record.

**B. Disclose certain relationships (15)**

1. Disclose certain relationships beyond what is required by statute or code.
2. Disclose certain relationships beyond what is required by statute or code.
3. Disclose certain relationships beyond what is required by statute or code.
4. Disclose certain relationships beyond what is required by statute or code.
5. As a general rule, I disclose where a party was a prior client.
6. Disclose certain relationships beyond what is required by statute or code.
7. Disclose if I have any private practice matter wherein one of the attorneys may be involved.
8. Disclosure of friends, distant family members and former law clerks and co-workers.
9. I routinely recuse myself if a party is a relative, close friend or neighbor. If not a close friend, I will disclose our relationship and poll the parties.
10. I tell counsel of any contact with counsel or witness in cases.
11. I will disclose social relationships or prior employment relationships with an involved attorney or party.
12. If have financial, professional or personal relationship, I disclose. If relationship could create appearance of impropriety, I get off the case.
13. I will disclose family relationships that are more distant.
14. Disclose certain relationships beyond what is required by statute or code.
15. Disclose certain relationships beyond what is required by statute or code.

**C. Disclose financial interests beyond what is required by law (8)**

1. Disclose financial interests beyond what is required by statute or code.
2. Disclose financial interests beyond what is required by statute or code.
3. Disclose financial interests beyond what is required by statute or code.
4. Disclose financial interests beyond what is required by statute or code.
5. Disclose financial interests beyond what is required by statute or code.
6. If have financial, professional or personal relationship, I disclose. If relationship could create appearance of impropriety, I get off the case.
7. Disclose financial interests beyond what is required by statute or code.
8. Disclose financial interests beyond what is required by statute or code.

**D. Recuse from cases involving attorney (12)**

1. Attorney is a very close, personal friend.
2. If one of the attorneys is a personal friend.
3. Routinely recuse myself from cases involving former clients where the current case may be affected by prior attorney-client relationship.
4. Routinely recuse from cases involving attorneys with whom I have had lunch or dinner within the last year in a setting other than a bar function, convention, wedding, or other very large social event.
5. Routinely recuse from cases involving attorneys with whom I have had lunch or dinner within the last year in a setting other than a bar function, convention, wedding, or other very large social event.
6. I disqualify myself from cases for any reason set forth in Hawaii Revised Statutes sec. 601-7(1993). I recuse myself from cases involving friends and attorneys with whom I socialize or maintain regular contact, or who are members of organizations that I work.
7. I recuse myself in cases where the attorney is a person whom I would invite to a social gathering that is unrelated to matters concerning the law or who would invite me to such a gathering.
8. Personal, social relationships with attorneys; recuse myself from disputes involving relatives or neighbors or involving boards I may be affiliated with.
9. Routinely recuse from cases involving attorneys with whom I have had lunch or dinner within the last year in a setting other than a bar function, convention, wedding, or other very large social event.
10. Recuse from cases where close personal friends are attorneys or directors of an entity.
11. Recuse myself from any case involving a defendant who was pursued by [my former] office during my tenure.

**E. Recuse from cases involving friends, neighbors, cousins, or member of boards current serving (23)**

1. Relatives, neighbors.
2. If my husband's law firm is involved; if member of my prior law firm is involved.
3. Persons with whom I socialize; former partners and associates; husband's employer.
4. Routinely recuse myself from cases involving neighbors, cousins, or member of boards on which I currently serve.
5. Recuse former law clerks' cases for one year.
6. Routinely recuse myself from cases involving neighbors, cousins, or member of boards on which I currently serve.
7. Routinely recuse myself from cases involving neighbors, cousins, or member of boards on which I currently serve.
8. Routinely recuse myself from cases involving neighbors, cousins, or member of boards on which I currently serve.
9. Lawyers with whom I regularly lunch or play golf; lawyers I was associated with in practice.
10. Routinely recuse myself from cases involving neighbors, cousins, or member of boards on which I currently serve.
11. I recuse myself from cases involving friends and attorneys with whom I socialize or maintain regular contact, or who are members of organizations that I work with.
12. I recuse for friends and neighbors who are parties even though within the 3rd degree relationship. Although I feel that I can be fair, the relationship sometimes becomes strained if you rule against them as parties.
13. I routinely recuse myself from cases in which my former law firm is involved.
14. I routinely recuse myself from cases involving close personal friends who are parties or represent parties in cases before me.
15. I routinely recuse myself from cases wherein my former law partner of 22 yrs is involved even though the partnership terminated when I became a judge.
16. I routinely recuse myself if a party is a relative, close friend or neighbor. If not a close friend, I will disclose our relationship and poll the parties. If there are any concerns after disclosure, I will recuse myself.
17. If have financial, professional or personal relationship, I disclose. If relationship could create appearance of impropriety, I get off the case.
18. If I attend events that are purely social that are attended by fewer than 10 people and are with a person at more than 3 such events in a year, I will recuse myself from cases involving that person. I will disclose family relationships that are more distant.
19. If the nature of the case creates an appearance of impropriety, perhaps because of a social relationship I have or had with a party, I may elect to recuse myself rather than draw into controversy the nature of my past or present relationship.
20. Personal, social relationships with attorney; recuse myself from disputes involving relatives or neighbors or involving boards I may be affiliated with.
21. Routinely recuse myself from cases involving neighbors, cousins, or member of boards on which I currently serve.
22. Recuse from cases where close personal friends are attorneys or directors of an entity.
23. Routinely recuse myself from cases involving neighbors, cousins, or member of boards on which I currently serve.

**F. Recuse from cases involving family (2)**

1. If my husbands law firm is involved.
2. Routinely recuse if there may be a perception by the parties that due to a family relationship, my decision may be affected.

**G. Other (7)**

1. [I note the] Appearance of conflict and place it on the record.
2. At beginning of proceeding explain/disclose potential conflict to all counsel & parties on record. Allow anyone to add additional facts. Then allow parties & counsel an opportunity to state their positions.
3. Cases in which my fairness might be questioned.
4. For me, the overarching question is whether the identity of any party or party's representative will highly affect my capacity to be fair and impartial.
5. Regularly socialize.
6. The degree to which the matter is likely to be subject of a real dispute is an important consideration. I would be less likely for example to recuse where the matter was an uncontested divorce.
7. I feel that any appearance of impropriety or impartiality may be present, I err on the side of caution.

11a. Do you find that existing statutes or codes of conduct, and rulings and decisions interpreting or applying those provisions, provide adequate guidance in the area of recusal or disqualification?

- **The vast majority of judges (95%) indicate there is adequate guidance in area of recusal or disqualification.**
- **Although most per diem and full-time judges indicate there is adequate guidance, there is a significant difference in the proportion of these judges who answered *yes* (90% vs. 98%) and *no* (10% vs. 2%).**
- **No significant differences between trial vs. appellate judges or years of service as a judge.**

	No. of respondent	Yes (%)	No (%)
All	103	95	5
Trial Judge	92	95	5
Appellate Judge	10	100	0
Per diem Judge	38	90*	10*
Full-time Judge	64	98*	2*
Service as a Trial Judge			
0-5	34	97	3
6-10	23	91	9
More than 10 years	35	94	6

\* Differences between groups are significant at  $p=0.05$  (Test of difference between column proportions)

11b. Below, state your concerns, if any, regarding existing provisions, and identify in your response the specific provision(s), ruling(s), or other matter(s) that pose problems. (Verbatim)

*“Statute conflicts with judicial ethics rules. The word “shall” in the statute when facts presented are incorrect or false”*

*“Canon 2 does not provide sufficient guidance regarding the kinds of situations that present the appearance of impropriety. For example does it appear to be improper to sit on a case where the judge's own insurance company is a party?”*

*“[For] those of us who work on the outer islands this issue can create lots of problems unless applied with a dose of common sense. Many of us know a very high percentage of the people that we see in court in one capacity or another”*

*“Procedures and bases for disqualification are not clear”*

12a. Do you know of a case (whether decided by you or by another judge) in which a motion to disqualify a judge had a negative effect on a case, litigant, or attorney?

- **The vast majority of all judges (91%) indicate they do not know of a case in which a motion to disqualify a judge had a negative effect on the case, litigant, or attorney.**
- **No significant differences between trial vs. appellate judges, per diem vs. full-time judges, or years of service as a judge.**

	No. of respondent	Yes (%)	No (%)
All	108	9	91
Trial Judge	96	9	91
Appellate Judge	10	10	90
Per diem Judge	40	3	97
Full-time Judge	67	13	87
Service as a Trial Judge			
0-5	35	6	94
6-10	24	8	92
More than 10 years	38	13	87

12b. If yes, what form did the negative effect take? Check all that apply:

- **Of the 10 respondents who indicated there was a negative effect on cases, the most cited effects were: the case was significantly delayed (50%) and the judge was irritated (40%).**

Response category (N=10)	Yes (%)
(1) Judge was irritated	40
(2) Judge took a hard look at scheduling requests	0
(3) Judge leaned against attorney's substantive position	0
(4) Case was significantly delayed	50
(5) New judge to whom case was assigned was unfairly burdened	20
(6) Other; please describe below: (verbatim)	20
<i>"Litigants' costs and fees increased by motions for reconsideration and writs to Supreme Court".</i>	
<i>"Some attorneys appear somewhat uncomfortable if their M/disqualify is denied and the judge continues to preside".</i>	
<i>"Litigant perception that attorney's opinion was correct instead of judges"</i>	

12c. What percentage of disqualification motions (whether in cases decided by you or by another judge) do you believe resulted in a negative effect on a case, litigant, or attorney?

- **Nearly half of the 83 responding judges (48%) believe less than 1% of disqualification motions result in a negative effect on a case, litigant, or attorney.**

Response category	All (%) (N=83)	Type of Judge (%)		Type of Judge (%)	
		Trial Judge (N=73)	Appellate Judge (N=9)	Per diem Judge (N=26)	Full-time Judge (N=56)
0%	30	31	33	19	36
Less than 1%	18	21	0	19	18
1% to 5%	10	11	0	12	9
6% to 10%	1	1	0	0	2
11% to 25%	3	3	0	0	3
26% to 50%	3	3	0	4	2
More than 50%	0	0	0	0	0
Do not know	36	32	67	46	30

13. Circle the number that best corresponds to your agreement or disagreement with the following statements:

- Nearly three-fourths of responding judges (71%) agree or strongly agree that *litigants* perceive that a judge's personal relationships and biases affect the judicial decisions rendered, while 16% disagree or strongly disagree.
- Over one-half (55%) of responding judges agree or strongly agree that *attorneys* perceive that a judge's personal relationships and biases affect the judicial decisions rendered, while 24% disagree or strongly disagree.
- Less than one-fifth (18%) of responding judges agree or strongly agree that *judges* perceive that a judge's personal relationships and biases affect the judicial decisions rendered, while 63% disagree or strongly disagree.
- Over 60% of responding judges agree or strongly agree that most judges have developed personal standards or practices. Note that 44% of judges indicated in an earlier question that they had personal standards or practices.
- Over 80% of responding judges disagree or strongly disagree that judges do not recuse themselves when they should.
- Judges were split (35% agree or strongly agree, 35% neutral, 30% disagree or strongly disagree) regarding whether judges recuse themselves when they shouldn't.
- More judges were neutral (40%) than in agreement (32% agree or strongly agree) or disagreement (28% disagree or strongly disagree) regarding whether attorney or litigants abuse the disqualification process by seeking disqualifications for inappropriate reasons.
- Significant difference between per diem vs. full-time judges in percentages who responded "neutral" to two statements: (1) *There is a perception among judges that a judge's personal relationships and biases affect the judicial decisions rendered, and (2) Most judges have developed personal standards or practices that augment, clarify, or assist them in implementing the Hawaii Code of Judicial Conduct.*



Statement	Response category	All (N=107) %	Type of Judge (%)		Type of Judge (%)	
			Trial Judge (N=96)	Appellate Judge (N=10)	Per diem Judge (N=39)	Full-time Judge (N=67)
There is a perception among <i>litigants</i> that a judge's personal relationships and biases affect the judicial decisions rendered.	Agree or strongly agree	71	70	80	74	70
	Neutral	13	14	10	8	15
	Disagree or strongly disagree	16	17	10	18	15
There is a perception among <i>attorneys</i> that a judge's personal relationships and biases affect the judicial decisions rendered.	Agree or strongly agree	55	53	70	54	57
	Neutral	21	21	20	26	16
	Disagree or strongly disagree	24	26	10	20	27
There is a perception among <i>judges</i> that a judge's personal relationships and biases affect the judicial decisions rendered.	Agree or strongly agree	18	18	20	15	19
	Neutral	19	21	0	30*	12*
	Disagree or strongly disagree	63	62	80	55	69
Most judges have developed personal standards or practices that augment, clarify, or assist them in implementing the Hawaii Code of Judicial Conduct.	Agree or strongly agree	62	59	80	51	67
	Neutral	31	32	20	44*	24*
	Disagree or strongly disagree	7	8	0	5	9
Judges do not recuse themselves when they should.	Agree or strongly agree	5	5	0	8	3
	Neutral	14	13	20	18	12
	Disagree or strongly disagree	81	82	80	74	85
Judges recuse themselves when they shouldn't.	Agree or strongly agree	35	33	40	28	39
	Neutral	35	38	20	41	31
	Disagree or strongly disagree	30	29	40	31	30
Attorneys or litigants abuse then disqualification process by seeking disqualifications for inappropriate reasons	Agree or strongly agree	32	32	30	23	38
	Neutral	40	38	60	35	42
	Disagree or strongly disagree	28	30	10	42*	20*

\* Differences between groups are significant at p=0.05 (Test of difference between column proportions)

SURVEY ON RECUSAL AND DISQUALIFICATION

Instructions: Please mark or write in your response to the items in the survey. If you do not know a specific number when one is asked for, enter your best estimate. When the survey is completed, please put it in the enclosed envelope and send it to the Center on the Family at the University of Hawai'i by \_\_\_(enter date here)\_\_\_\_. Note that you are not asked to identify yourself in this survey. Thank you for your honest responses.

Definitions: Recusal is used in this survey to refer to instances in which a judge, without any formal motion, removes herself/himself from a case. Disqualification is used to refer to removals that result from motions brought by litigants. Removal is used to refer generally to instances in which a judge ceases to preside over a matter, whether as a result of a recusal or a disqualification motion.

If there is insufficient space on the survey for your written responses, continue writing on the back of the page or attach other sheets of paper to the survey.

- 1. What is the total number of different cases assigned to or handled by you in a typical year? ...
2. a. Do you belong to a court that has a system for automatic recusals? ...
b. If you answered "no," skip to question #3. ...
3. In a typical year, how many times are you removed from matters assigned to or handled by you?
4. In a typical year, how many times do these removals result from disqualification motions?

Table with 4 rows and 2 columns: Question ID (Q01-Q04) and COF Use Only.

**EXHIBIT 2**

5. a. In a typical year, how many times do these removals result from recusals?  
Total number: \_\_\_\_
- b. In a typical year, how many of your recusals were *not* based solely on your own initiative? (Examples: A party expresses a concern without bringing a motion, and you recuse yourself. A newspaper editorial calls for your recusal.)  
Total number: \_\_\_\_  
List reasons below:

6. How many removals involved entire cases, as opposed to removals only from portions of cases? (For instance, you might remove yourself only with respect to a disqualification motion or a motion to intervene brought by someone with whom you have a close personal relationship.)  
Total number of entire cases: \_\_\_\_

7. With respect to cases from which you recused yourself without a motion in the past five years, please complete the following in two ways. In the first column, "Factors," check *all* the items that caused you to recuse yourself. In the second column, "Rank," rank the five most common factors (or fewer, if fewer than five factors have influenced you) that have influenced your decisions, with "1" being the most common.

**Factors    Rank**

- \_\_\_\_ a. Personal bias or prejudice concerning a party or lawyer.
- \_\_\_\_ b. Personal knowledge of disputed facts in case.
- \_\_\_\_ c. You or a family member\* were/was:  
     (1) a party, or an officer a director, or a trustee of a party;  
     (2) a lawyer in the case;  
     (3) a person with more than a *de minimus* interest that could be affected by the case; or  
     (4) someone likely to be a material witness.
- \_\_\_\_ d. You or a family member had a financial interest in the case

\* "Family member" includes your spouse or partner, a person within the third degree of relationship to you (or to your spouse or partner), or the spouse or partner of such a person.

**COF Use Only**

Q05a \_\_\_\_\_

Q05b \_\_\_\_\_

Q05bT \_\_\_\_\_

Q05bR \_\_\_\_\_

Q06 \_\_\_\_\_

F07a \_\_\_\_\_ R07a \_\_\_\_\_

F07b \_\_\_\_\_ R07b \_\_\_\_\_

F07c \_\_\_\_\_ R07c \_\_\_\_\_

F07d \_\_\_\_\_ R07d \_\_\_\_\_

EXHIBIT 2

COF Use Only

- \_\_\_ or in a party in the case.
- \_\_\_ e. You made a public statement (other than in a judicial decision) that committed or appeared to commit to reach a particular result related to the case.
- \_\_\_ f. You were a lawyer in the controversy or associated with a lawyer who participated substantially in the matter during such association.
- \_\_\_ g. You were in public employment and in that capacity participated as a lawyer or advisor concerning the case or expressed an opinion on the merits of the case.
- \_\_\_ h. You were a material witness concerning the matter.
- \_\_\_ i. You previously presided as a judge in the case in another court.
- \_\_\_ j. You had a close relationship with an attorney, party, or witness in the matter.
- \_\_\_ k. Your impartiality might reasonably be questioned for reasons not set forth in the above choices. Explain generally below:
  
- \_\_\_ l. Other. Explain generally below:

F07e \_\_\_ R07e \_\_\_

F07f \_\_\_ R07f \_\_\_

F07g \_\_\_ R07g \_\_\_

F07h \_\_\_ R07h \_\_\_

F07i \_\_\_ R07i \_\_\_

F07j \_\_\_ R07j \_\_\_

F07k \_\_\_ R07k \_\_\_

F07k\_T \_\_\_\_\_

F07k\_TR \_\_\_\_\_

F07l \_\_\_ R07l \_\_\_

F07l\_T \_\_\_\_\_

F07l\_TR \_\_\_\_\_

8. a. Have any motions to disqualify you been filed in the last five years?

- Yes
- No

Q08a \_\_\_\_\_

b. If you answered "no," skip to question #9. If you answered "yes," how many such motions were filed in the last five years?

Total number of motions: \_\_\_

Q08b \_\_\_\_\_

c. Check *all* bases for the motions:

- (1) Personal bias or prejudice concerning a party or lawyer.

Q08c\_1 \_\_\_\_\_

**EXHIBIT 7**

COF Use Only

- (2) Personal knowledge of disputed facts in case.
- (3) You or a family member (see note for Question 7) were/  
was:
  - (a) a party, or an officer, a director, or a trustee of a party;
  - (b) a lawyer in the case;
  - (c) a person with more than a *de minimus* interest that could be affected by the case; or
  - (d) someone likely to be a material witness.
- (4) You or a family member had a financial interest in the case or in a party in the case.
- (5) You made a public statement (other than in a judicial decision) that committed or appeared to commit to reach a particular result related to the case.
- (6) You were a lawyer in the controversy or associated with a lawyer who participated substantially in the matter during such association.
- (7) You were in public employment and in that capacity participated as a lawyer or advisor concerning the case or expressed an opinion on the merits of the case.
- (8) You were a material witness concerning the matter.
- (9) You previously presided as a judge in the case in another court.
- (10) You had a close relationship with an attorney, party, or witness in the matter.
- (11) Your impartiality might reasonably be questioned for reasons not set forth in the above choices. Explain generally below:
  
- (12) Other. Explain generally below:

Q08c\_2 \_\_\_\_\_

Q08c\_3 \_\_\_\_\_

Q08c\_4 \_\_\_\_\_

Q08c\_5 \_\_\_\_\_

Q08c\_6 \_\_\_\_\_

Q08c\_7 \_\_\_\_\_

Q08c\_8 \_\_\_\_\_

Q08c\_9 \_\_\_\_\_

Q08c\_10 \_\_\_\_\_

Q08c\_11 \_\_\_\_\_

Q08c\_11T \_\_\_\_\_

Q08c\_11TR \_\_\_\_\_

Q08c\_12 \_\_\_\_\_

Q08c\_12T \_\_\_\_\_

Q08c\_12TR \_\_\_\_\_

**EXHIBIT 2**

9. State the number, if any, of matters over which you have presided in the last five years with the parties' agreement, after you disclosed waivable grounds for your removal.

Total number: \_\_\_\_

10. a. Do you have any personal standards or practices concerning recusals or disclosure of possible recusal considerations? These may be (a) practices that augment applicable rules or statutes, making your own recusal criteria more stringent than required by statute or code; (b) practices that you believe implement more concretely general statutes or codes; or (c) simply your own practices.

Yes       No

b. If you answered "no," skip to question 10. If you answered "yes," please describe those personal standards or practices below. (Examples: You may (a) routinely recuse yourself from cases involving attorneys with whom you have had lunch or dinner within the last year in a setting other than a bar function, convention, wedding, or other very large social event; (b) routinely recuse yourself from cases involving neighbors, cousins, or member of boards on which you currently serve; and/or (c) disclose certain relationships or financial interests beyond what is required by statute or code.)

11. a. Do you find that existing statutes or codes of conduct, and rulings and decisions interpreting or applying those provisions, provide adequate guidance in the area of recusal or disqualification?

Yes       No

b. Below, state your concerns, if any, regarding existing provisions, and identify in your response the specific provision(s), ruling(s), or other matter(s) that pose problems.

**COF Use Only**

Q09 \_\_\_\_\_

Q10a \_\_\_\_\_

Q10bT \_\_\_\_\_

Q10bTR \_\_\_\_\_

Q11a \_\_\_\_\_

Q11b \_\_\_\_\_

Q11bR \_\_\_\_\_

**EXHIBIT 2**

12. a. Do you know of a case (whether decided by you or by another judge) in which a motion to disqualify a judge had a negative effect on a case, litigant, or attorney?

- Yes       No

b. If yes, what form did the negative effect take? Check all that apply:

- (1) Judge was irritated
- (2) Judge took a hard look at scheduling requests
- (3) Judge leaned against attorney's substantive position
- (4) Case was significantly delayed
- (5) New judge to whom case was assigned was unfairly burdened
- (6) Other; please describe below

c. What percentage of disqualification motions (whether in cases decided by you or by another judge) do you believe resulted in a negative effect on a case, litigant, or attorney?

- 0%
- Less than 1%
- 1% to 5%
- 6% to 10%
- 11% to 25%
- 26% to 50%
- More than 50%
- Don't know

**COF Use Only**

Q12a \_\_\_\_\_

Q12b01 \_\_\_\_\_

Q12b02 \_\_\_\_\_

Q12b03 \_\_\_\_\_

Q12b04 \_\_\_\_\_

Q12b05 \_\_\_\_\_

Q12b06 \_\_\_\_\_

Q12b06T \_\_\_\_\_

Q12b06R \_\_\_\_\_

Q12c \_\_\_\_\_

**EXHIBIT 2**

~~CGF Use~~  
Only

13. Circle the number that best corresponds to your agreement or disagreement with the following statements:

Statement	Strongly agree	Agree	Neutral	Disagree	Strongly disagree
a. There is a perception among <i>litigants</i> that a judge's personal relationships and biases affect the judicial decisions rendered.	1	2	3	4	5
b. There is a perception among <i>attorneys</i> that a judge's personal relationships and biases affect the judicial decisions rendered.	1	2	3	4	5
c. There is a perception among <i>judges</i> that a judge's personal relationships and biases affect the judicial decisions rendered.	1	2	3	4	5
d. Most judges have developed personal standards or practices that augment, clarify, or assist them in implementing the Hawaii Code of Judicial Conduct.	1	2	3	4	5
e. Judges do not recuse themselves when they should.	1	2	3	4	5
f. Judges recuse themselves when they shouldn't.	1	2	3	4	5
g. Attorneys or litigants abuse the disqualification process by seeking disqualifications for inappropriate reasons.	1	2	3	4	5

Q13a\_\_\_

Q13b\_\_\_

Q13c\_\_\_

Q13d\_\_\_

Q13e\_\_\_

Q13f\_\_\_

Q13g\_\_\_

14. Are you a trial or appellate judge?

- Trial judge       Appellate judge

Q14\_\_\_

15. If you are a trial judge, how many years have you served as a judge? (Appellate judges need not respond to this question.)

- 0-5 years  
 6-10 years  
 More than 10 years

Q15\_\_\_



**EXHIBIT 2**

COF Use Only

16. Are you a per diem judge?

Yes       No

17. Please feel free to add any comments regarding this survey or the subject of recusal or disqualification in the space below.

Q16 \_\_\_\_\_

Q17T \_\_\_\_\_