Judicial Recusal & Disqualification: Is Sexual Orientation a Valid Cause in Florida?

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I. INTRODUCTION

An essential cornerstone of our American legal system is equality and justice to individuals under the law. The United States Supreme Court has achieved this goal by continuously holding that "[a] fair trial in a fair tribunal is a basic requirement of due process." This concept has stood for the prem-

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ise that "[a] judge [will] perform judicial duties without bias or prejudice." This important principal has been a major cornerstone of the judiciary since the beginning of common law. There are two fundamental principals that the law of judicial disqualification rests upon; first, "no-one should be a judge in his own cause," and second, "Lord Hewart’s famous maxim that justice should not only be done ‘but manifestly and undoubtedly be seen to be done,’ [which] is evidence of the intimate relationship between judicial impartiality and the legitimacy of the legal system."

The law of the United States has since developed and now both individualized states and the national government have created codes that govern judicial conduct. The governing codes are the United States Code of Judicial and Judicial Procedure and the Model Code of Judicial Conduct that was adopted by the American Bar Association (ABA) House of Delegates in 1972, stating under what circumstances a judge shall be disqualified for his or her failure to apply the law impartially and diligently. In 1990, the ABA revised the Code of Judicial Conduct “creating a prohibition on sexual orientation bias in Canon 3,” resulting in several states specifically prohibiting judicial bias based on sexual orientation. Although many of these rules clearly put the world on notice as to when judicial disqualification or recusal


5. Kate Malleson, Judicial Bias and Disqualification After Pinochet (No. 2), 63 MOD. L. REV. 119, 120 (2000).


9. Impartially is defined as “without bias.” BLACK'S LAW DICTIONARY 767 (8th ed. 2004).

10. See 28 U.S.C. § 455; see also FLA. CODE JUD. CONDUCT Canon 3.

11. Duncan, supra note 8, at 87.
is appropriate, one rule is not as clear, and that is whether a judge in Florida should be disqualified or recused from a case because of his or her sexual orientation, when sexual orientation is the main issue at stake.

This note will examine cases, governing rules of law, statutes, articles, and journals that have surrounded this topic, and suggest whether judicial recusal based on sexual orientation is expected or appropriate. The primary purpose of this note is to determine whether society throughout the State of Florida expects judicial recusal or disqualification based on a judge’s sexual orientation. The first section of this note will begin by explaining the general laws concerning judicial disqualification and recusal. This section will explain the challenges that judges are constantly facing concerning motions for disqualification, ethical responsibilities, and the expectations placed upon each judge by the Model Code of Judicial Conduct. This section is separated into three subsections that thoroughly explain the rules governing automatic disqualification, motions filed by parties seeking judicial disqualification, and the legal sufficiency of these motions. The subsection concerning the sufficiency of motions filed by parties against judges explains what motions warrant disqualification and what motions are deemed insufficient by law.

Next, this note will explain the general principles of judicial disqualification and recusal throughout the nation. This section will explain the relevancy of the Model Code of Judicial Conduct and Title 28 of the United States Code concerning judicial disqualification and recusal. This section also discusses a recent challenge an Oregon Supreme Court Justice, Rives Kistler, faced when determining whether his sexual orientation presented a conflict of interest warranting recusal.

The next section in this note will thoroughly explain Florida’s law concerning judicial disqualification and recusal based on case law, statutes, and the Florida Code of Judicial Conduct. This section is broken down into four subsections, each one explaining an important aspect of judicial recusal. The first subsection is further broken down in order to more thoroughly explain what is deemed as judicial bias towards an individual person, compared to what is deemed as judicial bias towards a subject matter. Next, this note will provide the author’s closing remarks on judicial disqualification and recusal based on the research concerning this topic. Finally, it will be concluded that based on case law, statutes, articles, and journals concerning the topic of judicial recusal and disqualification, Florida does not expect a judge to be disqualified nor recused based on a judge’s sexual orientation, even when sexual orientation is the main issue in the proceeding.

12. See id. at 88.
II. DISQUALIFICATION OF JUDGES

The issue of judicial bias is continuously leveled at judges, whether in the form of an attorney filing for judicial disqualification, or the media writing about a judge’s bias towards a person, subject matter, or case.13 When an attorney decides to move for judicial disqualification based on a valid allegation concerning the potential violation of a particular judicial cannon, there are many serious consequences that can result in the handling of the attorney’s case.14 The “attorney moving for judicial disqualification on the ground of bias risks alienating a judge before whom [he or] she must present [his or] her case should the motion be denied.”15 “[R]ecusal motion[s] present[] difficult challenges for” attorneys involved, parties, and the judge who has been accused of being incapable of acting impartially.16 By filing this motion, the moving party seeking disqualification of a judge, on the basis of bias or prejudice, will ultimately bear the burden of persuasion.17

In Florida, the procedures for filing a motion for judicial disqualification, for both civil and criminal cases, are outlined in Rules 2.31018 and 2.33019 of the Florida Rules of Judicial Administration. The other bodies of law that govern judicial disqualification are Florida Statutes section 38.1020 and the Florida Code of Judicial ConductCanon 3.21 There are several other statutory provisions that provide a mechanism for judicial disqualification, such as Florida Statutes sections 38.01,22 38.02,23 and 38.05.24 Florida laws

14. Id.
15. Id. at 696.
16. Frank M. McClellan, Judicial Impartiality & Recusal: Reflections on the Vexing Issue of Racial Bias, 78 TEMP. L. REV. 351, 355 (2005). When a motion for judicial disqualification is filed by an attorney “[t]he judge’s first reaction . . . is likely to be one of indignation . . . [which can insult] someone who has taken an oath to resolve disputes impartially [by alleging that he or] she cannot fulfill the oath in a particular case.” Id.
17. City of Hollywood v. Witt, 868 So. 2d 1214, 1217 (Fla. 4th Dist. Ct. App. 2004) (noting that the moving party will have the burden of proving that he or she has a “well-founded fear of not receiving a fair trial” and that bias is legally sufficient to disqualify the judge from the case).
18. FLA. R. JUD. ADMIN. 2.310 (stating the rules regarding “Judicial Discipline, Removal, Retirement, and Suspension” of judicial officers).
19. FLA. R. JUD. ADMIN. 2.330. Rule 2.330 was formerly Rule 2.160. Id.
20. FLA. STAT. § 38.10 (2007). Section 38.10 provides the process for judicial disqualification. Id.
21. FLA. CODE JUD. CONDUCT Canon 3E.
22. FLA. STAT. § 38.01 (stating disqualification of a judge is appropriate when a judge is a party to the pending action).
on judicial disqualification are similar to other jurisdictions, except for one way "in which Florida is very different."25 "Whereas judges in most jurisdictions are not penalized for commenting on, or responding to, motions which have been brought to disqualify them, when a Florida judge has been challenged, he or she may generally do no more than rule upon the legal sufficiency of the disqualification motion."26 If the judge violates this rule "by taking issue with the moving party’s allegations, [judicial] disqualification . . . may be mandated even when . . . disqualification would not have been warranted otherwise."27

A. Automatic Disqualification

Prior to automatic disqualification, "[d]iscretion is confided in the . . . judge in the first instance to determine whether [or not] to disqualify himself."28 Once a judge has acted in such a manner where his or her impartiality may be questioned, that judge is required to be immediately recused from the proceeding.29 This category of automatic disqualification indicates that the courts strictly apply the definition of impartiality.30 While each state has different statutes governing the disqualification of judges, several principals concerning when a judge should automatically be disqualified are consistent.31 However, when a judge is not automatically disqualified for his or her bias or prejudice, a party can file a motion seeking judicial disqualification.32

23. Id. § 38.02 (stating when a party may show by a suggestion that the challenged judge, or judge’s relative, is a party or is otherwise interested in the result of the case, that the judge is related to one of the attorneys, or that the judge is a material witness). This section states that if the truth of the suggestion appears from the record, the judge shall disqualify himself or herself. Id.
24. Id. § 38.05 (authorizing a judge to “disqualify himself or herself” on his or her own motion when the judge knows of any appropriate grounds for recusal).
26. Id.
27. Id.
29. FLA. CODE JUD. CONDUCT Canon 3E(1).
30. Malleson, Judicial Impartiality, supra note 4, at 55.
31. See FLA. CODE JUD. CONDUCT Canon 3E(1)–(2).
32. See FLA. R. JUD. ADMIN. 2.330(b).
B. Motion for Disqualification

The disqualification of a judge is appropriate as provided by the *Model Code of Judicial Conduct*, the applicable states' code of judicial conduct, and the states' statutes. The motion to disqualify a judge must: 

1. be in writing;
2. specifically allege the facts that indicate the grounds for [judicial] disqualification; and
3. be sworn to by the party by signing the motion under oath or by a separate affidavit. 

The filing of this motion must be within a reasonable amount of time, not exceeding "[ten] days after discovery of the facts constituting the grounds for the motion and shall be promptly presented to the court for an immediate ruling." Motions made during the course of a trial are based on the facts discovered throughout the trial. Failure of a party to comply with the requirements of Rule 2.330 is a sufficient ground for denying a party's motion for disqualification.

C. Sufficiency of Motion

Once the motion has been properly filed, according to the statutory procedures required, the "sufficiency of the motion" will be closely examined in order to determine whether judicial disqualification is appropriate. Florida law measures the legal sufficiency of a motion based on whether "a reasonably prudent person [would] have a well-grounded fear that he or she will not receive a fair and impartial trial from the judge." The grounds for judicial disqualification must present:

(1) that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge; or

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35. *Fla. R. Jud. Admin. 2.330(c)(1)–(3)* (emphasis added). Case law clearly indicates that if the motion is not signed by the party seeking disqualification, the motion will be deemed as legally insufficient. Gaines v. State, 722 So. 2d 256, 256 (Fla. 5th Dist. Ct. App. 1998).
36. *Fla. R. Jud. Admin. 2.330(e).*
37. *Id.* (stating that such trial motions "may be stated on the record," filed in writing, and immediately ruled upon).
39. *See Fla. R. Jud. Admin. 2.330(f).*
(2) that the judge before whom the case is pending, or some person related to said judge by consanguinity or affinity . . . is a party thereto or interested in the result thereof, or that said judge is related to an attorney or counselor of record . . . or that said judge is a material witness for or against one of the parties to the cause.41

The legal sufficiency of a motion to disqualify a judge is a pure question of law, meaning that if the motion is legally sufficient, then the truth of the substance alleged is irrelevant.42 This requires the court to view the motion from the perspective of the litigant, rather than from the perspective of the judge.43 What the judge feels is not a question that is taken into consideration when examining the sufficiency of the motion, and rather, it is the "'feeling [that] resides in the affiant's mind, and the basis for such feeling.'"44

Once an initial motion for disqualification has been filed against a judge, the judge must then only determine "the legal sufficiency of the motion and shall not pass on the truth of the facts alleged."45 This may require a judge to "immediately enter an order granting disqualification and proceed no further in the action;" however, if the motion is insufficient, the judge must immediately enter "an order denying the motion."46 If a recommendation has been made to the Judicial Qualifications Commission, rather than a litigant filing a motion for disqualification, the commission will then determine whether or not the recommended action is appropriate.47 If the commission determines that removal is appropriate, an order shall be issued "directing the justice or judge to show just cause in writing why the recommended action should not be taken."48 This process allows a judge to respond to the commission by filing his or her response showing why he or she

41. FLA. R. JUD. ADMIN. 2.330(d).
43. Jimenez, 954 So. 2d at 708 (explaining that the judge's impartiality is questioned rather than his or her ability to act impartially and fairly).
45. FLA. R. JUD. ADMIN. 2.330(f).
46. Id.
47. See FLA. R. JUD. ADMIN. 2.310(b).
48. Id.
should not be removed from the proceeding before the commission makes its final decision.\textsuperscript{49}

III. PRINCIPLES OF JUDICIAL RECUSAL & DISQUALIFICATION

"The Code of Judicial Conduct demands that judges conform to a higher standard of conduct than is expected of lawyers or other persons in society."\textsuperscript{50} This higher standard that judges are held to has led to the enactment of statutes concerning judicial conduct and numerous guides to judicial ethics.\textsuperscript{51} Congress' goal when enacting judicial recusal statutes was to, first, preserve the role of judges as neutral parties, and second, to preserve society's perception of judges as neutral parties.\textsuperscript{52} The purpose of these statutes requiring judicial recusal and disqualification are "‘to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.’"\textsuperscript{53} The importance of a judge remaining a neutral party was based on "[t]he basic tenet for [judicial] disqualification [that] ‘justice must satisfy the appearance of justice.’"\textsuperscript{54} This basic tenet has been the backbone of our judicial branch of government, and "must [still] be followed even when the record lacks any actual bias or prejudice."\textsuperscript{55}

Currently, every state has different statutes governing judicial recusal and disqualification for state and federal judges within that state.\textsuperscript{56} Many of the concepts used by various state statutes are reflected in the \textit{Model Code of Judicial Conduct}, which was "designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies."\textsuperscript{57} There are currently two conditions for judicial disqualification that have been established by Title 28 section 455 of

\textsuperscript{49}. Id. (stating that "the commission may serve a reply [to the judge’s written response] within 20 days from service of the response").

\textsuperscript{50}. State v. Pattno, 579 N.W.2d 503, 506 (Neb. 1998).


\textsuperscript{55}. \textit{See id.} at 143.

\textsuperscript{56}. \textit{See generally} FLA. CODE JUD. CONDUCT pmbl.

\textsuperscript{57}. \textit{MODEL CODE OF JUD. CONDUCT pmbl.} (2004); \textit{see also} FLA. CODE JUD. CONDUCT pmbl.
the United States Code. First, section 455(a) provides that a judge "shall disqualify himself [or herself] in any proceeding in which his [or her] impartiality might reasonably be questioned." Under section 455(a), judicial recusal is only appropriate if "an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." Next, section 455(b) provides that a judge shall also be disqualified "[w]here he [or she] has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." In order for this bias to qualify as a sufficient basis for judicial recusal, "[t]he judge's bias [or prejudice] must be personal and extrajudicial," meaning that it must have derived from something besides what "the judge [has] learned by participating in the case."

Judicial recusal is required, based on the Code of Judicial Conduct, in cases where a judge is proven to be biased or when failure of a judge to recuse himself or herself would result in a void decision being rendered. A party moving for judicial disqualification "on the basis of bias or prejudice [has] the heavy burden of [rebutting] the presumption of judicial impartiality." Rebuttal of this presumption is especially difficult because this motion is purely a question of law; therefore, all allegations made are taken to be true and only the judge's impartiality is questioned. Ultimately, in order for a motion for judicial disqualification to be deemed appropriate, the facts alleged "must be 'germane to the judge's undue bias, prejudice or sympathy.'"

59. Id. § 455(a).
60. United States v. Patti, 337 F.3d 1317, 1321 (11th Cir. 2003) (quoting Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988)).
63. See MODEL CODE JUD. CONDUCT Canon 3E(1) (2004); see also FLA. CODE JUD. CONDUCT Canon 3E(1).
A. When Disqualification or Recusal Is Inappropriate

The Code of Judicial Conduct, statutes, and case law state under what circumstances judicial recusal and disqualification are appropriate and under what circumstances judicial recusal and disqualifications are inappropriate. The case law concerning judicial disqualification and recusal tends to demonstrate clearly under what circumstances the court should deny a party’s motion for judicial disqualification. Case law indicates that a judge’s rulings or opinions are insufficient to justify recusal, absent clear judicial bias or favoritism that would render a fair decision impossible. Generally, a judge’s manifestation of annoyance, impatience, and even anger is not enough to constitute bias sufficient to warrant a recusal motion. In Florida, a judge is also allowed to form opinions and mental impressions throughout a proceeding without being disqualified from the case, so long as the judge’s opinions do not lead to prejudgment of the case. The objective person standard that is used by courts throughout the nation, including Florida, requires all doubts to be resolved in the favor of judicial disqualification or recusal. Meaning that even if the factors do not clearly indicate there have been substantial grounds for disqualification, courts tend to use the safer approach in order to protect the parties involved and the integrity of the judiciary.

A judge has no “duty to recuse himself [or herself based] on unsupported speculation.” The fact that a judge may also be familiar with the facts of a case is also insufficient grounds for recusal or disqualification. Recusal has also been inappropriate when “characterizations and gratuitous comments” that can, or have been, offensive to litigants have been made by judges during a proceeding. These instances, where a judge’s comments or

68. See Pennsylvania v. Local Union 542, Int’l Union of Operating Eng’rs, 388 F. Supp 155, 158–59 (E.D. Pa. 1974). This case outlines the law of judicial disqualification, also explaining the importance of examining the legal sufficiency of parties’ motions for judicial disqualification. Id.
70. Id.
72. See United States v. Patti, 337 F.3d 1317, 1321 (11th Cir. 2003).
73. See id.
75. Id. at 1088.
76. Wargo, 669 So. 2d at 1124. The court has also held that remarks made by judges during trial that are disapproving, hostile, or critical to any party or witness involved in the proceeding are generally insufficient grounds for judicial disqualification. United States v. Bertoli, 854 F. Supp. 975, 1118 (D.N.J. 1994).
behavior have been insufficient grounds for recusal or disqualification, indicate that the *Code of Judicial Conduct*, case law, and statutes strictly govern what a judge can say or do in the courtroom; however, there are certain circumstances where a judge’s actions may offend a particular party in a proceeding, but fall short of satisfying the reasonable person standard required for judicial recusal and disqualification.77

B. Recent Issues Within the Courtroom: Judicial Recusal Based on Sexual Orientation

The issue of a judge’s sexual orientation and judicial recusal was a question that one of Oregon’s Supreme Court Justices recently faced when a case concerning same-sex marriage was brought before the court in 2004.78 Oregon Supreme Court Justice Rives Kistler, an openly homosexual member of Oregon’s highest court, did not want to jeopardize the future judgment of the case and, therefore, decided to stop all of his involvement and determine whether there was a potential conflict of interest.79 Justice Kistler consulted with both a judicial ethics book and the judicial ethics panel in order to determine whether being homosexual presented a conflict of interest.80 After being advised that there was no conflict of interest, he joined the majority decision ruling “that same-sex marriages were not allowed” in Oregon.81 The outcome of these circumstances proved that, in Oregon, a judge’s sexual orientation was not ground for judicial recusal even when sexual orientation was the premise of the proceeding.82 This principal became more clear when the citizens of Oregon supported that notion by electing Justice Kistler the following year in a statewide election.83 The premise of this situation exemplified the issue that a homosexual judge may have to question whether or not by ruling on a case concerning sexual orientation, the appearance of a bias decision or a conflict of interest may be presented.84

79. Id.
80. Id.
81. Id.
82. Id.
84. See id. (suggesting that a judge may have to question whether the public will perceive his or her decision as bias or prejudice based on his or her sexual orientation).
IV. FLORIDA LAW: CURRENT POLICIES CONCERNING JUDICIAL RECUSAL & DISQUALIFICATION

Currently, Florida's Code of Judicial Conduct requires judicial recusal when a judge discriminates "on the basis of race, sex, religion, or national origin. [However, membership in a fraternal, sororal, religious, or ethnic heritage organization shall not be deemed to be a violation."

Therefore, in Florida, a judge's involvement or membership in certain groups, such as ethnic heritage organizations, will not be sufficient grounds for judicial disqualification although a case may involve the rights of that group.

Florida's Code of Judicial Conduct currently does not mention what a judge is expected to do when faced with a potential conflict of interest based on his or her sexuality. Over the recent years, the number of homosexuals seeking enforcement of their civil rights has dramatically increased, leading to more cases concerning the issue of sexual orientation being heard throughout courtrooms worldwide. The recent increase of homosexual judges throughout the nation suggests that the issue of judicial recusal and disqualification based on sexual orientation will also increase throughout the state.

A. Actual Bias and Prejudice

The Florida Code of Judicial Conduct, clearly states that one of its primary goals is to "avoid . . . impropriety and the appearance of impropriety" in all of the judge's activities, further stating that "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3 of the Code of Judicial Conduct stresses the importance of an un-biased judiciary by providing that "[a] judge shall perform the [d]uties of [j]udicial [o]ffice [i]mpartially and [d]iligently." This canon stresses the importance of a judge's judicial duties and adjudicative responsibilities to the court of law in which the judge represents. Canon 3B(5) states that:

85. FLA. CODE JUD. CONDUCT Canon 2.
86. See id.
87. See generally FLA. CODE JUD. CONDUCT.
88. See generally Biskupic, supra note 78.
89. See id.
90. FLA. CODE JUD. CONDUCT Canon 2.
91. Id. Canon 2A.
92. Id. Canon 3.
93. See id.
[a] judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control do so. This section does not preclude the consideration of race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors when they are issues in the proceeding.\footnote{94. Id. Canon 3B(5).}

The Florida Code of Judicial Conduct also provides a list of instances when "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned,"\footnote{95. FLA. CODE JUD. CONDUCT Canon 3E(1).} for example, when "the judge has a personal bias or prejudice concerning a party or a party's lawyer . . . ."\footnote{96. Id. Canon 3E(1)(a).} Statements made by judges can also be sufficient grounds for disqualification if the remarks or statements demonstrate that a judge may have or has prejudiced the case.\footnote{97. Glaid, supra note 38, at 32.}

In addition to the Florida Code of Judicial Conduct, the Florida Statutes and case law provide that a judge shall be disqualified if "the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge."\footnote{98. FLA. R. JUD. ADMIN. 2.330(d)(1).} These bodies of law stress the importance of judges performing judicial duties fairly and impartially in order to prevent "bring[ing] the judiciary into disrepute."\footnote{99. See FLA. CODE JUD. CONDUCT Canon 3B(5) cmt.} These ethical standards imposed on judges have been tremendously stressed at the state and federal level, requiring recusal in cases where a judge is actually biased towards the parties involved, or the subject matter of the proceeding.\footnote{100. See generally FLA. CODE JUD. CONDUCT.} Case law clearly indicates that in order for a judge to not be deemed biased, the judge must not only be impartial but also leave an impression of impartiality to all who attended court.\footnote{101. See Hayslip v. Douglas, 400 So. 2d 553, 556 (Fla. 4th Dist. Ct. App. 1981).}

Although on its face it may seem that only one type of judicial bias exists, there are several types of bias that can occur throughout a proceeding that would require immediate disqualification.\footnote{102. See generally FLA. CODE JUD. CONDUCT.} Before taking a closer ex-
amination of the concept of judicial bias based on a judge’s sexual orientation, a distinction should be made between the various types of bias.

1. Bias Toward the Party

In *State v. Pattno*, the defendant filed an appeal alleging that the ruling judge was bias against his sexual orientation as evidenced by the judge expressing his religious views when reading a passage from the Bible during the defendant’s sentencing. On appeal, the court found that “because the trial judge interjected his own religious views immediately prior to sentencing, a reasonable person could conclude that the sentence was based upon the personal bias or prejudice of the judge.” The biblical passage that was read prior to the defendant’s sentencing clearly indicated that the judge considered the defendant’s sexual orientation when reaching the sentence. The appellate court ruled that the defendant was deprived of both due process and the impartiality of the judge when the judge imposed a sentence that was based on his prejudice of the defendant’s sexual orientation.

Judicial bias ordinarily must be directed towards a specific individual; however, certain jurisdictions do not require that the alleged bias be personal or directed towards a specific person. In these jurisdictions, such as Florida, a judge’s negative feelings towards a specific class, such as an ethnic or religious group, may constitute bias towards individual parties that belong to that specific class. In *Baskin v. Brown*, the contrary perspective to jurisdictions like Florida was established, here the court made it clear that “[a] judge cannot be disqualified merely because he believes in upholding the law . . . [a] personal bias against a party must be shown.”

The critical question surrounding whether a judge or justice is biased toward a person or class of persons is whether there is sufficient bias that

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103. 579 N.W.2d 503 (Neb. 1998).
104. *Id.* at 506.
105. *Id.* at 509 (holding that a judge who injects his or her personal beliefs as a basis for a ruling “injects an impermissible consideration in the [ruling] process”).
106. *Id.*
107. *Id.* at 508.
109. *Id.*
110. 174 F.2d 391 (4th Cir. 1949).
111. *Id.* at 394 (holding that the defendants grounds to disqualify a judge after the judge refused to recuse himself from a case was not sufficient because the judge did not have a personal bias against the defendants or the particular class of persons in this case).
would prevent the judge from being fair and impartial when ruling on the case as outlined by the Code of Judicial Conduct. The critical question of whether the statements or activities [of the judge] would suggest to the reasonable man that the judge’s bias against a class would give rise to a personal bias against a party in court who is a member of that class” must be determined prior to deciding whether a judge should recuse himself or herself or be disqualified from a case.

There are many cases where the bias of a judge is based on “the judges’ conduct, specifically, statements made by the judges themselves indicating a bias against the classes to which the parties [or party] belonged.” This varies significantly with bias that is based on a judge’s sexual orientation, sex, race, religion, or ethnicity. Florida’s current Code of Judicial Conduct specifically prohibits a judge from being biased or prejudiced based on a party’s race, sex, sexual orientation, religion, ethnicity, age, national origin, or disability. With this concept in mind, the same consideration should also be given to a “judge’s sexual orientation, which, in the absence of conduct or other circumstances to indicate bias toward a party, similarly should not be a ground for disqualification.”

2. Bias Toward the Subject Matter

“[B]ias, as to the subject matter of a case, can [also] compromise the impartiality of a judge” and may also be sufficient grounds for judicial disqualification. “The concept of bias toward [the] subject matter, as used here, poses difficult questions regarding the types of preconceptions that are permissible in the mind of the trial judge, and those that are not.”

Generally, judges can develop mental impressions and personal opinions throughout the course of evidence presentations, so long as the judge “does not pre-judge the case.” In Williams v. Reed, the defendant filed for appeal challenging the judge’s decision after ordering a transfer of primary physical matter...
custody of the party’s minor child to defendant’s former husband/plaintiff.\textsuperscript{122} The defendant appealed the judge’s ruling, claiming that the trial court erred when denying her motion for judicial disqualification.\textsuperscript{123} The defendant argued that the judge’s comments and conduct throughout the proceeding toward the defendant, based on her sexual orientation, clearly demonstrated grounds for disqualification.\textsuperscript{124} The judge’s comments and conduct were argued to have stemmed from his own personal bias towards the subject matter of same-sex relationship child custody issues.\textsuperscript{125} This type of subject matter bias clearly demonstrates how a fixed anticipatory judgment can taint or prejudice a proceeding, resulting in an impartial decision being made based on a fixed belief regarding the subject matter of a case.\textsuperscript{126}

The argument of a judge being biased toward a subject matter often is based on a judge’s membership in a minority group; however, “membership in a minority group [should] not, in itself, indicate [a] greater likelihood” of a judge deciding on a particular issue in any particular manner.\textsuperscript{127} A judge who abides by the rules outlined in the \textit{Code of Judicial Conduct} should disqualify himself or herself in the event that he or she feels they would be “incapable of detached judgment.”\textsuperscript{128} Ultimately, a judge’s religion, race, sex, ethnicity, or sexual orientation is not sufficient grounds to infer the appearance of bias or actual bias, and therefore should not warrant disqualification.\textsuperscript{129} An attorney seeking judicial disqualification based on a judge’s “sexual orientation should be required to show specific examples of the judge’s conduct or other circumstances to support [his or] her charge.”\textsuperscript{130}

Stereotyping judges based on the preconception that a judge will be more likely to have bias or prejudice towards a litigant, attorney, or witness, based on his or her memberships, damages society’s confidence in the judiciary.\textsuperscript{131} The judiciary as a whole includes members of various minorities, including heterosexual, and homosexual judges; therefore, if we are to clas-

\begin{itemize}
\item \textsuperscript{122} \textit{Id.} at 918.
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} \textit{Id.} ("[The] judge’s conduct and statements during the hearing on Ms. Reed’s motion for change of judge would give a reasonable person a factual basis to doubt the judge’s ability to thereafter preside as a neutral arbiter . . . ").
\item \textsuperscript{125} \textit{See} \textit{id.} at 919 (explaining that the judge in this case was personally involved in a similar situation regarding same-sex relationships and child custody issues concerning his ex-wife and minor child).
\item \textsuperscript{126} \textit{See} \textit{Williams}, 6 S.W.3d at 918–19.
\item \textsuperscript{127} \textit{Malarkey}, \textit{supra} note 13, at 708.
\item \textsuperscript{128} \textit{Id.} at 709.
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.} at 714.
\end{itemize}
sify judges as being bias or prejudice because of their involvement in a minority group, such as alternative sexual orientation, that premise would have to be applied fairly across all groups, meaning that a judge's involvement in a minority group, such as ethnicity, should also be grounds for disqualification.\(^{132}\)

B. Appearance of Bias

Ethical standards and statutory law require a judge to not only remove himself or herself from "any proceeding in which his [or her] impartiality might reasonably be questioned," but also to avoid any appearance of bias.\(^{133}\) The premise of avoiding the appearance of any bias also comes from "[t]he basic tenet for [judicial] disqualification [that] 'justice must satisfy the appearance of justice.'"\(^{134}\) In order for judges "[t]o maintain public confidence in the judiciary," judges must not only apply the law impartially but must also appear to do so as well.\(^{135}\) The appearance of impartiality must be used as the general standard for judicial recusal and when applying this standard judges should determine whether their impartiality may be questioned from the perspective of a reasonable person.\(^{136}\) Although this standard varies slightly by each jurisdiction, the implications of its appropriateness are consistent.\(^{137}\)

The appearance of bias or impropriety may derive from a judge's conduct during an issue or proceeding, or remarks made to parties involved or to witnesses.\(^{138}\) This appearance of impropriety can also come from judicial frustration, such as when a judge chooses to speak, "[a] judge's attitude to-

\(^{132}\) See Malarkey, supra note 13, at 713–14.

\(^{133}\) 28 U.S.C. § 455(a) (2000). Society and the governing rules of law demand that a judge not only recuse himself or herself when there is reason to do so, but judges also have an equal responsibility to do so when a reasonable person would harbor doubts concerning the judges impartiality. Tonkovich v. Kansas Bd. of Regents, 924 F. Supp. 1084, 1087 (D. Kan. 1996).


\(^{135}\) Malarkey, supra note 13, at 710.

\(^{136}\) Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1111 (5th Cir. 1980) (explaining that when a judge is facing possible disqualification, the judge should consider how his impartiality appears "to the average person on the street," meaning that disqualification is appropriate if a reasonable person were "to know all the circumstances" and would doubt the judge's impartiality). Id.


ward an attorney practicing in the judge’s court[room],” and a judge’s business or personal relationships. In United States v. Salemme, the court reiterated the standard for recusal concerning the appearance of impartiality as an objective standard, as outlined in section 455 of the United States Code. The court also stated that the decision of disqualification can even occur when a “judge is not actually biased or prejudiced,” as long as his “impartiality might reasonably be questioned.” This concept is seen throughout many cases both on the state and federal level, highlighting the importance of an impartial and fair judiciary. In Salemme, the court thoroughly explained the importance of this standard and why:

[t]he disqualification decision must reflect not only the need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.

This concept of “judge-shopping” is frequently used by parties and attorneys when an argument can be made as to the appearance of impropriety and a new judge would be more favorable to one or more of the parties involved. Courts disfavor this use of disqualification and recusal motions because these motions cannot be used by litigants as strategies to “judge-shop” and rather should only successfully be used when there is the appearance of or actual judicial impropriety.

139. Id. at 85. The comment to Canon 3B(5) states:
A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

FLA. CODE JUD. CONDUCT Canon 3B(5) cmt.
141. Id. at 80; see also 28 U.S.C. § 455 (2000).
142. Salemme, 164 F. Supp. 2d at 80.
143. See id. at 81.
144. Id. at 52.
147. Bertoli, 854 F. Supp. at 1120 (explaining that the defendant’s previous attempts to disqualify the judge for insufficient reasons evidenced his attempt to judge-shop). The balancing test used to determine whether judicial recusal is appropriate involves balancing two key factors. Idaho v. Freeman, 478 F. Supp. 33, 35–36 (D. Idaho 1979). First, the right for all litigants to have their case heard and “decided by an impartial tribunal.” Id. at 35. Second,
"The appearance of bias standard theoretically would apply to a judge’s sexual orientation regardless of whether it was a matter of public knowledge . . . .\(^{148}\) "Clearly, the goal of [section 455] is to foster the appearance of impartiality . . . [this concern] also pervades the Code of Judicial Conduct and the ABA Code of Professional Responsibility, [which] stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence."\(^{149}\) Thus, one can argue that because undisclosed facts such as a judge’s sexual orientation can become public knowledge at any time, "consideration of facts of which the public may be unaware is proper under a standard emphasizing appearance."\(^{150}\) One can also argue that the Code of Judicial Conduct should not apply to a judge’s sexual orientation because doubts based on a "homosexual judge’s impartiality are reasonable and would be widely held by members of the public of which homosexuals comprise a decided minority."\(^{151}\) The reasonableness of doubts concerning a homosexual judge’s impartiality requires subjective determination; however, the premise that a vast majority of people or even a large minority of people would harbor such thoughts is supported by fact that a small majority or large minority of society fears homosexuality.\(^{152}\)

C. Extrajudicial Activities

Canon 5 of the Code of Judicial Conduct clearly states that "[a] [j]udge [s]hall [r]egulate [e]xtrajudicial [a]ctivities to [m]inimize the [r]isk of [c]onflict with [j]udicial [d]uties."\(^{153}\) This Canon not only restricts the extrajudicial activities a judge can participate in, but also helps preserve the "[e]xpression[] of bias or prejudice by a judge" based on the activities he or she participates in.\(^{154}\) Some of these restrictions imposed on judges by the Code of Judicial Conduct involve avoiding activities that "cast reasonable

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149. Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1111 (5th Cir. 1980). The case discussed the fact why the issue of judicial disqualification is such a sensitive issue by explaining that when a motion for judicial disqualification is filed, the court must assess all of the facts surrounding the circumstances before determining whether a judge’s failure to properly recuse himself or herself from the proceeding "was an abuse of sound judicial discretion."
150. Malarkey, \textit{supra} note 13, at 711.
151. \textit{Id.} at 713.
152. \textit{See id.}
153. \textit{FLA. CODE JUD. CONDUcT} Canon 5.
154. \textit{Id.} Canon 5A–B cmt.
doubt on the judge’s . . . impartiality,”155 regulating activities in order to minimize a risk of conflict with judicial duties,156 practicing law,157 and refraining from inappropriate political involvement.158 “A judge is encouraged to engage in [extrajudicial] activities to improve the law, the legal system, and the administration of justice.”159 A judge’s involvement in extrajudicial activities is encouraged so long as they don’t demean the judiciary, interfere with judicial responsibilities, or cast doubt on a judge’s impartiality.160

Although the Code of Judicial Conduct suggests that a judge’s sex, religion, ethnicity, or race is not sufficient grounds for disqualification alone,161 case law suggests otherwise.162 A question worth considering is whether public self-acknowledgement of a judge’s sexual orientation “is type of extrajudicial activity that is discouraged by the Code of Judicial Conduct.”163 Unlike race, sex, religion, national origin, and ethnicity, “sexual orientation has not” historically been characterized as warranting special legal protection.164 If our “system of judicial ethics” must distinguish between extrajudicial activities that promote a promising judiciary and those that adversely interfere with judicial responsibility, the consideration of a judge’s personal life in relation to his or her sexual orientation and which group of extrajudicial activities that falls under must be determined.165

It has been held that through the First Amendment’s “application to the judiciary, . . . a judge’s right to freedom of expression and association must

155. Id. Canon 5A(1).
156. Id. Canon 5A(3).
157. Id. Canon 5G.
158. FLA. CODE JUD. CONDUCT Canon 5C(2).
159. Id. Canon 4.
160. Id. Canon 4A(1)–(3). The commentary following Canon 4A states:

A judge is encouraged to participate in activities designed to improve the law, the legal system, and the administration of justice. In doing so, however, it must be understood that expressions of bias or prejudice by a judge, even outside the judge’s judicial activities, may cast reasonable doubt on the judge’s capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.

Id. Canon 4A cmt.

161. See id. Canon 3B(5).
162. See generally Idaho v. Freeman, 478 F. Supp. 33, 35–36 (D. Idaho 1979); Pennsylvania v. Local Union 542, Int’l Union of Operating Eng’rs, 388 F. Supp 155, 157–58 (E.D. Pa. 1974). In Freeman, the court addressed the factor of judicial reasonableness by explaining that a judge must not only be alert in order “to avoid the possibility” of having his impartiality questioned, but also to avoid having litigants fear a judge’s impartiality. Freeman, 478 F. Supp. at 36.

163. Malarkey, supra note 13, at 721 (emphasis added).
164. Id. at 699.
165. Id. at 722.
be balanced against the public’s right to an impartial judiciary.”\textsuperscript{166} Although there are some situations “where a judge’s right to freedom of expression and association outweighs the need to regulate the conduct in question,” such as when the appearance of judicial impartiality is not threatened.\textsuperscript{167} “Certainly, a restriction on a judge’s ability to express himself [or herself] regarding so personal a matter as sexual orientation raises serious first amendment concerns.”\textsuperscript{168} Although judges are far more restricted in forming certain social relationships that may rise to the appearance of impropriety, it is highly unlikely that a judge will be required to distance himself or herself from social and family networks based on his or her sexual orientation in order to protect public confidence in an impartial judiciary.\textsuperscript{169} Therefore:

[t]o hold that a homosexual judge’s public acknowledgement of his [or her] sexual orientation is the type of activity discouraged by the Code of Judicial Conduct would, in effect, impose a requirement of secrecy on the judge, potentially far more damaging to public confidence in the integrity of the judiciary than the open admission of one’s sexual orientation.\textsuperscript{170}

V. AUTHOR’S CLOSING REMARKS

America is a society that places high expectations on the impartiality of its judicial branch of government as a mechanism for protecting the integrity of the law and also to ensure equality for all citizens. As a country that prides itself for standing behind the premise of equal protection and civil rights, we take a step backward when we ask ourselves whether judicial impartiality is affected by a judge’s personal and private sexual orientation. If the law places expectations on our judges through Codes of Judicial Conduct, ethical regulations, and state and federal statutes, why is it that we don’t assume the same expectation, by accepting the fact that sexual orientation should not raise sufficient grounds for claiming judicial disqualification?

Ultimately, “[t]he rule of necessity arises from the obvious requirement that, in a legal proceeding, some judge must sit.”\textsuperscript{171} If we are to question whether a homosexual judge is prejudiced or biased solely based on his or her sexual orientation, one should also question a black judge’s impartiality.

\textsuperscript{166} STEVEN LUBET, BEYOND REPROACH: ETHICAL RESTRICTIONS ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES 42 (1984).

\textsuperscript{167} Id. at 43.

\textsuperscript{168} Malarkey, supra note 13, at 722–23.

\textsuperscript{169} Id. at 723.

\textsuperscript{170} Id.

\textsuperscript{171} Id. at 717.
on the basis of race in a proceeding concerning racial discrimination. In Pennsylvania v. Local Union 542, International Union of Operating Engineers, this very issue was addressed when the defendants filed a motion for judicial disqualification based on the racial prejudice of the judge. Ultimately, the court denied the defendant's motion concluding that just because "one is black does not mean . . . that he is anti-white." The court also noted that:

[i]f America is going to have a total rendezvous with justice so that there can be full equality for blacks, . . . minorities, and women, it is essential that the "instinct" for double standards be completely exposed and hopefully, through analysis, those elements of irrationality can be ultimately eradicated.

Therefore, with this rationale in mind, it cannot be said with certainty that a homosexual judge will more likely be partial than a heterosexual judge in a case, involving a homosexual plaintiff and a heterosexual defendant.

Not only is it impractical and insulting to presume that judges are unable to set aside their personal beliefs and private views when deciding a case but it also undermines the strength of the judiciary. It is unfair to question a homosexual judge's capability of applying the law fairly and impartially—a principal so embedded in our judiciary—simply because issues concerning sexual orientation may be raised during the proceeding. If we demand our judiciary to be blind of our race, sex, ethnicity, sexual orientation, national origin, and age, why is it that society should be allowed to openly support a double standard by not providing our judge's that very same right.

"The sexual orientation of any judge may or may not give him [or her] insight into the sexual orientation of a party;" however, being bias toward the possibility of a homosexual judge having insight into the sexual orientation of a party is prejudicial and unfair. It has been noted that "[g]ay and lesbian judges do not appear to have had a particular impact on gay-rights

173. Id. at 162–63. The defendants in this proceeding claimed that the judge was biased based on a speech the judge had given to a group of black individuals, although the speech contained no references to the defendant's case. See id. at 157.
174. Id. at 163. The court held that although the judge spoke to the Association for the Study of Afro-American Life and History, a judge's background and association are insufficient grounds to sustain a motion for judicial disqualification based on bias or prejudice. Id. at 182.
175. Local Union 542, 388 F. Supp. at 181.
176. Malarkey, supra note 13, at 725.
issues;”\textsuperscript{177} therefore, society should not expect that by entrusting in our homosexual judges, they are inadvertently impacting gay-rights issues. Ultimately, society should expect a fair and impartial judiciary free of personal and professional bias; meaning that we should not question the impartiality of judges based on discriminatory beliefs such as a judge’s sexual orientation, race, age, or ethnicity.

VI. CONCLUSION

When considering the question of whether the citizens of Florida expect judicial recusal or disqualification of a state or federal judge simply based on the judge’s sexual orientation, society should consider whether the law allows a judge’s personal beliefs or views to affect his or her decision making. Based on the Model Code of Judicial Conduct, the Florida Code of Judicial Conduct, statutes, case law, and ethical regulations, the answer is clearly no. A judge should never allow his or her own personal beliefs or views, including a judge’s sexual orientation, to affect his or her decision making once a judge is dressed in his or her judicial robe, which represents to all in his or her presence that he or she will uphold the law fairly and impartially.

The Florida Code of Judicial Conduct currently requires judicial recusal or disqualification in circumstances where a “judge’s impartiality might reasonably be questioned.”\textsuperscript{178} The rules behind preserving judicial impartiality are supported by the important principal that a judge must at all times act in such “a manner that promotes public confidence in the integrity and impartiality of the judiciary.”\textsuperscript{179}

It would be unfortunate if the citizens of the State of Florida based the impartiality of a state or federal judge on such a personal matter such as sexual orientation. Individuals that have filed motions for judicial disqualification claiming judicial bias based solely on a judge’s race have continuously been unsuccessful.\textsuperscript{180} Similarly, individuals that claim judicial bias solely based on judges religion or age have also been unsuccessful; therefore, those individuals who wish to file motions for judicial disqualification solely based on a judge’s sexual orientation should also fail.

Ultimately, the best approach towards eliminating judicial bias based on sexual orientation is through education.

\textsuperscript{177} Biskupic, supra note 78.
\textsuperscript{178} FLA. CODE JUD. CONDUCT Canon 3E(1).
\textsuperscript{179} Id. Canon 2A.
\textsuperscript{180} See generally Local Union 542, 388 F. Supp. at 155.
United States Supreme Court Justice Felix Frankfurter stated that “on the whole, judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline, and that fortunate alchemy by which men [and women] are loyal to the obligation with which they are entrusted.” As long as the judiciary continues to be made up of men and women of different sexual orientations, the suggestion that a judge’s sexual orientation is likely to affect his impartiality damages the public’s confidence in the judicial system and places little faith in a judge’s ability to perform his [or her] duties in an impartial manner independent of personal considerations.  

Society must be educated as to what constitutes actual prejudice and bias that would adversely affect a judge’s duty to be impartial and fair in all proceedings. This concept must be then be compared to the notion of molding the judicial branch to reflect the personal beliefs society has towards what they believe is morally right and wrong.

If society was to require judicial recusal based on a judge’s sexual orientation, we would be sending the negative message to our judges that in order to preserve the appearance of impartial decision making, judges are required to keep secret all aspects of their personal life society may shun upon. Imposing this burden on our judiciary would not only be unfair, cruel, and against the notion of equality, but would also send a message to other states and countries that Florida expects their judiciary to fit a particular mold and those who do not fit that mold will be subjected to silence and secrecy or face disqualification. The disqualification and recusal of judges should be decided based on a rational application of governing law and ethical codes “and the same considerations that lead one to conclude that a judge’s race, sex, ethnicity, or religion is not a sufficient basis, in itself, to infer bias, apply with equal validity to a judge’s sexual orientation.”


182. Id. at 725.