

PRINCIPLES OF STATE APPELLATE JUDICIAL DISQUALIFICATION

AMERICAN ACADEMY OF APPELLATE LAWYERS

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Every State should have clearly articulated procedures for disqualification that incorporate the following protections for the public and the litigants:

1. The right to review on the merits by judges whose impartiality cannot reasonably be questioned.
2. The right to be timely informed of who will decide an appeal.
3. The right to seek disqualification of any member of the merits panel pursuant to clearly articulated procedures.
4. The right to know who will decide a disqualification request.
5. The right to decision on any disqualification request before an appeal is submitted on the merits.
6. The right to be informed of grounds for disqualification of any member of the merits panel.
7. Review of the disqualification decision pursuant to clearly articulated procedures.
8. Replacement of a disqualified judge to maintain a quorum or prevent a tie.

Why Procedural Standards For State Appellate Court Judicial Disqualification Are Needed

Appellate courts make law, interpret constitutions, and lead the judiciary in their jurisdictions. Appellate courts play a key constitutional role arising from “[d]ifferences in the institutional competence of trial judges and appellate judges.” *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 (2001). Bias or perceived bias of a decisionmaker in the appellate courts affects not only the immediate case before the court, but also other cases and other legal transactions that depend upon precedents created by appellate decisions. The appearance of bias, let alone actual bias, causes the public to lose respect for and confidence in the judicial system. “Not only is a biased decisionmaker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness.” *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

Indeed, if the bias of an appellate decisionmaker affects his or her reasoning about an appeal, then the taint of that biased decision extends to every future litigant whose case may be affected by the appellate decision under the principle of *stare decisis*. Appellate opinions “collectively form the body of the common law” and “govern what a trial judge does, even if no appeal is ever taken in a particular case” Daniel J. Meador, Maurice Rosenberg and Paul D. Carrington, *Appellate Courts: Structures, Functions, Processes, and Personnel* xxxi-xxxii (Michie 1994) (hereafter “Meador”). Decisions of appellate courts also guide the advice lawyers give their clients, the actions clients take based on that advice, even the content of legal forms people use. The text of the opinion

deciding a case may have as much effect on future litigants and on others who depend on the state of the law as it does for the immediate parties to a case.

Not every action by an appellate court creates precedent or resolves a constitutional dispute, of course. Correcting trial court error is another important role played by appellate courts. For more than two centuries, the American people have made provision for appellate courts in their state constitutions, to elevate fairness and equal application of justice over the risks of local bias and the fallibility of trial judges acting alone. Overwhelmingly, state constitutions and statutes provide a right of review. Today, first resort is usually to an intermediate court that emphasizes the error-correcting function. When trial court decisions are reviewed, they should be reviewed carefully to ensure that they are free of improper influence, and that the review itself is free from taint.

Appellate oversight of trial courts brings consistency to the legal system as a whole. That oversight must be exercised without bias. For that reason, *why* an appellate court decides a case a certain way can be as important as *what* the court decides. When an improper factor taints appellate decisionmaking, it also distorts the process of explaining judicial reasoning – *i.e.*, writing opinions – that is at the heart of an appellate court’s mission.

The U.S. Supreme Court recently recognized that there are circumstances under which the appearance of bias of an appellate decisionmaker will violate due process. It said disqualification is required when there is “a serious, objective risk of actual bias” in *Caperton v. A.T. Massey Coal Co., Inc.*, ___ U.S. ___, 129 S. Ct. 2252 (2009). The majority found such a risk in the size of the

campaign contributions made by the owner of Massey Coal to the election of a justice of the West Virginia Supreme Court who voted to overturn a \$50 million verdict against the company. But, as Chief Justice Roberts' dissent noted, the majority decision in *Caperton* provides little "guidance to judges and litigants about when recusal will be constitutionally required." Roberts' dissent identifies 40 questions that courts may have to resolve in future disqualification cases. And there is very little case law to guide the practitioner, or the courts, in deciding future challenges.

**The Academy's Interest And Expertise In Appellate Decisionmaking,
And The Scope Of This Disqualification Project**

This paper is an effort to begin establishing the principles that should govern the disqualification of appellate judges. The American Academy of Appellate Lawyers (the "Academy") is a non-profit, national professional association of lawyers skilled and experienced in appellate practice and related post-trial activity in state and federal courts. It is dedicated to the improvement of appellate practice, the administration of justice, and the ethics of the profession. The Academy brings together 300 leading attorneys who devote their practices to appellate representation. Membership in the Academy is by nomination or invitation only.

Although the Academy has for many years addressed issues of judicial disqualification in its discussions, the impetus for the current project and paper arose at the Academy's Fall 2008 meeting in Portland, Oregon, which was held in conjunction with the Conference celebrating the 40th anniversary of the Federal Judicial Center. At the time, *Caperton* was pending in the U.S. Supreme Court.

It was apparent that, regardless how the case was decided, appellate courts would continue to be confronted with increasingly difficult issues of judicial disqualification and recusal.

A committee was appointed to survey and study the state of judicial selection and disqualification in the states. After reviewing relevant statutory and regulatory provisions, case law, and available literature, the committee quickly decided to focus its efforts on trying to establish principles that should govern the disqualification of state appellate court judges. A preliminary draft of these Principles was presented to and extensively discussed by the Fellows at the Academy's Fall 2009 meeting in Philadelphia, Pennsylvania, and then submitted for review by the Fellows on the Academy's website.

Although many of the Principles proposed in this paper will have equal application to federal courts, the Academy chose to focus on state appellate courts because of the Academy's comprehensive knowledge of those courts and the difficult issues raised by disqualification in the various state court systems, where appellate judges generally are neither appointed by an executive officer and confirmed by a legislative body nor hold their positions for life. The Principles are intentionally broadly drafted, and intended to apply regardless of the method of selection and retention of judges in a particular state.

Because the Academy is an organization of appellate advocates, these Principles are written from the perspective of our clients, who are litigants in the appellate courts, and the public and private interests they represent. When the consensus of the Academy was that a particular Principle should be universally

honored, the Principle is articulated as a “right.” In the case of the last two Principles, addressing review of disqualification decisions and replacement of a disqualified judge, because application of the Principle depended upon how a related “right” was addressed by a state’s disqualification procedures, the Principle was drafted in the form of a “best practice.”

This paper generally follows the convention of the ABA Model Code of Judicial Conduct in use of the term “disqualification.” Only when the Academy’s view of the applicability of a particular Principle depends upon whether removal is voluntary or requested by a party, this paper refers to “recusal” when a judge voluntarily removes him or herself from consideration of an appeal on the merits.

The remainder of this paper discusses the reasons for Principles proposed by the Academy in more detail:

PRINCIPLES OF STATE APPELLATE JUDICIAL DISQUALIFICATION

The Academy proposes that every State should have clearly articulated procedures for disqualification that incorporate the following protections for the public and the litigants:

1. The Right To Review On The Merits By Judges Whose Impartiality Cannot Reasonably Be Questioned.

This Principle is embodied in Canon 3 of the Code of Judicial Conduct, and by the restrictions imposed on judges’ conduct in each Canon of the Code in order to enhance and maintain confidence in our legal system. Some version of the Code has been adopted by each of the states. The precise nature of conduct that might raise a reasonable question of the impartiality of an appellate decision-maker may depend upon many factors, including a state’s method of selection

and retention of judges, other avenues for review of judicial conduct, and the nature, scope, and consequence of appellate review and decision-making in a particular case. This paper does not attempt to set out in any detail the substantive bases for raising a reasonable question of a judge's impartiality. In general, these potential sources of concern can be identified as follows:

Campaign contributions. *Caperton* holds that the appearance of a state appellate judge's bias arising from campaign contributions can become so intolerable as to offend federal constitutional due process. The majority opinion gives little guidance to identify such violations. It gives no advice at all to states that appropriately want to adopt rules and procedures for a more secure promise of fairness and a less disruptive method of deciding a judge's qualification to serve.

The appropriate limits in each state will depend on a variety of factors, including the type of election through which judges are selected or retained, whether judicial races are partisan, existing campaign financing restrictions, and historic campaign practices and experience. For instance, some states have limitations on the amount of contributions, or on who can contribute. Those limitations should be considered in deciding when campaign contributions require disqualification. In other states, there are limits to the amount any individual or entity can contribute to a judge's campaign. There are, however, very few attempts to limit "public issue" campaigns that do not directly target a particular individual but instead may use issues to promote or challenge a judicial candidate's perceived philosophy. These independent expenditures also must

be considered. Further, we write at a time when the constitutionality of campaign finance limits is itself in doubt.

A related question concerns the consequence of not only contributions, but also of the solicitation of contributions. The ABA Model CJC provides that a judge or judicial candidate shall not “personally solicit or accept campaign contributions.” But candidates can establish a committee to do so in most states. MCJC Canon 4, Rule 4.4(A)(8)(2007). Courts are divided as to whether candidates themselves can solicit contributions, or if candidates can even sign mass solicitation letters. Solicitation prohibitions have been held to be unconstitutional in several states. Whether judicial candidates may personally solicit, or even know of the sources of, campaign contributions in a particular state may affect whether and what contributions could be considered to raise a reasonable question of a judge’s impartiality.

Finally, it should be recognized that the significance of campaign contributions and independent expenditures will likely be greater in elections for appellate judges than in trial court races because of the policy-making role of the appellate courts. The appellate courts declare the law. The decision-making and the consequence of decisions in the appellate courts are decidedly of a higher profile than in most trial court races. The decisions of appellate courts are closely watched, are often the subject of intense press coverage, and have consequences far beyond the individual case being decided. Races for appellate court positions, which are often state-wide, attract far more attention and funding than trial court races – precisely because of the broader consequences of

appellate court decisionmaking. And as *Caperton* illustrates, a case involving a contribution or campaign contributor may be in the appellate courts during a campaign. The potential consequence of campaign contributions to appellate court judges thus deserves heightened concern in establishing standards for disqualification.

Campaign and Judicial “Speech”. In *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002), the Supreme Court determined that Minnesota’s judicial conduct rule prohibiting judicial candidates from announcing positions on controversial issues violated the First Amendment because the rule was overbroad and the state lacked a compelling reason for it. The *White* Court did not reach the issue of whether Minnesota’s companion rule prohibiting specific pledges or promises was unconstitutional. 536 U.S. at 770, 780. States and courts are divided on the constitutionality of these clauses, and of five other judicial canons arguably implicated by the reasoning of *White*. Since *White*, many states have amended their judicial canons in an attempt to avoid challenges. The status of these restrictions on judicial and judicial candidate speech in each state may affect whether a judge’s impartiality may reasonably be questioned in later decision-making:

“Pledges or Promises” Clause. Under the ABA Model CJC, a judge or judicial candidate “shall not...in connection with cases, controversies, or issues that are likely to come before the court, make pledges [or] promises...that are inconsistent with the impartial performance of the adjudicative duties of the office.” MCJC Canon 4, Rule 4.1(A)(13) (2007).

“Commit” Clause. Under the ABA Model CJC, a judge or judicial candidate “shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments.” [1990 ‘appeared to commit’ Canon 5(A)(3)(d)(ii)] MCJC Canon 4, Rule 4.1(A)(13) 2007. Some states combine the commit clause with the pledges or promises clause, while others separate them.

“False and Misleading Statements” Clause. The ABA Model CJC provides that “[a] judge or judicial candidate shall not ... knowingly, or with reckless disregard for the truth, make any false or misleading statement.” MCJC Canon 4, Rule 4.1(A)(11)

“Political Activity” Clause. Essentially, this clause in the ABA Model CJC prohibits judges or judicial candidates from participating in or speaking for , or endorsing, political organizations or non-judicial candidates. MCJC Canon 4, Rule 4.1(A)(1)-(7) (2007). A state’s approach to this provision may depend in large part on whether judges are elected in “partisan “ elections in which party affiliations are announced, or required, or in elections in which candidates are prohibited from revealing their party affiliations, and on whether judicial candidates can endorse other candidates, judicial or partisan.

In considering the consequences of judicial speech, any disqualification standards also must recognize that a sitting appellate judge’s “speech” is far more likely to be targeted because it will often appear in published decisions. An appellate judge’s written opinions should not be a basis for disqualification in a subsequent case. Establishing reasoned standards for disqualification should

make less likely questions of impartiality raised as a result of the appellate courts' law-declaring function. The Academy understands that appellate judges need to be supported in unpopular decisions. The standards for disqualification must make clear that an appellate judge's fulfillment of his or her obligation to decide a case is not a basis for disqualification.

Precedent. Particular concerns may be raised by a judge's participation in an appeal if the consequence of the decision would be to bolster pending litigation involving the judge or closely affiliated entities or individuals by providing helpful precedent. The participation of an appellate judge in cases in which he or she have no direct stake, but who may be personally affected by the precedent established in the case, may raise reasonable questions of impartiality that would not arise in lower courts, where the judge's decision would not have impact beyond the case in question.

2. The Right To Be Timely Informed Of Who Will Decide An Appeal.

Briefs have become the primary input that parties have to the appellate decision making process. Even in states in which oral argument is liberally granted, judges typically come to argument prepared to decide the case based on the briefs and the court's internal work product. In some states, oral argument occurs in a diminished and diminishing percentage of cases or is restricted in time. The consequence of briefing, and who is considering the briefing, thus becomes more important.

Appellate courts also typically sit in multi-judge panels. Substitutions may be made to the panel before consideration of a case on the merits, or the panel

may be constituted to avoid potential grounds for disqualification. In order to ensure that both the court and the parties are able to assess and act on grounds for questioning the impartiality of a judge, state appellate courts should timely inform the parties which judges will decide an appeal.

What is timely will vary in practice from state to state. This Principle is universal: parties should be informed of the identity of each member of a panel who will decide an appeal on the merits at a time that will give the parties a reasonable opportunity to inform the court of a potential basis for recusal, or make a motion to disqualify, before an assigned judge invests material effort in a case. The identity of who will decide an appeal on the merits should be made available: (1) by a process explained in published rules or operating procedures, (2) to all parties by the same process at the same time, (3) in a manner that does not require unusual expertise or methods for access, and (4) that is identical in all divisions of a court that has multiple districts, divisions, or departments.

3. The Right To Seek Disqualification Of Any Member Of The Merits Panel Pursuant To Clearly Articulated Procedures.

Many states have no disqualification procedure at all. Some states follow the rule that an appellate judge decides his or her own qualification, but provide no orderly means to inform an appellate judge of grounds for disqualification. In states that have a motion or affidavit procedure, accessing it may still have “black box” aspects. This is a remarkable contrast in most states to the process for disqualification of trial court judges, which is usually explained in reasonably clear statutes or rules.

The Academy believes that the time has come for states to provide and disclose clear disqualification procedures at the appellate level:

- The fact that any appellate judge is only one of multiple decision-makers is not a reason to preclude formal procedures for disqualification. The litigants are entitled to a full panel of impartial judges to fulfill the collegial nature of appellate decision-making.

- For the parties, there should not be any question of guessing how to go about seeking disqualification. A system in which specialists have inside knowledge of such a basic process increases public perception of unfairness. Establishing a clear procedure for seeking disqualification also is a protection for the courts. If an appellate court provides a clear and transparent means for seeking disqualification, a party may waive or be estopped from seeking disqualification if the procedure is not followed. Establishing procedures for disqualification requests also reduces the possibility of tactical rather than substantive disqualification requests.

- Under the Principles proposed by the Academy, the right to seek disqualification is limited to parties. This Principle serves to ensure that there is not an overly broad or artificial means for disqualifying a judge from a case. This Principle also limits “judge- (or lawyer-) shopping” to prevent recruitment of counsel on the basis that a judge might as a result feel the need to recuse, or be subject to disqualification.

- When a state's intermediate appellate or supreme court has more than one district, division, or department, the disqualification procedure should be uniform statewide.

4. The Right To Know Who Will Decide A Disqualification Request.

A variety of options may be acceptable on a state-by-state basis in designating the individual or collective body giving initial consideration of disqualification decisions in state appellate courts. At a minimum, however, the parties must know who will decide a request for disqualification. A state's appellate procedures should make clear who will decide a request to disqualify a judge. Several potential decision-making processes have been identified:

Recusal by the judge. In the absence of established procedures for seeking disqualification in most states, this appears to be the way in which disqualification is addressed. Leaving to the judge whose impartiality is being questioned the initial decision whether to sit on a case has several advantages. It encourages compliance with ethical rules by the judge and draws on the judge's knowledge of the facts that may call for recusal. The disadvantages include a perception that a judge who has not voluntarily recused is not likely to favorably entertain a request for disqualification. There is a corresponding fear that making a disqualification request may infect decision-making on the merits, or subject to question a substantive decision made by a judge who declined to recuse even if the merits decision was unaffected by bias.

Although the Academy was not able to reach a consensus on the wisdom of leaving the decision on a disqualification request to the judge, there was a

general consensus that if the judge rules initially on the request, the judge's decision must be subject to some form of further review, in accord with the fundamental proposition that no one should be a judge in his or her own case. Further, some Academy members believed that if the disqualification decision is left to the judge, judges should be encouraged to consult with a trusted colleague before ruling on the request.

Disqualification by chief administrative judge. One advantage to decision by the chief administrative judge of an appellate court is that disqualification can arguably be properly characterized as the type of interlocutory decision often made by judges acting in an administrative capacity within any particular court. Having another judge decide the issue of disqualification as an administrative matter may also reduce the ethical burdens on the judge and eliminate or reduce the need for further review. On the other hand, not requiring the judge to confront potential grounds for questioning the judge's impartiality may discourage full compliance with the rules governing judicial behavior. Allowing or requiring one judge in an administrative capacity to consider the disqualification of another may lead to intercollegial difficulties among judges who, by the very nature of appellate decision-making, must work collaboratively.

Disqualification by appellate court panel or en banc. Consideration of a disqualification request by a panel of the appellate court, or by the court sitting *en banc* with or without the judge whose disqualification is sought, raises many of the same collegiality concerns raised by decision by a chief administrative judge.

The desire for collegiality (or mutual back-scratching) on the appellate bench also may lead to "rubber stamping" a judge's desire not to be disqualified from a case. On the other hand, diffusing responsibility for the disqualification decision promotes impartiality and may reduce the possibility that the decision could turn on irrelevant inter-personal factors.

Disqualification by an "ethics judge." Having disqualification decisions made by a single independent judge, designated either by the chief administrative judge or another State officer or body, would allow development of substantial expertise and a body of precedent in considering disqualification requests. An "ethics judge" could be viewed as a neutral authority whose decision is respected as impartial, well-grounded, and less subject to question. The disadvantages in such a procedure include the excess of discretionary power residing in any single individual and the danger of arbitrary decisions grounded on personal factors.

Independent judicial conduct commission. Although an independent body such as a state Judicial Conduct Commission might well be assigned the duty of final review of recusal and disqualification decisions, either in examining the initial disqualification decision or in addressing ethics complaints arising from the challenged judicial conduct, the consensus of the Academy was that the initial disqualification decisions generally should not be made by such an independent body. Taking the disqualification decision wholly outside the appellate court system discourages judicial self-examination. Further, the procedures these bodies use are often geared to protecting the procedural rights

of judges, and so tend to be laborious, time-intensive, and not conducive to a timely decision on disqualification requests. There also was concern that placing disqualification decisions within the purview of such bodies ran the risk of politicizing both the body and decision-making in a manner that would hamper respect for the disqualification decision. Finally, placing the responsibility for disqualification decisions with an independent body unduly conflates disqualification and discipline.

5. The Right To Decision On Any Disqualification Request Before An Appeal Is Submitted On The Merits.

Whether an appellate judge is disqualified from deciding a case should not in any way be governed by, or be perceived as being governed by, the result reached, or the substantive position taken by the judge in the appeal at issue. Procedures established for dealing with appellate disqualification requests should ensure that the decision on a disqualification request is made before the appeal is submitted on the merits. This Principle protects the right of all the parties and the public, not just the party seeking disqualification, to a decision-making process that avoids any appearance of impropriety.

6. The Right To Be Informed Of Grounds For Disqualification Of Any Member Of The Merits Panel.

It is not uncommon on appeal for a judge to recuse without explanation. Motions to disqualify are also usually granted, or denied, without explanation. In part because judges have a duty to sit on cases where there is not a ground for disqualification, many members of the Academy believed that an explanation should be provided whenever an appellate judge does not sit on a case.

Recognizing that there are circumstances under which an appellate judge may wish or need to recuse for personal or private reasons, the Academy chose to limit this Principle to grounds for disqualification, and not to require a judge to explain his or her grounds for recusal.

Adherence to this Principle would also allow the establishment of a body of precedent in this area. Many disqualification decisions are made ad hoc, are not reported, and often are not even reduced to writing. This decreases confidence in the judiciary and is inconsistent with the courts' mission and contrary to purposes of the rule of law.

If courts adhere to Principle 2 requiring that the parties be informed who will decide their appeal, this Principle also may help to relieve the court and its judges of the burden of identifying grounds for disqualification for every judge on a court where all judges do not sit on a particular merits panel. The obligation to inform would only arise once, when an arguably partial judge is scheduled to sit on a particular appeal.

7. Review Of The Disqualification Decision Pursuant To Clearly Articulated Procedures.

Particularly where a state has determined that the judge is entitled to determine whether he or she should recuse from participation in a particular appellate case, the parties should have the right to seek review of the disqualification decision on an interlocutory basis. In many instances, a state's current rules governing appellate procedure need be only slightly modified to accommodate this review of an individual judge's decision.

8. Replacement Of A Disqualified Judge To Maintain A Quorum Or Prevent A Tie.

Any set of Principles established to govern disqualification of judges must insure that disqualification does not depopulate the appellate courts. Appellate decisions are made collegially to ensure collective wisdom. Cases are decided by a panel of appellate judges so that the quirks or misconceptions of any single judge will not have a significant effect on the decision reached by a majority of the panel.

One of the objections sometimes made to recusal or disqualification of appellate judges is that if a judge does not sit on a case, no replacement would be available – the so-called "Rule of Necessity". In the states, at least, the "Rule of Necessity" has limited application. In all but four states, justices of the state's highest court who are disqualified from sitting in a particular case may be replaced on the court for that case by a temporary justice.

The authority for such single-case replacement may be a provision of the state constitution, a statute, or a rule or policy of the state supreme court in these states. The appointing authority may be the chief justice of the Supreme Court, the Supreme Court as a whole, the remaining non-disqualified justices, or the governor. Generally, the provision authorizing the designation of replacement justices for a particular case specifies the persons eligible for such designation – for example, all retired Supreme Court justices, or all intermediate appellate court judges, or all judges of lower courts of record, or all persons who have been members of the state bar for at least a prescribed period of time. The pertinent

constitutional, statutory, and rule provisions are set discussed, alphabetically by state, in the Appendix to this paper.

In some states, the pertinent provisions are regularly applied to provide single-case replacement judges for disqualified judges. In other states, however, a culture of appellate collegiality has led to the disuse of such provisions, and the non-replacement of disqualified judges. This latter practice seems troubling, particularly where a policy that a fully-constituted appellate court panel should consider cases on review has been established by state constitution or statute.

Invocation of the "Rule of Necessity," or refusal to use established replacement provisions, often boils down to the dubious proposition that a biased judge is better than no judge at all. States should take measures to avoid inappropriate reliance on the "Rule of Necessity" by enacting or encouraging resort to preexisting provisions for temporary replacement of a disqualified appellate judge, particularly if the failure to replace the judge would prevent a case from being heard by a number of appellate judges sufficient to maintain a quorum or avoid a possible tie vote. In cases where the grounds for a judge's disqualification are discovered by a party only after the appeal has been decided, rehearing should be granted and a replacement judge appointed if the original decision could be upheld only by invocation of the "Rule of Necessity" to count the vote of the disqualified judge.

APPENDIX

State Provisions for Replacement of Disqualified Justices

Justices of the state's highest court who are disqualified from sitting in a particular case may be replaced on the court for that case by a temporary justice (usually, although not always, a judge of an inferior state court) in 46 states – every state but Indiana, Michigan, Virginia, and Wisconsin. The authority for single-case replacement is a provision of the state constitution, a statute, or a rule or policy of the state supreme court. The appointing authority is the chief justice of the supreme court, or the supreme court as a whole, or the remaining non-disqualified justices, or the governor.

Part A of this Appendix sets out, alphabetically by state, the provisions for appointment of temporary supreme court justices in each of the 46 states identified as having such provisions.¹ Part B addresses the four states that do not have provisions for the appointment of temporary supreme court justices.

A. Provisions for appointing temporary supreme court justices

1. Alabama. Justices of the Alabama Supreme Court are elected and re-elected in partisan elections for six-year terms. A provision of the state constitution (Ala. Const. art. VI, § 149) allows the chief justice to appoint an active or retired judge of an inferior court as a special justice of the supreme court. See *City of Bessemer v. McClain*, 957 So. 2d 1061, 1092-1093 (Ala. 2006). The provision has occasionally been applied to create a special supreme court composed entirely of special justices. See *McClain*, 957 So. 2d at 1093-1095.
2. Alaska. Justices of the Alaska Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of three years and thereafter are elected and re-elected for ten-year terms in retention elections. A provision of the state constitution (Alaska Const. art. IV, § 16) allows the chief justice to assign a judge of an inferior court to serve temporarily on the supreme court. See *Oxereok v. State*, 611 P.2d 913, 916 n.8 (Alaska 1980).
3. Arizona. Justices of the Arizona Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of two years and thereafter are elected and re-elected in retention elections to six-year terms. A provision of the state constitution (Ariz. Const. art. VI, § 3) authorizes the chief justice to “assign judges of intermediate appellate courts, superior courts, or courts inferior to the superior court to serve in other courts or counties.” See, e.g., *In re Marriage of Zale*, 972 P.2d 230 (1999).
4. Arkansas. Justices of the Arkansas Supreme Court are elected and re-elected in non-partisan elections for eight-year terms. A provision of the state constitution (Ark. Const. amend. 80, § 13) allows the governor to appoint a retired justice, an active judge of an inferior

¹Information about the methods of selection and retention of regular supreme court justices is taken from American Judicature Society, *Judicial Selection Methods in the States* (2008).

court, or a licensed attorney as a special justice of the supreme court in place of a regular justice disqualified from sitting in a particular case. See *White v. Priest*, 73 S.W.3d 572, 583-584 (Ark. 2002) (supplemental concurring opinion of Brown, J., on recusal). The provision has been applied to create a supreme court composed entirely of special justices. See *Johnson Timber Corp. v. Sturdivant*, 758 S.W.2d 415, 416 (Ark. 1988).

5. California. Justices of the California Supreme Court are appointed by the governor for a term of twelve years and thereafter are elected and re-elected in retention elections to twelve-year terms. A provision of the state constitution (Cal. Const. art. 6, ' 6) creates a Judicial Council and authorizes, in subsection (e), the chief justice to assign active or retired judges of inferior courts to serve as judges pro tempore of the supreme court. See *Mosk v. Superior Court*, 601 P.2d 1030, 1034-1036 (Cal. 1979).

6. Colorado. Justices of the Colorado Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of two years and thereafter are elected and re-elected in retention elections to ten-year terms. A provision of the state constitution (Colo. Const. art. VI, ' 5(3)) authorizes the chief justice to assign any active or retired judge of an inferior court "temporarily to perform judicial duties in any court."

7. Connecticut. Justices of the Connecticut Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of eight years and thereafter are re-nominated and reappointed every eight years. A statute (Conn. Gen. Stat. Ann. § 51-204 (West, Westlaw through the 2010 supplement to the Connecticut General Statutes)) allows for superior court judges to be designated as temporary supreme court justices.

8. Delaware. Justices of the Delaware Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of twelve years, and are eligible for reappointment by the governor on recommendation of the nominating commission for terms of the same length. A provision of the state constitution (Del. Const. art. IV, ' 12) authorizes the chief justice, in the event of the lack of a quorum, to designate judges of inferior courts "to sit in the Supreme Court temporarily to satisfy the number of Justices required by law." Another provision of the state constitution (Del. Const. art. IV, ' 15) allows the governor to appoint a judge or judges ad litem to sit in a particular case in the supreme court when there is lacking a sufficient number of justices to hear the case. See *Nellius v. Stiffel*, 402 A.2d 359, 361-362 (Del. 1978). A third provision of the state constitution (Del. Const. art. IV, ' 38) allows for the appointment of temporary assignment of retired judges and justices to the supreme court.

9. Florida. Justices of the Florida Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of one year and thereafter are elected and re-elected in retention elections for six-year terms. A provision of the state constitution (Fla. Const. art. 5, ' 2(b)) authorizes the chief justice to assign active and retired judges of inferior courts "to temporary duty in any court for which the judge is qualified. . . ." See also Fla. Const. art. 5, ' 3 ("When recusals for cause would prohibit the court from convening because of the requirements of this section, judges assigned to temporary duty may be substituted for justices.")

10. Georgia. Justices of the Georgia Supreme Court are elected and re-elected in non-partisan elections for six-year terms. A provision of the state constitution (Ga. Const. art. 6, ' 6, ¶ 1) provides that if a justice is disqualified in any case, a substitute judge may be designated by the remaining Justices to serve.

11. Hawaii. Justices of the Hawaii Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of ten years and thereafter are

reappointed for ten-year terms by a judicial selection commission. A provision of the state constitution (Haw. Const. art. 6, ' 2) authorizes the chief justice to assign judges of inferior courts and retired supreme court justices to serve temporarily on the supreme court. For a case anticipating decision by a supreme court composed entirely of district court judges, see *Kekoa v. Supreme Court*, 488 P.2d 1406, 1406-1407 (Haw. 1971).

12. Idaho. Justices of the Idaho Supreme Court are elected and re-elected in non-partisan elections for six-year terms. A provision of the state constitution (Idaho Const. art. V, ' 6) allows the supreme court to call a district court judge to sit in a particular case in the supreme court in place of a disqualified, ill, or absent justice. A statute (Idaho Code ' 1-215(2) (Michie Supp. 2008)) allows the supreme court to assign a retired justice or an active or retired judge of an inferior court to sit on the supreme court in a particular case in place of a disqualified justice.

13. Illinois. Justices of the Illinois Supreme Court are elected and re-elected in partisan elections for ten-year terms. A provision of the state constitution (Ill. Const. art. 6, ' 16) provides that the "Supreme Court may assign a Judge temporarily to any court."

14. Iowa. Justices of the Iowa Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of one year and thereafter are elected and re-elected in retention elections to eight-year terms. A statute (Iowa Code Ann. ' 602.1612 (West, Westlaw current with legislation signed as of 3/9/2010 from the 2010 Reg.Sess.)) provides that retired judges may be appointed to temporary judicial duties by the supreme court.

15. Kansas. Justices of the Kansas Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of one year and thereafter are elected and re-elected in retention elections to six-year terms. A provision of the state constitution (Kan. Const. art. 3, ' 6(f)) authorizes the supreme court to assign a district judge to serve temporarily on the supreme court. The power appears to be exercised by the chief justice. See *Kellogg Mall Associates v. Board of County Commissioners*, 607 P.2d 1330, 1339 (Kan. 1980); *Leek v. Theis*, 539 P.2d 304, 329 (Kan. 1975). A statute (Kan. Stat. Ann. ' 20-2616(a) (2007)) authorizes the supreme court to assign any retired supreme court justice or retired judge of an inferior court "in connection with any matter pending in the supreme court"

16. Kentucky. Justices of the Kentucky Supreme Court are elected and re-elected in non-partisan elections for eight-year terms. A policy adopted by the supreme court in 1989 (set out in an appendix to *Kentucky Utilities Co. v. South East Coal Co.*, 836 S.W.2d 407, 411 (Ky. 1992)) pursuant to statutory (Ky. Rev. Stat. Ann. ' 26A.015(3)(a) (Michie 1998)) and constitutional (Ky. Const. ' 116) authority provides, in the event of the disqualification of a regular justice from sitting in a particular case, for the appointment by the chief justice of an attorney as special justice of the supreme court to sit in that case. If at least two regular justices decline or are unable to sit in a particular case, the state constitution (Ky. Const. ' 110(3)) provides for appointment by the governor of special justices "to constitute a full court." *Kentucky Utilities Co.*, 836 S.W.2d at 409.

17. Louisiana. Justices of the Louisiana Supreme Court are elected and re-elected in partisan elections for ten-year terms. A provision of the state constitution (La. Const. art. 5, ' 5(A)) authorizes the supreme court to "assign a sitting or retired judge to any court."

18. Maine. Maine's judicial selection process is similar to the process for selecting federal

judges—judges are nominated by the governor and confirmed by the senate, but they serve seven-year terms rather than serving for life. A statute (4 Me. Rev. Stat. Ann. § 6 (West, Westlaw through Chapter 469 of the 2009 Second Regular Session of the 124th Legislature)) provides that retired justices may be appointed as an “Active Retired Justice” who may then be assigned to judicial duties by the Chief Justice. Under the statute, such Justices may “hear all matters and issue all orders, notices, decrees and judgments in vacation that any Justice of the Supreme Judicial Court is authorized to hear or issue.” 4 Me. Rev. Stat. Ann. § 6.

19. Maryland. Judges of the Maryland Court of Appeals are appointed by the governor on recommendation of a nominating commission to serve until the first general election following the expiration of one year from the date of the occurrence of the vacancy being filled, and thereafter are elected and re-elected in retention elections to ten-year terms. A provision of the state constitution (Md. Const. art. IV, § 18(b)(2)) authorizes the chief judge to assign a judge of an inferior court “to sit temporarily in any court. . . .” See also Md. Const. art. IV, § 3(a)(1) (“any former judge . . . may be assigned by the Chief Judge of the Court of Appeals, upon approval of a majority of the court, to sit temporarily in any court of this State”). A statute (Md. Code Ann., Cts. & Jud. Proc. § 1-302(b) (2006)) authorizes the chief judge to assign any “former judge” of any court (with specified exceptions) “to sit temporarily in any court”

20. Massachusetts. Justices of the Massachusetts Supreme Court are appointed by the governor on recommendation of a nominating commission to serve until age 70. A statute (Mass.Gen. Laws Ann. ch. 211 § 24 (West, Westlaw through Chapter 46 of the 2010 2nd Annual Sess.)) provides that a retired justice whose name has been placed on a designated list may be appointed by the Chief Justice to perform “such of the duties of the office of associate justice of the supreme judicial court as may be requested of him and which he is willing to undertake, provided that no single assignment shall be for a term longer than ninety days, and provided that full-bench duties may be assigned only to fill a temporary vacancy, including temporary disability, on the court.”

21. Minnesota. Justices of the Minnesota Supreme Court are elected and re-elected in non-partisan elections for six-year terms. A statute (Minn. Stat. Ann. § 2.724(2) (2006)) enacted pursuant to a provision of the state constitution (Minn. Const. art. 6, § 2) allows the supreme court to assign a retired justice or an active judge of an inferior court to sit in a particular case in the supreme court in place of a disqualified regular justice.

22. Mississippi. Justices of the Mississippi Supreme Court are elected and re-elected in non-partisan elections for eight-year terms. A provision of the state constitution (Miss. Const. art. 6, § 165) construed in *Hewes v. Langston*, 853 So. 2d 1237, 1241-1243 (Miss. 2003), allows the governor to appoint a special justice of the supreme court to sit in a particular case in place of a recused regular justice “where the Court lacks a quorum and where the parties are unable to agree in the selection of special justices to hear [the] case.” 853 So. 2d at 1243. The constitutional provision requires the gubernatorial appointee to be a person “of law knowledge.” In *Public Employees Retirement System v. Hawkins*, 781 So. 2d 899 (Miss. 2001), “all justices recused . . . and the parties agreed on five special justices (who constituted a quorum and) who were appointed by the Supreme Court, to determine the case.” *Hewes*, 853 So. 2d at 1241 (internal citations omitted). A statute (Miss. Code Ann. § 9-1-105 (Supp. 2008)) allows, in paragraph 1, the chief justice to appoint a “special judge” to hear a case in place of any disqualified “judicial officer.” Paragraph 4 of the same statute provides that if the appointment is within the governor’s constitutional power to make under Miss. Const. art. 6, § 165, the governor may subsequently make the appointment and the “appointment made by the Chief Justice . . . shall be void and of no further force or effect from

the date of the Governor's appointment." The interrelationship of the constitutional and statutory provisions is analyzed by Judge Leslie Southwick in *Recent Trends in Mississippi Judicial Rule Making: Court Power, Judicial Recusals, and Expert Testimony*, 23 Miss. C. L. Rev. 1, 11-15 (2003), in the context of "the never-ending and ever-escalating tort wars being fought out at every level of the Mississippi court system." *Id.* at 11.

23. Missouri. Justices of the Missouri Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of one year and thereafter are elected and re-elected for twelve-year terms. A provision of the state constitution (Mo. Const. art. 5, ' 6) authorizes the supreme court to assign any judge to sit temporarily on any court.

24. Montana. Justices of the Montana Supreme Court are elected and re-elected in non-partisan elections for terms of eight years. A provision of the state constitution (Mont. Const. art. VII, ' 3(2)) provides for the substitution of a district judge for a supreme court justice "in the event of disqualification or disability," but it does not designate the substituting authority.

25. Nebraska. Judges of the Nebraska Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of three years and thereafter are elected and re-elected in retention elections for terms of six years. A provision of the state constitution (Neb. Const. art. V, ' 2) authorizes the supreme court to appoint judges of inferior courts to sit temporarily as supreme court judges "in the event of the disability or disqualification by interest or otherwise of any supreme court judge. A statute (Neb. Rev. Stat. Ann. ' 24-729 (2004)) extends that authority to the appointment of retired judges of inferior courts. See *Conagra, Inc. v. Cargill, Inc.*, 388 N.W.2d 458, 459-460 (Neb. 1986).

26. Nevada. Justices of the Nevada Supreme Court are elected and re-elected in non-partisan elections for six-year terms. Constitutional (Nev. Const. art. 6, ' 4) and statutory (Nev. Rev. Stat. Ann. ' 1.225(5) (2004)) provisions allow the governor to designate a state district judge to sit on the supreme court in a particular case in place of a disqualified regular justice.

27. New Hampshire. Justices of the New Hampshire Supreme Court are appointed by the governor on recommendation of a nominating commission to serve until reaching the age of 70. A statute (N.H. Rev. Stat. Ann. ' 490:3(II) (Supp. 2008)) authorizes the chief justice to assign, on a random basis, a retired supreme court justice or, if such a retired justice is unavailable, a retired superior court justice to sit on the supreme court during a vacancy due to disqualification or other inability to sit. If no retired supreme or superior court justice is available, the selection of a replacement judge is made on a random basis from a pool of active superior court justices and, if no superior court justice is available, from a pool of active district and probate court justices. Under subsection II-a, the chief justice of the superior court may be assigned as a temporary supreme court justice by the chief justice of the supreme court on a non-random basis if the vacancy on the supreme court occurs within seven days of the scheduled oral argument of a case.

28. New Jersey. Justices of the New Jersey Supreme Court are appointed by the governor for an initial term of seven years, and thereafter may be reappointed by the governor with the consent of the Senate to serve until reaching the age of 70. A provision of the state constitution (N.J. Const. art. 6, ' 2, ¶ 1) directs the chief justice, "[w]hen necessary," to assign superior court judges, on the basis of seniority, to serve temporarily in the supreme court.

29. New Mexico. Justices of the New Mexico Supreme Court are appointed by the governor on recommendation of a nominating commission to serve until the next general election, and thereafter are elected in a partisan election for an eight-year term, followed by election and re-

election in retention elections for eight-year terms. When a justice cannot sit on a case by reason of interest, absence, or incapacity, a provision of the state constitution (N.M. Const. art. VI, ' 6) authorizes the remaining justices to "call in any district judge . . . to act as a justice of the [supreme] court." A separate constitutional provision (N.M. Const. art. VI, ' 28) allows the chief justice to designate any intermediate appellate judge as an acting supreme court justice.

30. New York. Judges of the New York Court of Appeals are appointed by the governor on recommendation of a nominating commission for a term of fourteen years, and may be reappointed in the same manner to successive terms of the same length. A provision of the state constitution (N.Y. Const. art. 6, ' 2) authorizes, in subsection (a), the judges of the Court of Appeals to designate any justice of the supreme court (a court inferior to the Court of Appeals) to serve as a Court of Appeals judge during the absence or inability to act of a Court of Appeals judge. The same constitutional provision authorizes, in subsection (b), the governor to designate not more than four supreme court justices to sit as temporary Court of Appeals judges, upon the certification of the Court of Appeals to the governor that the number of temporary judges to be appointed is necessary "by reason of the accumulation of causes pending" in the Court of Appeals.

31. North Carolina. Justices of the North Carolina Supreme Court are elected and re-elected in non-partisan elections for eight-year terms. A statute (N.C. Gen. S. Ann. ' 7A-39.14 (West, Westlaw through S.L. 2009-577 (end) of the 2009 Regular Session)) provides that the Chief Justice, with the concurrence of the majority of the Supreme Court, "may recall an emergency or retired justice to serve on the Supreme Court in place of a sitting justice who, as determined by the Chief Justice, is temporarily unable to perform all of the duties of his office."

32. North Dakota. Justices of the North Dakota Supreme Court are elected and re-elected in non-partisan elections for ten-year terms, with midterm vacancies filled by appointment of the governor on recommendation of a nominating commission. A provision of the state constitution (N.D. Const. art. VI, ' 11) directs the chief justice to assign an active or retired judge of an inferior court, or a retired justice, to hear a pending case in place of a justice unable to sit because of conflict of interest or physical or mental incapacity. For a case in which the entire supreme court was composed of district judges acting as supreme court justices, see *State ex rel. Linde v. Robinson*, 160 N.W. 512, 514 (N.D. 1916).

33. Ohio. Justices of the Ohio Supreme Court are elected and re-elected in partisan elections to six-year terms. A provision of the state constitution (Ohio Const. art. IV, ' 2(A)) authorizes the chief justice to assign any judge of an intermediate appellate court to sit on the supreme court in place of a justice unable to hear a case by reason of illness, disability, or disqualification.

34. Oklahoma. Justices of the Oklahoma Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of one year and thereafter are elected and re-elected for six-year terms in retention elections. Rule 9(b) of the Rules on Administration of Courts (appearing in Okla. Stat. tit. 20, Ch. 1, App. 2 (2001)), on the authority of a provision of the state constitution (Okla. Const. art. 7, ' 6), allows the chief justice to assign the judge of any inferior court to sit as a special justice of the supreme court in a particular case in place of a disqualified regular justice. Rule 9(c), citing a statute (Okla. Stat. tit. 20, ' 1402 (2001)), provides that when all regular supreme court justices are disqualified from sitting in a case, "then the Chief Justice shall request that the Governor appoint qualified members of the bar to sit in the case as special justices." For a case in which the entire supreme court was composed of special justices, see *In re Grimes*, 494 P.2d 635 (Okla. 1971).

35. Oregon. Judges of the Oregon Supreme Court are elected and re-elected in non-partisan elections for six-year terms. By state constitutional (Or. Const. art. 7 (Amended), ' 2a) and statutory (Or. Rev. Stat. Ann. ' 1.600(1) (2007)) authority, the supreme court may appoint a judge of an inferior court as a judge pro tempore of the supreme court whenever it determines that "the appointment is reasonably necessary and will promote the more efficient administration of justice." Or. Rev. Stat. Ann. ' 1.600(1).

36. Pennsylvania. Justices of the Pennsylvania Supreme Court are elected in partisan elections to a ten-year term and thereafter are re-elected in retention elections to ten-year terms. A statute (42 Pa. Cons. Stat. Ann. ' 326(c) (West 2004)) provides for the temporary assignment of judges to the supreme court sufficient to make up a quorum otherwise impossible to assemble by reason of vacancy, illness, disqualification, or otherwise. The statute does not specify the assigning authority.

37. Rhode Island. Justices of the Rhode Island Supreme Court are appointed by the governor with the advice and consent of the state legislature on recommendation of a nominating commission to life terms. A statute (R.I. Gen. L. Ann. ' 8-3-8(c) (West, Westlaw through chapter 392 of the January 2009 session) provides that the Chief Justice may assign retired supreme court justices "to perform such services as an associate justice of the supreme court as the chief justice of the supreme court shall prescribe."

38. South Carolina. Justices of the South Carolina Supreme Court are appointed and reappointed by the state legislature on recommendation of a nominating commission to ten-year terms. A provision of the state constitution (S.C. Const. art. V, ' 4) authorizes the chief justice to assign any judge to sit in any court. See *State ex rel. Riley v. Martin*, 262 S.E.2d 404, 407 (S.C. 1980). A statute (S.C. Code Ann. ' 14-3-60 (West, Westlaw through End of 2009 Reg. Ses)) provides that if "all or any" of the supreme court justices are prevented by disqualification or otherwise from sitting on a case, the governor shall commission "the requisite number of men learned in the law" for its determination.

39. South Dakota. Justices of the South Dakota Supreme Court are appointed by the governor on recommendation of a nominating commission to a term of three years and thereafter are elected and re-elected in retention elections to eight-year terms. A provision of the state constitution (S.D. Const. art. V, ' 11) authorizes the chief justice to assign any circuit court judge to sit on the supreme court in place of a justice who is disqualified or unable to act. The same constitutional provision, supplemented by a statute (S.D. Codified Laws ' 16-1-5 (West 2004)), authorizes the chief justice to assign retired justices and active or retired judges to act in place of disqualified supreme court justices.

40. Tennessee. Justices of the Tennessee Supreme Court are appointed by the governor on the recommendation of a nominating commission to serve until the next biennial general election and thereafter are elected and re-elected to eight-year terms in retention elections. Under state constitutional (Tenn. Const. art. VI, ' 11) and statutory (Tenn. Code Ann. ' ' 17-2-102, 17-2-110(a) (1994)) authority, as construed in *Hooker v. Sundquist*, 1999 Tenn. LEXIS 80, at *1-*7 (Tenn. Sup. Ct. Feb. 16, 1999), both the chief justice and the governor are empowered to appoint special justices to replace a regular supreme court justice who is "unable" to sit in a particular case. Section 17-2-110(a) allows the chief justice to assign a judge of an inferior court to sit in the case. Section 17-2-102 allows the governor to appoint "competent lawyers" as temporary replacements for regular supreme court justices in cases in which the justices are "incompetent" to sit. The cited constitutional provision also directs that if all the justices of the supreme court are disqualified from sitting in a particular case, the

governor shall appoint the requisite number of persons “of law knowledge” for its hearing and determination.

41. Texas. Justices of the Texas Supreme Court are elected and re-elected in partisan elections for six-year terms. Under state constitutional (Tex. Const. art. 5, ' 11) and statutory (Tex. Gov't Code Ann. ' 22.005 (Vernon 2004)) authority, the governor is empowered to appoint temporary replacements for regular supreme court justices disqualified from sitting in a particular case. The constitutional provision requires that the temporary justices be “persons learned in the law.” The statute limits the appointments to judges of an inferior court. A 1924 case which was heard and decided by a supreme court consisting entirely of non-judge special justices appointed by the governor is described by Alice McAfee in *The All-Woman Texas Supreme Court: The History Behind a Brief Moment on the Bench*, 39 St. Mary's L. J. 467 (2008).

42. Utah. Justices of the Utah Supreme Court are appointed by the governor on recommendation of a nominating commission to serve until the first general election within three years of their appointment, and are thereafter elected and re-elected in retention elections to ten-year terms. A provision of the state constitution (Utah Const. art. VIII, ' 2) directs the chief justice to assign a judge of an intermediate appellate court or the district court to sit on a case in the supreme court in place of a justice who is disqualified or otherwise unable to sit. (If the chief justice is disqualified or unable to participate in the case, the remaining justices are the assigning authority).

43. Vermont. Justices of the Vermont Supreme Court are appointed by the governor on recommendation of a nominating commission to a term of six years and are thereafter retained by vote of the General Assembly for six-year terms. A statute (Vt. Stat. Ann. tit. 4, ' 22(a), (c) (Supp. 2008)) authorizes the chief justice to appoint active and retired judges of inferior courts, and retired supreme court justices, to a “special assignment” on the supreme court, in the event of the disqualification, disability, or death of a justice.

44. Washington. Justices of the Washington Supreme Court are elected and re-elected in non-partisan elections for six-year terms. Under state constitutional (Wash. Const. art. 4, ' 2(a)) and statutory (Wash. Rev. Code ' 2.04.240(1) (2006)) authority, a majority of the supreme court may appoint active or retired judges of inferior courts of record to act as justices in the supreme court. For a case in which the entire supreme court was composed of justices pro tempore, see *In re Disciplinary Proceeding Against Sanders*, 145 P.3d 1208, 1209 n*. (Wash. 2006), cert. denied sub nom. *Sanders v. Washington State Commission on Judicial Conduct*, 128 S.Ct. 137 (2007).

45. West Virginia. Justices of the West Virginia Supreme Court of Appeals are elected and re-elected in partisan elections for twelve-year terms. The state constitution (W. Va. Const. art. VIII, ' 2) authorizes the chief justice to assign a judge of an inferior court to serve on the supreme court in place of a disqualified regular justice.

46. Wyoming. Justices of the Wyoming Supreme Court are appointed by the governor on recommendation of a nominating commission for a term of one year, and thereafter are elected and re-elected in retention elections to eight-year terms. A provision of the state constitution (Wyo. Const. art. 5, ' 4(a)) authorizes the chief justice to designate a district judge to sit on the supreme court in any case in which a regular justice cannot participate “for any reason.” A statute (Wyo. Stat. Ann. ' 5-1-106(f) (2007)) authorizes the chief justice to assign a retired supreme court justice or retired district court judge “to service on any court.”

B. States without provisions for appointing temporary supreme court justices

Three states, Indiana, Virginia, and Wisconsin, have authority expressly rejecting the appointment of temporary supreme court justices. Michigan authority seems to deny such appointments, but is somewhat ambiguous.

47. Indiana. In *State ex rel. Mass Transp. Authority of Greater Indianapolis v. Indiana Revenue Bd.*, 254 N.E.2d 1 (Ind. 1969), the petitioners filed a motion requesting that special judges be appointed to the Indiana Supreme Court to hear their petition for reconsideration. The Indiana Supreme Court denied the motion and held that “to appoint special judge(s) to sit as co-equal members on this court for the purpose of deciding these or any other issues, regardless of their import, would be in direct contravention of both our Constitution and the statutes of this state.” The Court reasoned that the court “is a creation of our Constitution, Art. 7, s 1” and thus “its composition is expressly governed by the terms of that document and can neither be expanded nor contracted at the whim of this court or the litigants standing before it.” *Id.* at 3.

48. Michigan. Michigan law is perhaps the murkiest regarding the issue of temporary appointment of supreme court justices. In *Adair v. State, Dept. of Educ.*, 709 N.W.2d 567 (Mich. 2006), two justices of the Michigan Supreme Court considered motions requesting that they recuse themselves. The court denied the motion, partially based on its assertion that “unlike members of the trial courts or the Court of Appeals, there can be no replacement of a justice who must recuse himself or herself.” *Id.* at 579. The court cited Mich. Const. art. 6, § 2 in support of this assertion, which states that “[t]he supreme court shall consist of seven justices elected at non-partisan elections as provided by law.” However, one of the other justices wrote separately to contest this assertion. See *id.* at 582-584 (Weaver, J., writing separately). Justice Weaver wrote that “the views expressed by Chief Justice Taylor and Justice Markman do not reflect those of all their colleagues, and are not binding on future decisions of this Court or on the decisions of individual justices on motions for their disqualification.” *Id.* at 582. Justice Weaver argued that a different provision of the Michigan constitution, art. 6 § 23, gave the supreme court the ability to assign active or retired judges to duty as supreme court justices. Article 6, § 23 states that “[t]he supreme court may authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments.” Justice Weaver argued that this “provision does not distinguish the ‘judicial duties’ of Michigan Supreme Court justices from those of other judges,” and thus active or retired judge could serve as supreme court justices.

Two Michigan statutes (Mich. Comp. Laws Ann. § 600.225-226 (West, Westlaw through P.A.2010, No. 18, of the 2010 Regular Session, 95th Legislature)), not cited by any of the justices in *Adair*, appear to support Justice Weaver’s position. Section 600.225 states that “[t]he supreme court may assign an elected judge of any court to serve as a judge in *any other court* in this state” and section 600.226 states that “[t]he supreme court may authorize any retired judge from any court to perform judicial duties in *any court* in the state.” (emphasis added).

49. Virginia. The constitution of Virginia provides that the Chief Justice of its supreme court is “the administrative head of the judicial system” and that he “may temporarily assign any judge of a court of record to any other court of record *except the Supreme Court* and may assign a retired judge of a court of record, with his consent, to any court of record *except the Supreme Court.*” Va. Const. art. VI, § 4 (emphasis added).

50. Wisconsin. The Wisconsin constitution provides that “[t]he chief justice may assign any judge of a court of record to aid in the proper disposition of judicial business in any court of record *except the supreme court.*” Wis. Const. art. VII, § 4 (emphasis added).