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Switching hats: The judge as litigant by Cynthia Gray

Like other individuals, judges may sue or be sued, requiring them to appear in court in the less-familiar role of litigant. That juxtaposition of their private status and their professional arena requires judges to ensure that their conduct as a litigant does not raise doubts about their integrity as a judge.

For example, a judge demonstrates “disdain, if not outright contempt, for the very system which he, as judge, has sworn to administer” if he ignores a court order “even though acting in a private capacity.” *In the Matter of Van Susteren*, 348 N.W.2d 579 (Wisconsin 1984) (judge failed to comply with a court order that he file a verified account after he resigned as personal representative of his brother’s estate). In a discipline case brought when a judge failed to comply with its order to file a financial disclosure

statement after it had rejected his constitutional challenge, the Wisconsin Supreme Court explained:

A judge, perhaps more than anyone else, is aware of the central role the rule of law plays in our society. The rule of law is dependent, however, on the willingness of litigants, public officials, and the public in general to respect the exercise of judicial authority. We have established procedures for challenging the exercise of judicial power, but when that challenge is unsuccessful, there must be compliance with the court’s decision or the rule of law will be destroyed. A judge who daily presides in court and makes rulings and decisions can only weaken his own judicial authority by refusing to comply with a judgment of the Supreme Court of this state simply because he disagrees with the judgment.

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Fine-tuning disqualification rules by Cynthia Gray

The complexity of a judge’s past and current relationships and activities makes a comprehensive catalogue of grounds for disqualification impossible. Therefore, the code of judicial conduct necessarily relies on the general standard requiring disqualification whenever the judge’s impartiality might reasonably be questioned to back-up the list of specific circumstances in which disqualification is “automatically” required. However, new grounds may be added to the list to give judges, litigants, and the public guidance about common situations that raise reasonable questions about impartiality. (Under most specific rules, the parties can waive disqualification following disclosure of the circumstances by the judge.)

For example, in the 2007 revisions to the *Model Code of Judicial Conduct*, the American Bar Association added two new specific grounds for disqualification. First, disqualification is now expressly required under the model code

when the judge, while serving in governmental employment, “participated personally and substantially as a lawyer or public official concerning the proceeding, or ... publicly expressed ... an opinion concerning the merits of the particular matter in controversy.” The second new ground applies when a judge “previously presided as a judge over the matter in another court.”

Further, in adapting the model code, many states have identified additional circumstances that require disqualification. For example, although the model code does not expressly address whether disqualification is required when a former client of the judge is a party to a case (unless the judge “served as a lawyer in the matter in controversy”), several states have adopted a per se rule that sets a specific period – two years in **Alaska** and **Maryland** and seven

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- A judge's spouse may include their co-owned residence in a garden walk that will raise funds for a community theater. *Nebraska Opinion 12-2*.

- A judge may appear at a mediation in a contested probate estate as guardian of his minor children. *Florida Opinion 2012-5*.

- A judge may provide informal, uncompensated legal advice and assistance to her husband in selecting and consulting with counsel regarding possible employment-related claims against the office of court administration. *New York Opinion 11-55*.

- If a judge has a close relationship with his siblings, he may provide legal advice to them about a claim made against their stepmother's estate but may not negotiate on behalf of his siblings or the estate. The judge may hire an attorney on behalf of his siblings or recommend an attorney. *Utah Informal Opinion 11-2*.

- A judge may accept wedding gifts from attorneys who work with her husband in a large government office unless the value is so great that a reasonable person would believe that the gift would undermine her independence, integrity, or impartiality. *Connecticut Informal Opinion 2012-3*.

- A judge's husband may write a letter supporting his first cousin in a criminal matter, but the judge should request that he not refer to her or her position, identify himself as a judge's spouse, state or imply that she shares his views, or express an opinion about the proceeding. *Connecticut Emergency Staff Opinion 2011-30*.

- A judge who is married to an attorney is not required to affirmatively inquire whether parties to a case are clients of his spouse or her law firm unless an independent circumstance causes the judge to believe that such an inquiry should be conducted; if the judge learns that his spouse's firm represents and/or has represented a party, the judge should disclose that relationship but is not required to disqualify absent independent circumstances. *Washington Opinion 12-2*.

- Absent unusual circumstances, a judge is not disqualified from a case involving the bank where she has a savings or checking account or a mortgage or other loan. *D.C. Opinion 12 (2012)*.

- A judge who is a tenant/defendant in a residential condominium foreclosure proceeding is not required to disqualify himself from all residential foreclosure proceedings but should disclose that status to all residential foreclosure litigants. *Florida Opinion 2012-9*.

- A judge or chambers staff may not ask vendors or sponsors for donations to support a judicial leadership program, but staff of the administrative office of the courts may do so. Donors may receive limited public recognition, but judges should ensure that the recognition does not imply that the court endorses the vendor's products or

services or that donors are in a special position to influence the court. *Nevada Opinion JE11-014*.

- A judge who is a member of a supreme court committee that drafted a brochure about the perception of fairness in the state's courts may not directly solicit donations from bar associations to help defray the costs of printing and distributing the brochure. *Florida Opinion 2012-4*.

- When local jail conditions are a matter of local controversy and lawsuits are anticipated, a judge may not serve on a legislatively-created board that will provide suggestions to the legislative and executive branches for improving the jails and will forward complaints about conditions to the sheriff's office. *New York Opinion 11-5*.

- A judge should not attend a retirement dinner for a

lawyer hosted by lawyers who appear regularly before the judge. *Connecticut Informal Opinion 2012-1*.

- A judge who is chair of the board of directors of a non-profit organization that provides programs for senior citizens and promotes independent living may not sign grant applications for the organization even if she is not identified as a judge. *Colorado Opinion 2012-1*.

- A judge whose name was listed as an honoree on invitations to an organization's fund-raising event, contrary to assurances that the event was not a fund-raiser, should object in writing and insist that the organization send a retraction. Because the invitations request significant donations beyond the cost of the event in honor of the honorees, the judge should not attend. *New York Opinion 11-35*.

- A judge may not recommend or endorse a candidate for a bar association elective office. *Ohio Opinion 2011-3*.

- A judge may not sign an attorney's petition to be nominated as a delegate to the state bar's house of delegates. *South Carolina Opinion 3-2012*.

- Unless required by law to perform marriages, a judge may adopt a policy of performing marriages only for friends and relatives or may decline to perform all marriages; whether a judge may adopt a policy of performing marriages only for opposite-sex couples is primarily a legal question; if a judge acts in conformity with the law, the judge will not violate the rules governing judicial conduct. *New York Opinion 11-87*.

- A judge may review a proposed bar examination question for the National Conference of Bar Examiners and accept an honorarium. *New York Opinion 11-93*.

- A judge may not meet privately with the representatives of a victims' advocacy group that wants to educate the judge about the group's role in the community and establish a mutually respectful relationship with the court system. *New York Opinion 11-85*.

The Center for Judicial Ethics has links to the web-sites of judicial ethics committees at www.ajs.org/ethics/.

Recent advisory opinions

Constitutional challenge

Sitting en banc, the U.S. Court of Appeals for the 8th Circuit upheld the constitutionality of clauses in the Minnesota code of judicial conduct prohibiting a judge or judicial candidate from publicly endorsing another candidate for public office and “personally solicit[ing] or accept[ing] campaign contributions” except by making “a general request for campaign contributions when speaking to an audience of 20 or more people;” by signing letters for distribution by the candidate’s campaign committee; or by soliciting “members of the judge’s family, . . . a person with whom the judge has an intimate relationship, or . . . judges over whom the judge does not exercise supervisory or appellate authority.” *Wersal v. Sexton*, 672 F.3d. 1010 (2012). For an analysis of the decision and other challenges to campaign and political restrictions in the code of judicial conduct, see www.ajs.org/ethics/pdfs/CaselawafterWhite.pdf.

While on military duty

Pursuant to the judge’s agreement, the Tennessee Court of the Judiciary publicly reprimanded a judge for, while he was on military duty in Germany, allowing an unauthorized individual to sit as a substitute judge and setting bonds by e-mail. *Letter to Bell* (February 27, 2012) (www.tsc.state.tn.us/boards-commissions/court-judiciary/disciplinary-actions).

In July 2003, the Tennessee Supreme Court entered a standing order specifically naming judges to be used as substitutes during Judge Bell’s terms of military service. The order was in effect in April 2011, when the judge was stationed for military service in Germany, but, during that time, he allowed an individual not authorized by the order to sit as a substitute judge on several occasions.

The judge also instructed staff that he would continue to set bonds in DUI cases. By e-mail, the judge received information at his duty station and notified jail personnel of the bonds, which caused delays in some cases.

Failure to read order

Adopting the findings and recommendation of the Judicial Standards Commission, which the judge did not oppose, the North Carolina Supreme Court censured a judge for signing an order that contained false recitations without reading the order or giving the prosecution notice or an opportunity to make arguments. *In re Totten*, 722 S.E.2d 783 (North Carolina 2012).

Pursuant to a plea agreement, after hearing the evidence proffered by the assistant district attorney, including the breath alcohol concentration test result of 0.17, the judge found a defendant guilty of DWI and entered a sentence. When the defense attorney approached the clerk in the courtroom to retrieve the paperwork, the

judge advised the attorney that he intended to set aside the requirement for an interlock device for the defendant and asked the clerk what procedure the division of motor vehicles would recognize. The clerk stated that, unless an order was entered, she was required to report BAC results of 0.15 and above in DWI convictions. The judge told the defense attorney that, if the attorney would prepare an order, he would sign it. All of the judge’s conversations with the defense attorney took place in the courtroom, at the bench, during an open session of court, but not as part of the official proceedings; the district attorney was not asked to participate and was not aware of the substance of the discussion.

The defense attorney later returned to the courtroom, handed the judge a prepared order to suppress the BAC results, and brought the assistant district attorney sitting in the courtroom to the bench. The judge noted the state’s objection to the order before the assistant district attorney was given the opportunity to make substantive arguments. The order incorrectly stated that the matter was heard on defense counsel’s motion to suppress and entered based on the evidence, the law, and arguments made by counsel. Because he believed that he was signing a form order setting aside the interlock device, the judge did not fully review the order before signing it and was not aware of the erroneous findings and conclusions.

Cancelling court reporter

The California Commission on Judicial Performance publicly admonished a judge for cancelling the court reporter scheduled to take down proceedings before another judge. *Public Admonishment of Edwards* (February 7, 2012) (http://cjp.ca.gov/res/docs/public_admon/Edwards_2-7-12.pdf). On July 13, 2010, Judge Edwards sent Judge Woodward an e-mail stating:

There is no need for a reporter [on July 19]. If we can cancel that court reporter today without incurring a claim tell me why we shouldn’t. If I don’t hear from you I will presume you agree and I will have [the court executive officer] call her off.

Judge Woodward responded by e-mail that he had a “number of matters set on the 19th that require a court reporter,” but Judge Edwards cancelled the court reporter, informing Judge Woodward that the court reporter had been cancelled because none of the cases required one. State and local laws require that an official reporter take down many felony proceedings.

Before the Commission, Judge Edwards claimed that he had cancelled the court reporter because he was

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In re Kading, 246 N.W.2d 903 (Wisconsin 1976). See also *In re Miller*, 949 So.2d 379 (Louisiana 2007) (judge failed to comply with a consent order in a sexual harassment suit that prohibited him from contacting his former secretary); *In the Matter of Staeger*, 476 N.W.2d 876 (Wisconsin 1991) (judge failed to comply with a court order to clean up junk stored on his property).

Similarly, the Connecticut Supreme Court publicly censured a judge for willfully and intentionally failing to make installment payments that a court had ordered in a suit to collect on a promissory note. *In re Dean*, 717 A.2d 176 (Connecticut 1998). A ruling that his state salary was exempt from a wage execution resulted in news reports about “a judge who issues court orders, but who refuses to pay when subject to such an order and leaves his creditors without a remedy because he is a state official” The “great deal of adverse publicity” prompted him to pay the installments for several months until he filed for bankruptcy.

The Court noted that the judge did not contest the finding that his failure to make the payments was intentional, concluding that he could have afforded to make the payments. The judge’s defense was that he had disobeyed the installment payment order and his failure to comply was not misconduct because his counsel had advised him that it was not a “coercive order,” in other words, it was not enforceable by contempt.

The Court rejected that argument, stating “whether a judge’s conduct compromises the integrity of the court or lessens public confidence in the judicial system cannot turn on whether contempt can lie.” The Court explained:

The responsibility of the judge extends not only to the business of the courts in its technical sense, such as the disposition of cases, but also to the business of the judge in an institutional sense, such as the avoidance of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system from the actions of a judge.

* * *

It is significant, therefore, that, although the conduct of the respondent involved in this case is private, as opposed to

official or judicial conduct, it relates directly to the system of justice in which he, in his official capacity, plays a central role. The viability of our system of justice depends in large part on voluntary compliance with its orders, because if every order were ignored until its target were coerced into compliance, public confidence in the system would be seriously impaired. Thus, it is reasonable to require upon pain of sanction, that a judge comply voluntarily with an order that he is capable of complying with, in order to maintain the public’s confidence.

In a dissent, one justice argued that the judge did not violate the code of judicial conduct because he had acted on the advice of counsel and with the good faith belief that his conduct was legal and appropriate.

Tactics

Deceitful action by a judge in a lawsuit is also “inconsistent with the responsibilities of a judicial officer” and casts serious doubt on a judge’s “ability to be perceived as truthful by those who may appear before her in her courtroom.” *In re Ford-Kaus*, 730 So. 2d 269 (Florida 1999) (judge told serious, substantial falsehoods during her deposition in a malpractice suit against her). See also *In re Nettles-Nickerson*, 750 N.W.2d 560 (Michigan 2008) (judge signed a divorce complaint that falsely stated her husband had resided in the county long enough for the case to be filed there).

The New York State Commission on Judicial Conduct disciplined a judge for filing a verified answer that contained defenses he acknowledged were invalid. *In the Matter of Honorof*, Determination (New York State Commission on Judicial Conduct April 18, 2007) (www.scjc.state.ny.us). After he became a judge, two former clients sued for advice he had given before he became a judge. They reached a settlement, and the judge signed a confession of judgment, agreeing to pay a lump sum of \$25,000, followed by 60 monthly installments of \$500. After a year and a half, the judge stopped making the payments. The former clients filed a second suit. Acting on advice of counsel, the judge verified an answer stating that the confession of judgment

New Jersey directive

A directive requires New Jersey judges to report involvement in litigation to the administrative director of the courts and the chief justice (www.judiciary.state.nj.us/directive/personnel/dir_4_81.pdf). The requirement applies to any type of litigation, including all federal, state, administrative agency, municipal board or agency, or municipal court matters (except those resolved by a violations bureau). A report must be filed if the judge is personally named, if the judge is a party in interest, and if the matter arises out of judicial duties. The report must include a summary of the matter, the nature of the judge’s involvement, the docket number, and venue.

had been procured by “fraud and duress.” In the discipline proceedings, the judge acknowledged that those defenses were invalid and that he owed the remaining debt, which he had arranged to pay.

The Commission concluded that “as a judge and officer of the court, respondent was especially obliged to be candid in the litigation process and not to verify assertions in a pleading unless he was reasonably certain, after due diligence, that such assertions were accurate.” The Commission stated that judges are held to stricter standards than “the morals of the market place’ and . . . society as a whole” to preserve the integrity and independence of the judiciary. One member dissented, however, stating that the judge did not know that his defenses were invalid at the time he raised them and expressing concern that the judge’s creditors were using the Commission to pressure him.

Based on the presentment of the Advisory Committee on Judicial Conduct, which the judge had accepted, the New Jersey Supreme Court reprimanded a judge for, in addition to related misconduct, filing a frivolous lawsuit against the mother of an 18-year-old who had damaged his son’s car. *In the Matter of Baptista*, 15 A.3d 323 (New Jersey 2011). (The Court’s order does not describe the judge’s misconduct; the Committee’s presentment is at www.judiciary.state.nj.us/pressrel/Baptista%20Presentment%20ACJC%202009-063.pdf.)

K.H. damaged the vehicle driven by the judge’s son while it was parked at the high school they attended. After learning that criminal charges would not be filed, the judge filed a lawsuit against K.H. for intentionally, maliciously, and negligently damaging the car and against K.H.’s mother, J.H., for failing “to adequately control, supervise or otherwise parent” K.H.

The Committee found that the judge’s suit against the mother was frivolous and not warranted by existing law, noting the judge had admitted that the claim was merely a tactic to keep her in the case and embarrass her. Rejecting the judge’s defense that he was acting “in his role as an advocate and not as a judge,” the Committee explained:

It is not simply a matter of switching hats. Respondent is, at all times, a member of the Judiciary. His representation of the Judiciary does not cease when he steps off the bench, and even his conduct as an advocate reflects on his judicial office. To us, his frivolous claim and admission under oath that he intended to embarrass J.H. reflects on the entire Judiciary and does so poorly. Rather than underscoring the Judiciary’s integrity, Respondent’s conduct tarnished it.

However, not all lawyerly maneuvers are off limits for judges when they are litigants. The Pennsylvania Supreme Court held that a judge’s use of the legal process constitutes

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misconduct only if it is analogous to malicious prosecution or abuse of process, accepting a report finding that a supreme court justice had not committed misconduct by appealing a zoning variance for a new development near his home. *In the Matter of Larsen*, 616 A.2d 529 (Pennsylvania 1992). (The justice was reprimanded for unrelated conduct.) The charges had alleged that the justice's opposition to the development was not sincere and that he had used the legal process to attempt to coerce a settlement that was disproportionate to the damage. However, the report had concluded that the justice's appeal of the variance was highly likely to succeed and, therefore, any suggestion of malicious prosecution was unfounded.

The report rejected the judge's argument that only off-bench conduct that is prohibited by law violates Canons 1 and 2. However, the report also rejected the argument by the judicial conduct commission that a judge/litigant must forego "legitimate strategic advantages in settlement" in deference to "the risk that an uninformed public might wrongly assume that the judge's adversary was cowed into an 'excessive' settlement because of fear that another judge might improperly favor the judge/litigant."

Misuse of office

Finally, a judge cannot use the prestige of office to gain an advantage in personal litigation. For example, the Massachusetts Supreme Judicial Court publicly reprimanded a judge for writing two letters on judicial stationery that attempted to pressure the *Boston Herald* to settle rather than appeal a judgment of more than \$2,000,000 a jury had awarded the judge in a libel case. *In the Matter of Murphy*, 897 N.E.2d 1220 (Massachusetts 2008). In the first letter, the judge told the publisher not to bring counsel to or tell counsel about a meeting. In the second letter, the judge stated, repeatedly and emphatically, that the *Herald* had no chance of prevailing on appeal. The *Herald* printed excerpts from the letters in its print edition and full copies in its on-line edition.

In the judicial discipline case, although noting that "a judge is not prohibited from communications related to personal litigation, including those in pursuit of settlement," the Court concluded that the judge's letters did not "reflect the high standards required to be followed by a judge both on and off the bench."

To a reasonable person, th[e] content, combined with the emphasis and the language selected by the judge, could be viewed as an attempt by a judge to exert inappropriate pressure. For a sitting judge to state with repeated emphasis that he knows with complete certainty what will happen in a case is a misuse of the power and prestige of judicial office; the judge's use of an official court stationery envelope to mail the message exacerbated the misuse.

That the publisher did not feel threatened or intimidated was not determinative, the Court stated, because the question "is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." The Court also concluded that the judge's belief that the letters would be confidential was unreasonable and, "even apart from their publication, the mere sending of letters with such content and tone fails to uphold the standard required of a judge." See *New York Advisory Opinion 00-7* (a judge who is considering bringing a defamation action should not seek the opinion of attorneys who appear before the judge as to the accuracy of the newspaper articles and should not use court time, resources, stationery, or staff in pursuing the matter). See also *In the Matter of DiLoreto*, Decision and Order (California Commission on Judicial Performance June 13, 2006) (http://cjp.ca.gov/pub_discipline_and_decisions.htm) (judge used court stationery in a code enforcement action initiated by the city).

The Indiana Supreme Court reprimanded a judge for improperly obtaining an ex parte temporary custody order and making "off-color and outrageous comments" about his wife's attorney. *In the Matter of Sauce*, 561 N.E.2d 751 (Indiana 1990). When the judge and his ex-wife disagreed about where their son should go to school, the judge personally visited another judge and obtained an ex parte order granting him temporary custody. When the order was vacated, the judge stated to his ex-wife's husband about his ex-wife's attorney words to the effect of, "I will nut him for an ex parte communication. I will serve their nuts up like beef stew. Your lawyer won't get away with this because I will nut him too when this is over. I'm going to f ... him up real bad if at all possible. I'm going to f ... him up just like he's trying to f ... up my kid."

In the judge's discipline case, the Indiana Supreme Court held:

For a judge to improperly obtain an order and to make threats against the attorney of his opponent in a personal case destroys the public's confidence in our judicial system. It was highly unethical for Respondent to use his position as a judge to gain an unfair advantage in his personal child custody case. Rules of law must apply equally to all citizens. Just because a citizen in a case happens to be a judge should not affect the outcome of a case or the way orders get issued.

To emphasize the distinction between the two roles, a judge should not gratuitously draw attention to his or her judicial status in the context of a personal case. See *In the Matter of Dumar*, Determination (New York State Commission on Judicial Conduct May 18, 2004) (www.cjc.ny.gov) (judge left his judicial business card with the court clerk while filing a small claims action against a snowmobile dealer and introduced himself to a judge of the court where

the case was pending); *In the Matter of Looper*, 548 S.E.2d 219 (South Carolina 2001) (in an ex parte communication, judge who, as owner, director, and officer of a corporation was involved in litigation, told the judge before whom the case was pending about his personal interest in the action). See also *New York Advisory Opinion 08-95* (a judge who has filed a civil action should not disclose his judicial status to the judge presiding in the action, but should instruct his attorney to notify counsel for other parties).

Other judges have also been disciplined for unbecoming conduct in personal litigation. See also *In the Matter of Dubose* (Alabama Court of the Judiciary June 5, 2008) (judge failed to implement a settlement agreement with a former client; in an easement condemnation action filed by the power company, judge filed harassing pleadings, used his position to delay, used profanity to refer to opposing counsel, and disobeyed a ruling); *Doan v. Commission on Judicial Performance*, 902 P.2d 272 (California 1995) (judge and her husband omitted at least six creditors from their bankruptcy petition); *Inquiry Concerning Blackwell*, Decision & Order (California Commission on Judicial Performance February 23, 1999) (http://cjp.ca.gov/pub_discipline_and_decisions.htm) (judge required a bank to sign a general release in his

suit against it without disclosing that he had cashed checks the bank had inadvertently sent him in excess of what was due him under an unrelated agreement); *Inquiry Concerning Hapner*, 718 So. 2d 785 (Florida 1998) (in a domestic violence proceeding, judge claimed she had tape recordings of her husband making threats of physical violence but could not produce the tapes when ordered to do so); *In re Kutrubis* (Illinois Courts Commission August 30, 2002) (judge being sued by his condominium association for unpaid assessments failed to appear when the case was scheduled for trial and personally asked the judge presiding over the case for a continuance); *In the Matter of Corning*, 741 N.E.2d 117 (New York 2000) (after a judgment for an unpaid bill was entered against him in favor of a funeral home, judge told the funeral home's attorney that he had been a town justice for 10 years and that he would discredit the attorney; when the attorney asked that the judge communicate with his client through him, the judge said that he would continue to call the funeral home and made derogatory remarks); *In re Hair*, 436 S.E.2d 128 (North Carolina 1993) (judge made hostile and unprovoked comments to employees of the district attorney for what he perceived to be their disloyalty to him in connection with his divorce case). ★

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responsible as presiding judge for managing the court's finances and he wanted to "prompt Judge Woodward to engage in a dialogue about court expenses." The Commission concluded that a presiding judge's responsibility for the allocation of resources and the establishment of budget priorities "does not extend to intruding on another judge's case-related authority by countermanding that judge's case-related orders. Judge Edwards's purported desire to prompt Judge Woodward to engage in a dialogue about court expenses was not a valid justification for cancellation of the court reporter in Judge Woodward's cases and was for a purpose other than the faithful discharge of judicial duties."

Reading on-line comments

The California Commission on Judicial Performance severely publicly admonished a judge for making denigrating and undignified comments to litigants and related parties in five family law proceedings; inappropriately commenting on complaints made against him; viewing litigants' web posts; and independently investigating facts. *In the Matter of Friedenthal*, Decision and Order (April 3, 2012) (http://cjp.ca.gov/res/docs/public_admon/Friedenthal_DO_4-3-12.pdf).

For example, while presiding over a custody case, the judge reviewed comments the maternal grandmother posted about him on an on-line forum and on a MySpace

page. In the Commission proceeding, the judge argued that he believed he could monitor postings if there was a threat to himself or his family. However, the Commission stated, "if a judicial officer has safety concerns, the appropriate steps are to alert judicial security and ask them to monitor the posts rather than to review ex parte communications."

While presiding over a second custody case, the judge reviewed comments the mother had posted on an on-line forum describing her belief that the judge might own property with minor's counsel in the case, suggesting that those concerned about the judge should call the district attorney's judicial integrity unit, and referring to what his "German-Jewish ancestors might think." At a hearing, the judge commented about the mother's posts, stating:

First, I don't know why you can't find my statement of economic interest for 2007, but if you keep looking, you'll find it, okay, and you won't find anything untoward. Okay. . . . Second, I don't have any investments or partnerships or any interest in any property owned by [the minor's counsel] or his family. . . . So you can continue this witch hunt to your heart's desire. Okay. Knock yourself out. I rule on the facts. I'm not blind. You can call the DA's Judicial Integrity Unit all you want. It's not going anywhere. I've never committed a crime. I am not about to start in this case or any other case. . . . So thank you for the defamation. Keep that in mind, that it is defamation, and my German-Jewish ancestors would be very proud of me. So thank you very much. ★

years in **Illinois** -- during which a judge may not hear a case involving a former client.

In addition, several states expressly require a judge to disqualify from cases in which the judge's former law firm or partner appears for periods from one to four years.

- In **Alaska**, the code states that a judge is disqualified when the "law firm with which the judicial officer was associated in the practice of law within the two years preceding the filing of the action has been retained or has professionally counseled either party with respect to the matter."

- In **California**, the rule provides that a judge is disqualified if, within the past two years, "a lawyer in the proceeding was associated in the private practice of law with the judge."

- In **Delaware**, the code states that disqualification is required if "the judge was associated in the practice of law within the preceding year with a law firm or lawyer acting as counsel in the proceeding."

- In **Illinois**, the code provides that a judge is disqualified when "the judge was, within the preceding three years, associated in the private practice of law with any law firm or lawyer currently representing any party in the controversy."

- In **Michigan**, the rule disqualifies a judge who was "a member of a law firm representing a party within the preceding two years."

Family relationships

In contrast to the model code's case-by-case approach to the question of disqualification when a relative is affiliated with a law firm involved in a proceeding, some states have adopted bright-line rules that require a judge to disqualify whenever a law firm with which a family member is affiliated appears, although different states draw the line in different places.

- The **Alaska** code of judicial conduct states that a judge is disqualified if the judge knows that the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household "is employed by or is a partner in . . . a law firm involved in the proceeding."

- The **California** rule provides that a judge is disqualified if the judge's "spouse, former spouse, child, sibling, or parent of the judge or the judge's spouse . . . is associated in the private practice of law with a lawyer in the proceeding."

- The **Montana** rule provides that a judge "must not sit or act in any action or proceeding

. . . when he is related to . . . any attorney or member of a firm of attorneys of record for a party by consanguinity or affinity within the third degree, computed according to the rules of law."

- The **Nebraska** rule states that a judge is disqualified from any case in which any attorney "is the copartner of an attorney related to the judge in the degree of parent, child, or sibling."

- The **New Jersey** code provides that a judge is disqualified when "the judge, the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person . . . is in the employ of or associated in the practice of law with, a lawyer in the proceeding."

- The **Utah** code states that "a judge is disqualified in proceedings involving a law firm that employs the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household as an equity holder in the law firm."

States have also adopted rules to require disqualification when "the judge's spouse or a person within the third degree of relationship to the judge participated as a lower court judge in a decision to be reviewed by the judge"

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(**Florida**) or when “the judge knows that the judge’s spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person . . . [h]as acted as a judge in the proceeding. . . .” (**Ohio**).

In other examples of tailored rules, states have spelled out that disqualification is warranted when “an attorney for a party has represented the judicial officer or a person against the judicial officer, either in the judicial officer’s public or private capacity, in a matter within two years preceding the filing of the action” (**Alaska**) or when the judge is “in the process of negotiating for employment with a law firm or other entity” that appears in the case (**Massachusetts**).

The **Tennessee** Supreme Court recently adopted a rule that requires disqualification when a judge “previously participated in a judicial settlement conference in the matter.” Similarly, in **Vermont**, a judge is disqualified “when the judge “is to serve as factfinder in a case in which the judge has conferred ex parte with the parties in an unsuccessful effort to mediate or settle the matter.”

Defining de minimis

Under the 1972 model code, disqualification was triggered by ownership of a legal or equitable interest “however small” in a party. Since the 1990 model code, disqualification has been required only for a “more than de minimus” interest, with de minimus defined as “an insignificant interest that could not raise a reasonable question regarding the

judge’s impartiality.”

Some states have spelled out what amounts require disqualification rather than leaving each judge on his or her own to work out what is de minimus, which could result in judges with similar size interests reaching different decisions on when to disqualify. In **California**, a disqualifying financial interest is defined “as ownership of more than a 1 percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value exceeding one thousand five hundred dollars.” In **Colorado**, “more than a one percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value exceeding \$5,000” is disqualifying. In **Maryland**, disqualification is required if the judge owns “(1) an interest as the result of which the owner has received within the past three years, is currently receiving, or in the future is entitled to receive, more than \$1,000 per year; (2) more than 3% of a business entity; or (3) a security of any kind that represents, or is convertible into, more than 3% of a business entity.”

Disqualification not warranted

Some states further clarify disqualification standards by describing circumstances under which a judge is *not* required to disqualify, in other words, describing what questions about impartiality are *not* reasonable. For example, three states explain that a discipline complaint

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New Tennessee rules

At the same time it adopted a new code of judicial conduct, the Tennessee Supreme Court adopted a new procedural rule for disqualification motions, granting a petition filed by the Tennessee Bar Association (www.tsc.state.tn.us/press/2012/01/04/supreme-court-adopts-new-ethics-rules-judges-outlines-procedure-recusals). Effective July 1, 2012, the new rule requires a judge to grant or deny a motion to disqualify promptly and, “if the motion is denied, to “state in writing the grounds upon which he or she denies the motion.” The new rule provides for an interlocutory appeal as of right if a judge denies a motion to disqualify.

The rule also describes the procedure for seeking disqualification of an appellate judge or supreme court justice. If an appellate judge denies a motion to disqualify, the movant “may file a motion for court review to be determined promptly by the other judges in that section of the court upon a de novo standard of review,” and, if that motion is denied, the movant has an accelerated appeal as of right to the supreme court. If a motion is filed seeking disqualification of a justice of the Tennessee Supreme Court, the justice is required to act promptly, and if the justice denies the motion, “the movant, within fifteen days of entry of the order, may file a motion for court review, which shall be determined promptly by the remaining justices upon a de novo standard of review.”

In August 2011, the ABA House of Delegates passed a resolution urging “states to establish clearly articulated procedures for: A. Judicial disqualification determinations; and B. Prompt review by another judge or tribunal, or as otherwise provided by law or rule of court, of denials of requests to disqualify a judge” (www.americanbar.org/content/dam/aba/administrative/judicial_independence/report107_judicial_disqualification.authcheckdam.pdf).

does not usually necessitate disqualification.

- The rule in **Florida** states that “if a lawyer or party has previously filed a complaint against the judge with the Judicial Qualifications Commission, that fact does not automatically require disqualification of the judge. Such disqualification should be on a case-by-case basis.”

- The code in **Maine** provides that “the filing of a complaint does not . . . automatically require the judge to disqualify himself or herself.”

- The code in **Nevada** states that “the filing of a judicial discipline complaint during the pendency of a matter does not of itself require disqualification of the judge from presiding over the litigation. The judge’s decision to recuse in such circumstances must be resolved on a case-by-case basis.”

Other rules explain that, absent additional circumstances, grounds for disqualification are *not* created:

- By “official communications received in the course of performing judicial functions” (**Arizona**).

- By “information gained through training programs and from experience” (**Arizona**).

- By the judge’s membership in “a racial, ethnic, religious, sexual or similar group” (**California**).

- By the judge’s expression of “a view on a legal or factual issue presented in the proceeding” (**California**).

- By the judge’s participation “as a lawyer or public official . . . in the drafting of laws or in the effort to pass or defeat laws, the meaning, effect or application of which is in issue in the proceeding” (**California**).

- By the fact that the judge is a citizen of, resident in, or pays taxes to the state or a political subdivision that is interested in a case (**Louisiana**).

- By the judge’s membership in a “religious body or corporation” that is interested in a case (**Louisiana**).

- By the judge’s former law clerk’s participation as an attorney of record in the case or association with a law firm representing a party (**Michigan**).

- By “campaign speech protected by *Republican Party of Minn v White*, 536 US 765 (2002), so long as such speech does not demonstrate bias or prejudice or an appearance of bias or prejudice for or against a party or an attorney involved in the action” (**Michigan**).

- By “the fact that an employee of the court is a party to the proceeding” (**New Mexico**).

Campaign contributions

Rule 2.11(A)(4) of the 2007 model code provides that a judge is disqualified when “the judge knows or learns by means of a timely motion that a party, a party’s lawyer, or the law firm of a party’s lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge’s campaign in an amount that is greater than \$[insert amount] for an individual or \$[insert amount] for an entity” A similar rule has been in the model code since 1999, but only three states have adopted a version of it.

- The **Arizona** code of judicial conduct provides that a judge shall disqualify when “the judge knows or learns by means of a timely motion that a party, a party’s lawyer, or the law firm of a party’s lawyer has within the previous four years made aggregate contributions to the judge’s campaign in an amount that is greater than the amounts permitted” by the statute that sets campaign contribution limits.

- The **California** rule, adopted by a statute amending the code of civil procedure, provides that a judge is disqualified if “the judge has received a contribution in excess of one thousand five hundred dollars (\$1500) from a party or lawyer in the proceeding” in support of the judge’s last election, if the last election was within the last six years, or “in anticipation of an upcoming election.” That disqualification “may be waived by the party that did not make the contribution unless there are other circumstances that would prohibit a waiver”

- The **Utah** code of judicial conduct provides that a judge shall disqualify when “the judge knows or learns by means of a timely motion that a party, a party’s lawyer, or the law

Judicial ethics advisory committees

To help judges decide when their impartiality might reasonably be questioned (as well as to answer other questions about interpreting the code of judicial conduct), approximately 43 states, the District of Columbia, and the U.S. Judicial Conference have judicial ethics advisory committees. Not all committees will answer questions about the propriety of disqualification in a particular, pending case, but some do, and all will address anticipated disqualification issues. For example, a judge can ask how to handle potential disqualification issues when the judge’s child becomes a police officer or after the judge has filed a discipline complaint against an attorney. Of the approximately 360 judicial ethics advisory opinions issued in 2011, about 90 dealt with disqualification. To ensure that their advice is as helpful to as many judges as possible, most committees post their opinions on-line, and some sites are searchable and have topic indices. The Center for Judicial Ethics has links to the web-sites of judicial ethics committees at www.ajs.org/ethics/.

New York assignment rule

In 2011, the Chief Administrative Judge of the New York State Unified Court System adopted an assignment rule (not a disqualification rule) that provides a judge should not be assigned a case if there is a “campaign contribution conflict” (www.nycourts.gov/attorneys/contributions_case_assignments.shtml). A campaign contribution conflict is defined as (1) an individual contribution to the judge’s campaign of \$2,500 or more from a party, an attorney appearing as counsel of record, co-counsel, or special counsel, or that attorney’s law firm or firms or (2) collective contributions to a judge’s campaign that total \$3,500 or more from an attorney, co-counsel, or special counsel, each attorneys’ law firm or firms, and each client of each attorney.

A contribution creates a conflict for two years after the State Board of Elections first reports it; if the candidate was not a judge at the time of the report, the two-year period begins the day he or she first assumes judicial office. Under the rule, the chief administrator of the courts will publish a list of contributions, derived from data provided to the State Board of Elections, to assist in the identification of campaign contribution conflicts.

firm of a party’s lawyer has within the previous three years made aggregate contributions to the judge’s retention in an amount that is greater than \$50.”

In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), reversing a decision of the West Virginia Supreme Court of Appeals, the U.S. Supreme Court held that, where campaign

contributions from the principal of one of the parties in a case “had a significant and disproportionate influence” on the election of one of the justices on the state court, the risk of actual bias was “sufficiently substantial” to require that justice’s disqualification from the case under the Due Process Clause of the U.S. Constitution. State supreme courts in nine states—Georgia, Iowa, Michigan, Missouri, New Mexico, North Dakota, Oklahoma, Tennessee, and Washington—have adopted new disqualification rules that expressly or impliedly incorporate that decision.

For example, the **Georgia** Supreme Court amended the code to require that a judge is disqualified when:

[T]he judge has received or benefited from an aggregate amount of campaign contributions or support so as to create a reasonable question as to the judge’s impartiality. When determining impartiality with respect to campaign contributions or support, the following may be considered: (i) amount of the contribution or support; (ii) timing of the contribution or support; (iii) relationship of contributor or supporter to the parties; (iv) impact of contribution or support; (v) nature of contributor’s prior political activities or support and prior relationship with the judge; (vi) nature of case pending and its importance to the parties or counsel; (vii) contributions made independently in support of the judge over and above the maximum allowable contribution which may be contributed to the candidate; and (viii) any factor relevant to the issue of campaign contributions or support that causes the judge’s impartiality to be questioned.

To see the complete rules in all nine states, go to www.ajs.org/ethics/eth_disqualification.asp.

In contrast, the **Wisconsin** Supreme Court adopted a rule that states:

A judge shall not be required to recuse himself or herself in a proceeding based solely on any endorsement or the judge’s campaign committee’s receipt of a lawful campaign contribution, including a campaign contribution from an individual or entity involved in the proceeding.

A judge shall not be required to recuse himself or herself in a proceeding where such recusal would be based solely on the sponsorship of an independent expenditure or issue advocacy communication (collectively, an “independent communication”) by an individual or entity involved in the proceeding or a donation to an organization that sponsors an independent communication by an individual or entity involved in the proceeding.

In 2011, the ABA Standing Committees on Ethics and Professional Responsibility and Professional Discipline began the process of drafting and receiving comment on proposed amendments to the model code regarding standards for judicial disqualification related to campaign contributions. ★



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