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# JUDICIAL CONDUCT REPORTER

A publication of the American Judicature Society Center for Judicial Ethics  
Volume 32, No. 3 Fall 2010

## Disqualification Issues Faced by New Judges

by Cynthia Gray

### Former clients

Canon 3E(1)(b) of the 1990 *American Bar Association Model Code of Judicial Conduct* and Rule 2.11A(6)(a) of the 2007 model code require a judge to disqualify from a case when “the judge served as a lawyer in the matter in controversy.” The use of “matter” rather than “case” indicates that a judge is disqualified not only from a specific case in which he appeared on behalf of a party but from any litigation that is in any way related to former representation of a client.

If a case is unrelated to representation in a “matter in controversy,” the code does not expressly address whether a

judge is disqualified if a former client is a party. Several state codes, however, have rules that require a judge to disqualify under those circumstances for a specified time, either two years after the representation (California and Michigan) or seven years (Illinois). Furthermore, several judicial ethics committees have advised that a judge should recuse from a former client’s case for at least two years after the representation ended. *Alabama Advisory Opinion 99-740*; *New York Advisory Opinion 08-133*.

Absent a specific rule, factors relevant to the inquiry

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## Case-law Following *Republican Party of Minnesota v. White* by Cynthia Gray

An article in the summer 2009 issue of the *Judicial Conduct Reporter* analyzed the decisions in the challenges to restrictions on judges’ and judicial candidates’ political activity filed after the U.S. Supreme Court held that the First Amendment allowed judicial candidates to announce their views on disputed legal and political issues in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). This article up-dates that discussion by examining the recent decisions in *Carey v. Wolnitzek*, 614 F.3d 189 (6th Circuit 2010); *Siefert v. Alexander*, 608 F.3d 974, rehearing denied, 619 F.3d 776 (7th Circuit 2010); and *Bauer v. Shepard*, 620 F.3d 704 (7th Circuit 2010). The plaintiffs have filed petitions for writs of certiorari from the two 7th Circuit decisions. A three-judge panel of the

8th Circuit had also declared unconstitutional several restrictions on political conduct in the Minnesota code of judicial conduct (*Wersal v. Sexton*, 613 F.3d 821 (8th Circuit 2010)), but the en banc court granted rehearing and vacated the opinion, scheduling oral argument for January 2011. (For further information, see [www.ajs.org/ethics/eth\\_judicialcampaign.asp](http://www.ajs.org/ethics/eth_judicialcampaign.asp).)

### Pledges, promises, and commitments

There are two model versions of the pledges, promises, and commitments clause. Canon 3A(3)(d) of the 1990 American Bar Association *Model Code of Judicial Conduct* provided that “a candidate for a judicial office shall not (i) make

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# Recent Advisory Opinions

 A judge may not accept a \$30,000 award from a program recognizing service to the community even if she designates a charitable organization to receive the money. *Massachusetts Opinion 2010-3*.

 A judge may not accept a child advocacy award from a city children's services agency that appears before him. *New York Opinion 10-65*.

 A judge may not accept an award from a violence intervention program that appears in her court and to which she refers defendants and may not appear at a candlelight vigil for those affected by domestic violence. *New York Opinion 10-59*.

 A judge may accept for official use a subscription to the *Connecticut Law Tribune* at a discounted rate offered to judges and other judicial branch officials. *Connecticut Opinion 2010-20*.

 A judge may not request that CLE providers offer programs to judges at a discount, and a committee on which judges serve may not make the request on their behalf. *Colorado Opinion 2010-1*.

 To finish a book, a judge may, if accepted, reside in an artists' colony for one month with free room and board. *New York Opinion 09-186*.

 A judge may negotiate a reduction from an attorney's usual rate as long as the negotiated fee is not so low that it can reasonably be perceived as exploiting his judicial position, but must report the fee discount as a gift. A judge may accept from a former employer partial reimbursement of attorney's fees incurred in connection with his former employment where the judge has entered a disqualification order for any cases involving the former employer. *Florida Opinion 2010-11*.

 A judge may not write a letter to the governor recommending a pardon for a convicted felon who is a case manager and liaison between the drug court and a mental health agency. *Florida Opinion 2010-29*.

 A judge may not write a letter to another judge in his jurisdiction advocating a drug program that can be used as an alternative to incarceration for a friend's grandson or testify about the program even if subpoenaed. *Florida Opinion 2010-34*.

 To promote pro bono activities, a court's access to justice program may, in partnership with a bar associ-

ation, present a panel of judges on ethical issues for pro bono attorneys at a private law firm in a CLE program that would be open to the public and widely advertised to lawyers generally. *New York Opinion 09-200*.

 A chief judge may send a letter encouraging attorneys to participate in a state bar campaign by donating pro bono legal services or, alternatively, donating money to a legal aid organization. *Florida Opinion 2010-31*.

 A judge may consult in the writing of a federal grant application for instructional materials on establishing a problem-solving court for child support disputes. *North Carolina Opinion 2010-3*.

 A court may not furnish information on dismissed red light traffic camera cases to the city attorney's office in a form not available on the court's case management system. *Washington Opinion 10-1*.

 A judge who cannot be impartial regarding a certain attorney must disqualify herself from the attorney's cases and cannot prevent the attorney from appearing in her court. *New York Opinion 09-188*.

 A judge may explain to the parties why he has rejected a proposed plea agreement as long as the explanation is based upon legitimate concerns and does not involve improper ex parte communications, further the judge's convenience or personal interest, or otherwise create an appearance of impropriety or coercion. *New York Opinion 09-216*.

 A judge may not endorse or promote education programs offered by a particular company but may include the company on a list from which a defendant may choose to earn a reduction or dismissal of charges; if there are no other programs, the judge may provide a defendant with an information sheet about the company. *New York Opinion 10-27*.

 A judge may not allow the broadcasting of drug court proceedings. *Arkansas Opinion 2010-1*.

 While still sitting, a retiring judge may not permit a mediation firm to send out an announcement that the judge is joining the firm. *Florida Opinion 2010-35*.

*The Center for Judicial Ethics has links to the websites of judicial ethics advisory committees at [www.ajs.org/ethics/](http://www.ajs.org/ethics/).*

## Independent investigation

Based on a stipulated resolution, the Arizona Supreme Court censured a judge for conducting his own factual investigation in a case involving a local girls' softball league. *Inquiry Concerning Andress*, Order (October 26, 2010) (<http://www.azcourts.gov/Portals/37/Andress%2010-099%20web.pdf>). The Court's order does not describe the misconduct; this summary is based on the pleadings.

Arlene Keirns and Shelly Somishka, the president and vice president of the local girls' softball league, pursued injunctions to keep Dave Radine, a coach and parent of one of the players, off the fields as a coach and away from them personally. After a hearing, the judge upheld injunctions against Radine but ordered the reinstatement of Radine's daughter to the team she had originally joined even though Radine had not requested that relief.

At a subsequent hearing, the judge reported that he had done "some digging," contacting at least one league coach, the city manager, and other officials and directing a coach to reinstate Radine's daughter regardless what the league decided. At the hearing, the judge had a discussion off the record to bring the attorney representing Keirns and Somishka "up to speed." When the parties discussed setting another hearing, Radine indicated he would like to hire counsel, but the judge advised him to save the money and wait to see what happens before hiring counsel. Before the next hearing, the judge quashed the injunctions and cancelled future hearings. The judge did follow up with the parks director about what happened with Radine's daughter and whether problems remained in the league.

The statement of charges, which the judge admitted, stated:

Respondent repeatedly acted outside the scope of his judicial capacity . . . in an effort to solve various problems, none of which were properly before him. First, Respondent sought to correct what he believed was an improper act by the softball league in removing a player. No party requested an order reinstating the girl to her team, and the league itself was not a party to any proceeding in the court. Respondent thus did not have authority to issue an order to the league directing it to take certain actions. Second, the case before the judge involved only injunctions against harassment and no party at any time raised the issue of a legal claim against the city based on the league's apparent retaliation against Radine's daughter. The judge identified this issue himself, and then sought improperly to "solve" it and prevent a lawsuit against the city, which is outside the

scope of judicial duties and suggests the judge mistakenly believes it is his role to protect the city from legal claims.

## Deflating tire

Based on an agreement for discipline by consent, the Maryland Court of Appeals suspended a judge for five work days without pay for deflating the tire of an automobile parked in the parking space reserved for him at the courthouse. *In the Matter of Nalley*, 999 A.2d 182 (Maryland 2010). (The Court's order does not describe the judge's conduct; this summary is based on the agreement and other pleadings with the Commission ([www.mdcourts.gov/cjd/publications.html](http://www.mdcourts.gov/cjd/publications.html)).

One afternoon in August 2009, the judge returned to the courthouse and found that someone unknown to him had parked a vehicle in the space that was reserved for him.

Using a pen or other sharp object, the judge deflated the tire of the vehicle by letting air out through the valve system. The vehicle belonged to a part-time maintenance employee at

the courthouse.

The judge entered a guilty plea to the misdemeanor charge of tampering with a motor vehicle. He was fined \$500, ordered to apologize to the owner of the vehicle, and placed on six months of unsupervised probation before judgment; he has met the conditions of his probation.

## Use of court stationery

Pursuant to a stipulation and agreement, the Washington State Commission on Judicial Conduct admonished a judge for writing three letters on official court stationery to members of the Italian judicial system on behalf of a criminal defendant, using court staff to type those letters, and speaking publicly on several occasions in an attempt to influence the case. *In the Matter of Heavey*, Stipulation, Agreement, and Order (Washington State Commission on Judicial Conduct September 24, 2010) ([www.cjc.state.wa.us/CJC\\_Activity/public\\_actions\\_2010.htm#5975](http://www.cjc.state.wa.us/CJC_Activity/public_actions_2010.htm#5975)).

Amanda Knox was arrested in 2007 in Italy in connection with the murder of her British roommate and convicted of murder, sexual assault, and obstruction of justice, receiving a 26-year prison sentence. In his self-report to the Commission, the judge had explained that he had written to the Italian judiciary to attempt to improve the fairness of the proceedings in the Knox case, but he also recognized that he had attempted to advance Knox' private interests and that,

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## Recent Decisions

## Case-law Following Republican Party of Minnesota v. White (continued from page 1)

pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.” After the decision in *White*, the ABA amended the model code to prohibit judges and judicial candidates from “with respect to cases, controversies or issues that are likely to come before the court, mak[ing] pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.” The substantive change was the elimination of the “appear to commit” clause in the latter version. When the model code was revised and reformatted in 2007, the pledges, promises, and commitments clause became Rule 4.1A(13).

Although two early district court decisions declared the pledges, promises, and commitments clause unconstitutional, more recent cases have upheld the clause if it omits the phrase “appear to commit” and is narrowly construed to allow judicial candidates to answer the questionnaires frequently sent by special interest groups. In *Bauer v. Shepard*, 620 F.3d 304 (7th Circuit 2010), the 7th Circuit held:

It is not clear to us that any speech covered by the commits clauses is constitutionally protected, as *White I* understands the first amendment. How could it be permissible to “make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office”? . . .

Imagine a judge or judicial candidate who said: “I will issue a search warrant every time the police ask me to.” That speaker is promising to defy the judicial oath of office. Or imagine the statement: “I will always rule in favor of the litigant whose income is lower, so that wealth can be redistributed according to the principles of communism.” (More plausibly, a candidate might say that he will award damages against drug companies, whether or not the drug has been negligently designed or tested, because they charge “too much” for their products.) Again that person is promising to disobey the law and disregard the litigants’ entitlements. Nothing in *White I* deals with statements of this flavor, or any other promise to act on the bench as a partisan of a political agenda.

The Court concluded that none of the questions in the Indiana Right to Life questionnaire at issue in the case “calls for a ‘commitment’ or ‘promise’ on any issue.”

A judge who answers yes to the first proposition (“I believe that the unborn child is biologically human and

alive and that the right to life of human beings should be respected at every stage of their biological development”) has not committed to defying *Roe v. Wade* and its sequels. The proposition concerns morals, not conduct in office. Statements of views on moral and legal subjects do not imply that the speaker will act in accord with his preferences rather than the law. Every judge enforces laws and applies judicial decisions for which he would not have voted.

\* \* \*

Under Indiana’s language, judges and candidates can tell the electorate not only their general stance (“tough on crime” or “tough on drug companies”) but also their legal conclusions (“I would have joined Justice White’s dissent in *Roe*” or “the death penalty should be treated as cruel and unusual punishment” or “I am a textualist and will not resort to legislative history” or “I will follow *stare decisis*” or “I am a progressive who will use a living-constitution approach”). Judges who have announced these views, on or off the bench, sit every day without being thought to have abandoned impartiality. Indeed, judges who have announced legal views in exceptional detail, by writing a treatise about some subject (*Weinstein on Evidence*, or *Martin on Bankruptcy*) have not made an improper “commitment,” even though a litigant can look up in the treatise exactly how the judge is apt to resolve many disputes. A judge who promises to ignore the facts and the law to pursue his (or his constituents’) ideas about wise policy is problematic in a way that a judge who has announced considered views on legal subjects is not. The commits clauses condemn the former and allow the latter.

The 7th Circuit acknowledged that neither the commits clauses nor the definitions pin down what promises are inconsistent with the impartial performance of the adjudicative duties of judicial office, noting that “the principle is clear only in these extremes.” However, the Court concluded that advisory opinions are a more appropriate method for clarifying the provision than summary condemnation by a federal court, stating “when a statute is accompanied by an administrative system that can flesh out details, the due process clause permits those details to be left to that system.”

The Kentucky Supreme Court adopted a unique version of the commits clause that provided a judge or judicial candidate “shall not intentionally or recklessly make a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way on a case,

controversy, or issue that is likely to come before the court.” In *Carey v. Wolnitzek*, 614 F.3d 189 (6th Circuit 2010), the 6th Circuit held that rule was constitutional insofar as it applies to cases or controversies.

By preventing candidates from making “statement[s]” that “commit[]” them “to rule a certain way in a case [or] controversy,” the clause secures a basic objective of the judiciary, one so basic that due process requires it: that litigants have a right to air their disputes before judges who have not committed to rule against them before the opening brief is read. Whatever else a fair adjudication requires, it demands that judges decide cases based on the law and facts before them, not based on “express . . . commitments that they may have made to their campaign supporters.”

However, the court stated, the application of the clause to issues was ambiguous, requiring a remand to the district court, which is pending.

### Personal solicitation clause

There is a split in the circuits on the constitutionality of the prohibition on candidates’ personally soliciting campaign contributions. Applying a strict scrutiny analysis, the 6th Circuit in *Carey* declared the clause unconstitutional. *Accord Weaver v. Bonner*, 309 F.3d 1312 (11th Circuit 2002) (Georgia). In contrast, stating “at heart, the solicitation ban is a campaign finance regulation,” the 7th Circuit applied the closely drawn scrutiny test and, in *Bauer* and

*Siefert*, upheld the prohibition.

The circuits differ on whether the problem addressed by the clause is the solicitation or the contribution. The 6th Circuit believed “it is knowing who contributed and who balked that makes the difference” because there is a risk that a judge will treat donors and non-donors differently. Therefore, the Court in *Carey* concluded the solicitation clause does too little by failing to prevent a judge from learning who contributed to his campaign and who did not and also does too much by prohibiting solicitation methods that “present little or no risk of undue pressure or the appearance of a quid pro quo,” for example, speeches to large groups and signed mass mailings.

In contrast, in *Siefert v. Alexander*, 608 F.3d 974 (7th Circuit 2010), the 7th Circuit concluded that the personal solicitation itself was the problem regardless whether a judge becomes aware of who has or has not contributed to her campaign.

A contribution given directly to a judge, in response to a judge’s personal

solicitation of that contribution, carries with it both a greater potential for a quid pro quo and a greater appearance of a quid pro quo than a contribution given to the judge’s campaign committee at the request of someone other than the judge, or in response to a mass mailing sent above the judge’s signature. . . .

The Court also concluded that “it would be unworkable for judges to recuse themselves in every case that involved a lawyer whom they had previously solicited for a contribution,” noting the “unfortunate reality” that “judicial campaigns are often largely funded by lawyers, many of whom will appear before the candidate who wins.”

Similarly, in *Bauer*, the 7th Circuit held that the solicitation clause was not unconstitutional on its face and that the absence of an exception that would allow solicitation of family members did not render it unconstitutional, noting Indiana may be willing to make such an exception if the plaintiff asked for an advisory opinion and adding “a federal court should not assume that a state will act unreasonably.” (The 7th Circuit stated it was not necessary “to address the distinction drawn in *Carey* between in-person and written solicitations” because the plaintiff did not raise the issue.)

## There is a split in the circuits on the constitutionality of the prohibition on candidates’ personally soliciting campaign contributions.

### Judicial Conduct Reporter

Fall 2010

**Seth S. Andersen**  
Executive Director

Published quarterly  
\$36 per year, single copy \$11

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© 2010  
American Judicature Society  
ISSN: 0193-7367

**American Judicature Society**  
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2700 University Avenue  
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## Case-law Following Republican Party of Minnesota v. White (continued from page 5)

### Endorsements

In *Siefert*, the 7th Circuit upheld the ban on judicial candidates' and judges' endorsing candidates for partisan office in the Wisconsin code of judicial conduct. The Court reasoned that an "endorsement is less a judge's communication about his qualifications and beliefs than an effort to affect a separate political campaign, or even more problematically, assume a role as political powerbroker."

Therefore, the Court did not apply strict scrutiny but a balancing test from the "long line of Supreme Court precedent determining the rights of government employees." Rejecting the plaintiff's argument that judges are different from "employees" because they are "ultimately accountable to the voters," the 7th Circuit emphasized that "a judge must also be accountable to her responsibilities under the Fourteenth Amendment."

It is small comfort for a litigant who takes her case to state court to know that while her trial was unfair, the judge would eventually lose an election, especially if that litigant were unable to muster the resources to combat a well-financed, corrupt judge around election time.

The Court concluded, "while *White I* teaches us that a judge who takes no side on legal issues is not desirable, a judge who takes no part in political machinations is," noting that "freely traded public endorsements have the potential to put judges at the fulcrum of local party politics, blessing and disposing of candidates' political futures." The 7th Circuit stated that Wisconsin's interest in preventing its judges' participation in politics unrelated to their campaigns is justified by its obligations under the Due Process Clause and "its obligation to prevent the appearance of bias from creeping into its judiciary." Emphasizing that the endorsement restriction does not infringe on a judge's ability to inform the electorate of his qualifications and beliefs, the Court held that the endorsement restriction was permissible. The Court did note that the failure of Wisconsin's code to prohibit endorsements in non-partisan races might be "fatal to the rule's constitutionality" if it were applying a strict scrutiny test and that its treatment of the endorsement prohibition was based on the claims of a plaintiff who was an incumbent judge.

### Partisan activities

In *Carey*, the 6th Circuit overturned a Kentucky prohibition on a judge or judicial candidate identifying himself or herself "as a member of a political party in any form of advertising or when speaking to a gathering." The Court believed

that a candidate's party is an "issue of potential importance to voters" and "a shorthand way of announcing one's views on many topics of the day."

Further, the 6th Circuit found that the clause was underinclusive because it permitted judges and candidates to state their political party when asked and, "once that information is disclosed, whether in answer to a question or based on prior publicly known affiliations (including holding other elected offices), nothing in the canon prohibits others, whether newspapers or political parties or interest groups, from disclosing to the world the candidate's party affiliation." Finally, the 6th Circuit noted that the code did not prohibit membership in other organizations that take positions even though "by identifying themselves with such groups, candidates can communicate more about their political and judicial convictions than they ever could by carrying a party membership card—and, in the process, may do as much to call judicial open-mindedness into question as any party affiliation ever would."

Similarly, in *Siefert*, the 7th Circuit concluded that the Wisconsin prohibition on judges and candidates belonging to political parties was underinclusive because "on the most polarizing issues, party membership is a significantly less accurate proxy for a candidate's views on contested issues" than membership in other groups, which was permitted. Further, the Court stated, nothing in the record suggested that political parties are such frequent litigants that it would be unworkable for a judge to recuse himself when necessary based on party membership.

In *Bauer*, however, the 7th Circuit rejected challenges to rules prohibiting a judge or judicial candidate from acting as a leader in, holding an office in, or making speeches on behalf of a political organization. Relying on U.S. Supreme Court decisions upholding federal and state limitations on political conduct by government employees, the Court concluded that similar limitations for judges are also valid under the First Amendment.

First, judges no less than FBI agents must be seen as impartial if judicial decisions are to be accepted by the public, and participation in politics undermines the appearance of impartiality; second, judges are not entitled to lend the prestige of office (which after all belongs to the people, not to the temporary occupant) to some other goal; third, states have a compelling interest in "preventing judges from becoming party bosses or power-brokers," something that would undermine actual impartiality, as well as its appearance.

## Disqualification

In several lawsuits, the plaintiffs have challenged the general requirement that a judge disqualify when her “impartiality might reasonably be questioned” or the rule that a judge disqualify if “the judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.” In *Bauer*, the 7th Circuit held that “the recusal clause does not present a constitutional issue at all.”

The recusal clause applies to a judge in his role as public employee, not his role as candidate. It specifies how a public employee will perform official duties (or, rather, which public employee will be assigned to which duties). . . . The state, as employer, may control how its employees perform their work, even when that work includes speech (as a judge’s job does). Rule 2.11(A)(5) represents a decision by the State of Indiana to assign to each lawsuit a judge

who has not made any statement “that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.” That decision is unexceptionable.

No public employee is entitled to do any particular task; a state may select the employee who can best do the job. . . . [A] state may decide to assign each case to a judge whose impartiality is not in question. All Rule 2.11(A)(5) does is allocate cases among judges . . . . States are entitled to protect litigants by assigning impartial judges before the fact, as well as by removing partial judges afterward.

*Accord Family Trust Foundation of Kentucky v. Wolnitzek*, 345 F. Supp. 2d 672 (Eastern District of Kentucky 2004); *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021 (District of North Dakota 2005). *But see Duwe v. Alexander*, 490 F. Supp. 2d 968 (Western District of Wisconsin 2007). 

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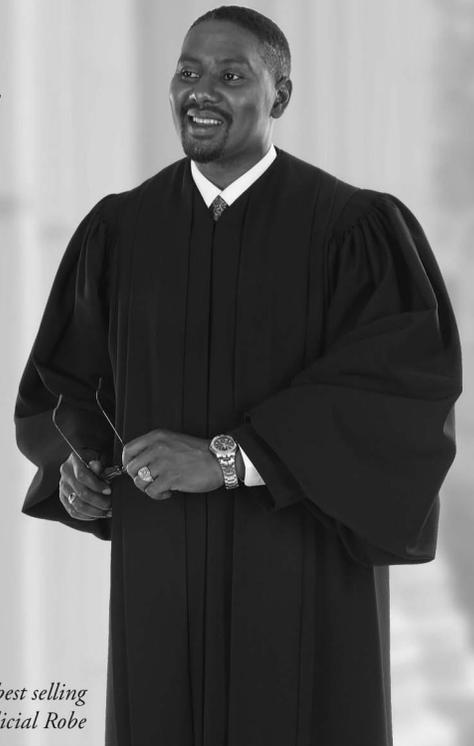
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## Disqualification Issues Faced by New Judges *(continued from page 1)*

whether disqualification, or at least disclosure, is required in cases involving former clients include:

- the nature, frequency, intensity, and duration of the prior representation;
- the length of time since the representation ended;
- whether the judge was “house counsel” for the client or represented the client case-by-case;
- the nature of the prior and current cases;
- whether the judge discussed the current case with the former client;
- whether, in the case currently before the judge, the former client will be litigating policies or practices the judge helped to formulate or defend as an attorney;
- whether the former client will be calling witnesses the judge previously worked with, prepared, or called to testify;
- whether the current case will be tried by the judge or a jury;
- the amount of financial benefit the judge received representing the former client; and
- whether the judge has any bias for or against the former client.

*See Alabama Advisory Opinion 97-658; Florida Advisory Opinion 2005-5; Oklahoma Advisory Opinion 98-18; South Carolina Advisory Opinion 24-2006.*

### Former law firm or partner

Under Canon 3E(1)(b) of the 1990 model code, a judge was disqualified if a lawyer with whom the judge previously practiced “served during such association as a lawyer concerning the matter.” Rule 2.11(A)(6)(a) of the 2007 model code requires disqualification when a judge “was associated with a lawyer who participated substantially as a lawyer in the matter during such association.” If a matter was not handled by a firm or lawyer during the judge’s association, however, neither version of the model code expressly addresses whether disqualification is required when a judge’s former firm or partner appears.

The majority rule adopted by advisory committees is that a new judge should not preside over cases involving a former partner or firm as long as the judge is receiving payments for her former interest in or work with the firm. The Florida committee, for example, in response to an inquiry from a judge whose former firm had given her a promissory note for the purchase of her stock with a pay-out of six years, explained why disqualification was necessary.

Although the inquiring judge has no direct financial interest in the law firm, the judge has an interest in the overall ability of the firm to make payments pursuant to the

terms of the promissory note and thus has an interest in the future financial success of the firm. Furthermore, a disclosure, whether inadvertent or otherwise, by a lawyer that the lawyer is making periodic payments to a judge would create in the public a perception of impropriety, and the impartiality of the judge might reasonably be questioned.

*Florida Advisory Opinion 2000-34. Accord Arkansas Advisory Opinion 96-9; Delaware Advisory Opinion 2000-1; Louisiana Advisory Opinion 67 (1986); Maine Advisory Opinion 05-2; Massachusetts Advisory Opinion 00-1; Michigan Advisory Opinion J-4 (1991); New Mexico Advisory Opinion 07-5; Ohio Advisory Opinion 07-2; West Virginia Advisory Opinion (January 16, 2001); U.S. Advisory Opinion 24 (2009). But see Utah Informal Advisory Opinion 89-2; Washington Advisory Opinion 91-5.* The Kansas advisory committee also stated that payment of the funds due the judge into a blind trust did not eliminate the need for disqualification. *Kansas Advisory Opinion JE-19 (1987).*

Disqualification is also required when an attorney owes the judge money, not as a former partner, but for taking over the judge’s solo practice or for referrals the judge made to the attorney upon taking the bench. *See Maryland Advisory Opinion 1974-6 (1974)* (disqualification is required if a judge will receive payments of indefinite amounts from a successor lawyer and law firm when contingent fee matters are resolved); *Maryland Advisory Opinion 1981-9 (1981)* (disqualification is required when a judge will receive referral fees from a law firm to which the judge referred a case upon taking the bench).

Whether a judge’s receipt of retirement payments from a former firm or participation in the firm’s retirement plan constitutes a continuing financial obligation that requires disqualification depends on the nature of the arrangement. If the plan is unfunded and the firm will pay benefits from its current revenues, disqualification is required because payments on the judge’s behalf depend on the continued viability of the firm. *Illinois Advisory Opinion 07-2.* However, if the judge has a separate, vested account to which the firm will not make additional contributions, disqualification is not required, although disclosure is necessary. *Virginia Advisory Opinion 01-3. See also California Advisory Opinion 45 (1997); Georgia Advisory Opinion 221 (1997); Michigan Advisory Opinion J-20 (1990); New York Advisory Opinion 04-42; Ohio Advisory Opinion 07-2.*

It is not uncommon for members of a law firm to co-own the building in which the firm has its office, and, if a new judge retains her interest with former partners in the building after taking the bench, the judge is disqualified from cases involving the firm. *See Florida Advisory Opinion 78-*

19; *Florida Advisory Opinion 03-2*. Cf., *Alabama Advisory Opinion 83-198* (the mere joint ownership of property by a judge and the judge's former law partners does not require the judge to disqualify in cases in which one of the attorneys represents a party if the judge is a limited partner and the property is managed by the general partners).

Several committees have indicated that disqualification based on a judge's continuing financial relationships with a former firm may be expressly waived by the parties after full disclosure by the judge. See *Florida Advisory Opinion 2003-2*; *Illinois Advisory Opinion 07-2*; *Kansas Advisory Opinion JE-19* (1987); *New York Advisory Opinion 04-42*. However, the Ohio advisory committee concluded that "remittal of disqualification, in most circumstances, will not be appropriate when a judge is receiving money from a former law firm," although it noted "that if a judge is due only an insignificant amount the parties may decide independently that the judge's disqualification should be remitted." *Ohio Advisory Opinion 07-2*.

### No financial relationship

Several state codes contain bright line rules that set a specific period during which a judge may not hear a case in which a former partner or firm appears even absent continuing financial ties; the period is one year in Delaware, two years in California, and three in Illinois. Further, noting that "many judges have a self-imposed automatic rule of disqualification for a specified number of years after leaving the law firm," the advisory committee for federal judges recommended that a judge consider a recusal period of at least two years after the judge receives final payment from a former firm. *U.S. Advisory Opinion 24* (2009). See also *Florida Advisory Opinion 04-6* (two years is an acceptable time for a new judge to disqualify from his former firm's cases as long as at the end of two years there are no financial ties); *New York Advisory Opinion 00-67* (a new judge should recuse from cases involving former partners for two years after the last payment to the judge). The Arizona judicial ethics advisory committee, however, stated that "a policy requiring judges to disqualify themselves simply because they had prior professional relationships with attorneys would be burdensome on the judiciary, particularly in rural areas where there are few judges and where judges know many of the litigants and lawyers." *Arizona Advisory Opinion 95-11*.

Judicial ethics committees have identified criteria for judges to use in evaluating whether to recuse from cases in which a former partner or firm appears even if there is no continuing financial relationship or set disqualification period. Those factors are:

- the length of the judge's association with the attorney or firm;

- the closeness of the association;
- the amount of time since the association ended;
- the size of the firm;
- the size of the community or district;
- whether the judge continues to have personal relationships with former partners or associates;
- the burden disqualification will place on other judges; and
- whether the judge has a personal bias or prejudice toward the former partner or firm.

See *Alabama Advisory Opinion 95-549*; *Arizona Advisory Opinion 95-11*; *Georgia Advisory Opinion 223* (1997); *Louisiana Advisory Opinion 70* (1986); *Massachusetts Advisory Opinion 95-6*; *New Mexico Advisory Opinion 07-5*; *New York Advisory Opinion 89-31*; *Ohio Advisory Opinion 95-3*; *South Carolina Advisory Opinion 5-1985*.

### Former government attorney

Rule 2.11(A)(6)(b) of the 2007 model code provides:

A judge shall disqualify himself or herself in any proceeding in which the judge . . . served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy.

There was no analogous rule in the 1990 model code although commentary directed a judge formerly employed by a government agency to "disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned."

If a criminal proceeding was initiated by a prosecutorial agency while the judge was serving as chief prosecutor, several advisory committees have adopted a per se rule that requires the judge to disqualify even if the judge did not actively prosecute the case, has no recollection of it, and was not personally involved in the matter. The Indiana advisory committee, for example, noted that "the elected Prosecuting Attorney is considered to be 'of counsel' in all cases in the office." *Indiana Advisory Opinion 3-89*. The Delaware committee stated that "prosecutorial decisions made by deputy attorneys general without the Attorney General's input are nevertheless attributable to the Attorney General" who had "control over criminal prosecutions and ultimate responsibility for the acts and decisions of deputy attorneys general." *Delaware Advisory Opinion 07-3*. See also *Arizona Advisory Opinion 06-1*; *Michigan Advisory Opinion JI-34* (1990); *New York Advisory Opinion 03-87*.

(continued on page 10)

## Disqualification Issues Faced by New Judges *(continued from page 9)*

If a case was being investigated but had not yet been filed before the judge left the position of chief prosecutor, advisory committees disagree on the extent of involvement that triggers disqualification. The Indiana and New York committees have advised that a former chief prosecutor should not preside in any prosecution that was investigated or pursued during the judge's term as chief prosecutor regardless whether she had actual knowledge of or had personally been involved in the matter. *Indiana Advisory Opinion 3-89*; *New York Advisory Opinion 03-87*. In contrast, the Delaware and Michigan committees concluded that a judge would not be disqualified from a case that was being investigated but had not yet been filed while the judge was chief prosecutor unless the judge was personally and substantially involved in the investigation. *Delaware Advisory Opinion 07-3*; *Michigan Advisory Opinion JI-34* (1990). In cases initiated after the judge went on the bench but prosecuted by attorneys whom the judge hired, trained, and supervised while serving as chief prosecutor, new judges have been advised to consider the nature and extent of the relationship with her former associates in the prosecutor's office when considering whether to disqualify. See *Arizona Advisory Opinion 06-1*; *New York Advisory Opinion 95-86*.

A judge is disqualified from any cases in which he participated personally and directly while a deputy or assistant prosecutor. See, e.g., *Kentucky Advisory Opinion JE-32* (1981); *New York Advisory Opinion 07-23*. That disqualification includes cases in which the judge:

- acted as a supervisor;
- screened the case or gave advice;
- gained knowledge of disputed evidentiary facts;
- obtained material, confidential information regarding the defendant or from witnesses, victims, other prosecutors, opposing parties, or defense counsel; or
- has a particularized former association with a lawyer who served in the matter.

See *D.C. Advisory Opinion 2* (1992); *D.C. Advisory Opinion 5* (1995); *Louisiana Advisory Opinion 200* (2006); *Missouri Advisory Opinion 14A* (1997); *North Carolina Advisory Opinion 2009-2*; *Washington Advisory Opinion 88-19*; *Washington Advisory Opinion 08-2*. But see *Illinois Advisory Opinion 03-2* (a judge is not disqualified from a case over which she had only supervisory authority while an assistant state's attorney).

Absent those circumstances, however, the majority rule is that a judge is not disqualified in cases that were active while the judge was a deputy prosecutor but in which she did not personally participate, although several committees

direct the judge to disclose her former position. For example, the Indiana advisory committee stated that "given the numbers of former deputies who become judges and the presumed distance one deputy has from cases which happened to be pending during his term but in which he was not engaged, the need for an efficient administration of justice" counseled against formulating a rule of disqualification in these cases. *Indiana Advisory Opinion 3-89*. Accord *Alabama Advisory Opinion 86-259*; *D.C. Advisory Opinion 2* (1992); *D.C. Advisory Opinion 5* (1995); *Kentucky Advisory Opinion JE-32* (1981); *Louisiana Advisory Opinion 130* (1996); *Missouri Advisory Opinion 14A* (1997); *Nevada Advisory Opinion 01-2*; *New York Advisory Opinion 07-14*; *Washington Advisory Opinion 94-1*. In response to an inquiry from a judge who used to be an assistant district attorney, however, the North Carolina committee advised that, while disqualification was not required if the judge had not been directly involved in the case, "the best practice is for judges to follow a 'Six Month Rule' whereby newly installed judges, for a minimum of 6 months after taking judicial office, refrain from presiding over any adjudicatory proceeding wherein an attorney associated with the judge's prior employer provides legal representation to a party absent specific circumstances that necessitate a deviation from the rule." *North Carolina Advisory Opinion 2009-2*.

Although a judge cannot preside over a post-conviction petition attacking a conviction the judge obtained as a prosecutor (*Illinois Advisory Opinion 03-2*), in general, a judge who prosecuted a defendant is not disqualified from a subsequent, unrelated criminal case with the same defendant unless, as a result of the earlier case, he has a lingering personal bias against the defendant or possesses personal knowledge of disputed facts relevant to the case. See *Alabama Advisory Opinion 94-522*; *Delaware Advisory Opinion 07-3*; *Illinois Advisory Opinion 03-2*; *New York Advisory Opinion 91-73*; *Washington Advisory Opinion 95-22*. The Indiana committee instructed a judge to "consider carefully" whether, as prosecutor, he gained information about the defendant that could be relevant to the current case, "the numbers of prosecutions he handled against the defendant, how long ago they occurred, whether they were notorious or well-publicized prosecutions, and, of course, whether he developed any personal biases against the defendant." *Indiana Advisory Opinion 3-89*.

### Other government attorneys

Judicial ethics committees have given analogous advice to judges who were public defenders before going on the

bench. See *Florida Advisory Opinion 2010-36* (a newly elected judge may hear a case involving a defendant who was represented by the public defender's office during the judge's employment there if the judge had no involvement with and no knowledge of the facts of the case); *Illinois Advisory Opinion 95-20* (a new judge who had been an assistant public defender is not disqualified from a case in which that office represents a defendant as long as the judge never represented the defendant in the matter). The Washington advisory committee stated that a judge who previously served as the county's sole mental health defense counsel should recuse from any mental health commitment hearings in which the judge served previously as an attorney or from unrelated cases involving a defendant whom the judge represented if, during the previous representation, the judge publicly articulated strong beliefs about the defendant's condition, ability, or willingness to comply with treatment or made arguments that would lead a reasonable person to believe that the judge had a personal bias or prejudice concerning the defendant. *Washington Advisory Opinion 05-1*.

## Recent Decisions *(continued from page 3)*

because this was not court business, he should not have used court staff or his judicial stationery. The judge assured the Commission he would not do so in the future. The judge also recognized that, when he became a judge, he could no longer seek to influence a legal proceeding as he could as a lawyer and assured the Commission he would stop speaking publicly about the Knox matter.

### Failure to disqualify

Based on an agreed statement of facts, the New York State Commission on Judicial Conduct admonished a judge for failing to disqualify himself in a harassment case in which he knew the defendant and the complaining witness, had personal knowledge of the events that resulted in the charge, and was a potential witness. *In the Matter of Trickler, Determination* (New York State Commission on Judicial Conduct October 7, 2010) ([www.scjc.state.ny.us](http://www.scjc.state.ny.us)).

The judge was acquainted with William Ellis and Julie Meyer, a married couple, and had had numerous social contacts with them because they lived across the street from and were good friends with the judge's sister and her husband. One day at around 12:30 PM, while performing chores outdoors at his sister's residence, the judge noticed a commotion at the Ellis/Meyer residence. When Meyer walked across the street, the judge commented that things sounded "hot" at her residence. Meyer told the judge that

Similar rules also apply when, pre-bench, a judge represented a government entity in civil litigation. See, e.g., *Nevada Advisory Opinion JE04-001* (a judge who used to be an attorney for a public housing agency is not disqualified from eviction cases brought by the agency); *New York Advisory Opinion 99-11* (a judge should not preside over cases involving the county or its departments or agencies that were pending while the judge was employed as a high-ranking deputy county attorney); *New York Advisory Opinion 97-8* (a judge may not preside over any tort cases against the city that were pending while she served as deputy chief of a branch of the tort division of the corporation counsel's office with general supervisory authority over tort cases against the city); *Utah Informal Advisory Opinion 98-16* (a judge who is a former county attorney is not disqualified from proceedings involving the county where the issues related to the litigation arose after the judge left the office). 📌

Ellis had shoved her and that he was taking some of her belongings from the house. She stated that Ellis wanted to take a shotgun and that his mood and tone made her feel worried about him having the weapon. Meyer told the judge that she had blocked, or was going to block, Ellis' truck in the driveway to prevent him from leaving. When Meyer asked for his advice, the judge told her that there was nothing he could do and that she should call the police. The judge left his sister's residence minutes after his conversation with Meyer. At the time he left, the judge saw people at the back door of the Ellis house taking property in and out.

Ellis was charged with harassment in the second degree and was issued an appearance ticket returnable in the judge's court. The judge arraigned Ellis and presided over three court appearances at those proceedings, the judge exercised his judicial discretion by releasing Ellis on his own recognizance, granting a one-month order of protection and then extending it to one year, and granting several adjournments. After three appearances, he finally disclosed that he knew the parties and was a potential witness and disqualified himself.

The Commission stated that the judge's failure to promptly disqualify himself when the case first came before him "resulted in a needless, four-month delay." The Commission noted there was no indication of favoritism. 📌



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