



To secure and promote
an independent and
qualified judiciary and
a fair system of justice

JUDICIAL CONDUCT REPORTER

A publication of the American Judicature Society Center for Judicial Ethics
Volume 30, No. 2 Summer 2008

Disqualification Following a Complaint or Lawsuit Against a Judge *by Elena M. Murphy*

In general, a judge is not automatically required to recuse when a party or attorney files a complaint or lawsuit against the judge. For example, the Nebraska advisory committee stated that a judge is not disqualified when a pro se litigant informs the judge that the litigant has filed a complaint against the judge unless the judge determines that this knowledge or other comments by the litigant has created a personal bias. *Nebraska Advisory Opinion 05-2*. Similarly, the Utah judicial ethics committee advised that a judge is not required to disqualify when a party who has a case pending before her sues her seeking a change of venue and a jury trial in the pending case. *Utah Informal Advisory Opinion 97-8*. Accord *Alabama Advisory Opinion 07-876* (judge is not disqualified by litigant's multiple complaints with the conduct commission and dissemination of accusations to various government agencies); *Kansas Advisory Opinion JE-130* (2005) (no disqualification after pro se litigant filed federal suit claiming the judge violated her constitutional right to use the courts to address her grievances);

New York Advisory Opinion 98-69 (no disqualification even though litigant complained about the judge to the conduct commission and commenced a federal civil rights lawsuit and filed a criminal complaint against the judge); *Pennsylvania Informal Advisory Opinion 6/5/07* (judge is not disqualified if a defendant in a criminal case names the judge as a defendant in a civil lawsuit); *Tennessee Advisory Opinion 99-3* (disqualification is not required after party filed a complaint with the conduct commission that the judge delayed a ruling); *Washington Advisory Opinion 96-17* (judge is not disqualified when a defendant in a criminal case named the judge as a defendant in a civil lawsuit). See also *Alabama Advisory Opinion 95-574* (judge is not disqualified after a plaintiff filed a letter in open court making allegations against the judge and sent copies to national and state officials); *California Advisory Opinion 45* (1997) (judge need not disqualify but should disclose if a party threatens to complain to the conduct commission); *Maine*

(continued on page 4)

When a Family Member is Running for Political Office *by Cynthia Gray*

The code of judicial conduct in most jurisdictions prohibits a judge from publicly endorsing a candidate for public office, and the judge's kinship to a candidate is not "a sufficient reason for removing the undesirability of such campaign activity." *Alabama Advisory Opinion 82-142*. A new comment added to the American Bar Association Model Code of Judicial Conduct in 2007 explains:

Although members of the families of judges and judicial candidates are free to engage in their own political activity, including running for public office, there is no "family

exception" to the prohibition . . . against a judge or candidate publicly endorsing candidates for public office. A judge or judicial candidate must not become involved in, or publicly associated with, a family member's political activity or campaign for public office. To avoid public misunderstanding, judges and judicial candidates should take, and should urge members of their families to take, reasonable steps to avoid any implication that they endorse any family member's candidacy or other political activity.

Thus, a judge should not publicly campaign on behalf of

(continued on page 6)

Recent Judicial Ethics Advisory Opinions— Campaign and Political Activity

 A judicial candidate may sign the Cuban American Bar Association Judicial Election Campaign Pledge committing to diversity. *Florida Opinion 2008-14*.

 A judicial candidate should not state in campaign advertisements that his judicial philosophy is that those who bring drugs into the county for sale should be dealt with harshly. *West Virginia Opinion* (March 24, 2008).

 A judicial candidate may not state in campaign literature: “I believe justice requires a fair system for all, especially little children who may be too small or unable to speak for themselves,” and “Balance the scales of justice for victims.” *Oklahoma Opinion 07-1*.

 A judicial candidate may state in advertisements that he is “not accepting campaign contributions from anyone” if that statement is accurate. *South Dakota Opinion 06-4*.

 A judge who is a candidate for another judicial office may include a link on her campaign web-site to articles about her and photographs taken in the courtroom during a trial and published by a newspaper. A judge’s campaign committee may solicit donations on a campaign web-site provided the contributions go directly to the committee. *New York Opinion 07-135*.

 A sitting judge may be pictured in campaign materials wearing a judicial robe and in a courtroom. *South Dakota Opinion 06-1*.

 A judge who is a candidate for re-election may use in a campaign advertisement a photograph of herself in a judicial robe in front of the door to her chambers but may not use a video of her asking viewers to vote for her filmed inside her chambers or the courthouse. *New York Opinion 07-139*.

 A judicial candidate whose parent is an elected public official may not publicize the parent’s endorsement, may not use the name and image of the parent in campaign materials, and may not authorize the parent to host a fund-raiser for her campaign even if the parent’s office is not identified, but may permit the parent to send letters, postcards, and e-mails to his friends and acquaintances urging a vote for the candidate and may campaign with the parent at church picnics and other public functions if the parent’s office is not identified, *Kentucky Opinion JE-116* (2008).

 A judge’s parents may not generate a letter soliciting campaign contributions for the judge’s re-election. *Florida Opinion 2008-9*.

 A judge may advocate for passage of a bond to fund a new court facility by writing an op-ed article for the local press, speaking at public informational forums, and advocating publicly about the need for the facility. *New York Opinion 07-109*.

 A judge may publicly campaign against a proposed constitutional amendment that would require that all municipal judges be licensed to practice law by writing commentary for the press, discussing the matter at debates, and speaking on the radio. *New Mexico Opinion 08-1*.

 A judge may submit to a newspaper an op-ed article that advocates citizens learn about each judge who is a candidate for retention and not vote “no” for all of the retention judges. *Pennsylvania Informal Opinion 10/3/07*.

 A judge may participate as an audience member at a “meet the candidates” event by distributing factual materials and questioning candidates for the state legislature about judicial compensation. *New York Opinion 08-5*.

 A judge who is not a candidate for elective judicial office may not attend a holiday party hosted by a friend who is a member of Congress and financed with the friend’s campaign funds. *New York Opinion 07-211*.

 A judge who is not a candidate for election may not attend a reception honoring elected officials sponsored by a political organization. *Pennsylvania Informal Opinion 12/26/07*.

 A judge may not contribute to a political action committee, including a political action committee of the Pennsylvania Bar Association. *Pennsylvania Informal Opinion 11/30/07*.

 A judge who had the credit card company block a campaign contribution after he realized the contribution violated the code of judicial conduct is not required to self-report to the Judicial Conduct Board. *Pennsylvania Informal Opinion 2/26/08*.

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

Confidentiality of Complaints

Many states impose confidentiality on complainants and witnesses in judicial conduct proceedings prior to a finding of probable cause to file formal charges against a judge. For example, the rules for the South Dakota Judicial Conduct Commission state: “All participants in the proceeding shall conduct themselves so as to maintain the confidentiality of the proceeding. Any violation by any person of the requirement of confidentiality shall constitute contempt and shall be punishable as such by the Supreme Court.”

In other states, however, confidentiality applies only to commission members and staff. For example, the rule in Michigan states, “before a complaint is filed, a member of the [judicial tenure] commission or its staff may not disclose the existence or contents of the investigation, testimony taken, or papers filed in it.” Similarly, the rule in Tennessee provides:

Individual members of the Court [of the Judiciary] will not discuss any matter pending before the Court, except with other members of the Court and with Disciplinary Counsel. However, nothing in the Rule shall prohibit the complainant, respondent-judge, or any witness from disclosing the existence or substance of a complaint, matter,

investigation, or proceeding under these Rules or from disclosing any documents or correspondence filed by, served on, or provided to that person.

Forced silence

Cases are split on whether prohibitions on complainants or others disclosing that they have filed complaints or spoken with judicial conduct commissions are constitutional.

The United States District Court for the Southern District of Florida held that the Florida constitution violated the First Amendment insofar as it prohibited a complainant from revealing that a complaint had been filed with the Judicial Qualifications Commission. *Doe v. Judicial Qualifications Commission*, 748 F. Supp. 1520 (S.D. Florida 1990). The court noted “imposing a forced silence on the fact of filing complaints with the [Commission] is more likely to engender resentment and suspicion than to promote confidence or integrity.”

The court concluded that the Commission’s “asserted interests in protecting the reputation of individual judges” were “insufficient to support the restriction on free speech.”

(continued on page 10)

Campaign Representations about Incumbency

The judicial campaign materials of a non-judge candidate, a judge running for a different office, a part-time or temporary judge, or a former judge should not suggest that he or she is the incumbent in the position.

For example, the election practices subcommittee of the Florida ethics advisory committee stated that a judicial candidate who is a retired judge may not use the title “judge” in campaign literature, media releases, printed ads, or other media venues. *Florida Advisory Opinion 2008-10*. The committee explained:

Utilization of the title “judge” in campaign literature conveys the impression that the candidate is currently a sitting judge, not that the candidate has prior service as a judge. Use of this term would be a misrepresentation of the current status of the candidate . . . [W]hen the use of a word in a campaign is likely to lead others to draw an inaccurate conclusion, or would likely result in confusion, that word is to be avoided.

That advice also applies to a former judge who has senior status. *Florida Advisory Opinion 2008-13*. However, the

committee stated, a former judge may use the term “former judge” or “retired judge” in campaign materials. Other judicial ethics committees have also advised that a former judge may not state “vote for judge [name]” or “re-elect judge [name]” in campaign advertising if he or she is not currently serving as a judge or use the title “judge” in campaign material unless the material makes clear that the judge is not currently a judge. See *Louisiana Advisory Opinion 104* (1993); *New Mexico Advisory Opinion 92-3*; *New York Advisory Opinion 97-72*.

Similarly, an incumbent judge running for a different judicial office may not use the title “judge” in campaign materials without clearly indicating that he is a judge in a different court than the one that is the subject of the campaign. See *In re Emrich*, 665 N.E.2d 1133 (Ohio 1996) (ordering county court judge running for probate court to cease and desist from using materials, literature, signs, and buttons indicating that he was the incumbent probate judge); *Alabama Advisory Opinion 98-718* (district judge

(continued on page 9)

Disqualification Following Complaint or Lawsuit Against a Judge *continued from page 1*

Advisory Opinion 94-2 (judge is not disqualified from a custody dispute even though the party who lost custody filed a complaint against the judge with the conduct commission and publicly criticized the judge). *But see Florida Advisory Opinion 95-20* (judge should disqualify when a party or the party's counsel files a complaint with the commission); *Texas Advisory Opinion 172* (1994) (part-time judge should recuse herself from cases involving an individual who has named the judge as a party in state and federal lawsuits).

That general tenet reflects a policy that the disqualification rules should not be interpreted to allow parties to judge-shop or to "easily disrupt court proceedings at any time by filing a complaint against the judge." *Arizona Advisory Opinion 98-2*. As the Indiana advisory committee explained, "judges are accustomed to ruling fairly in adverse situations and should not allow themselves to be manipulated or antagonized into recusal." *Indiana Advisory Opinion 3-07*. Automatic recusal also would be "unfair to the other parties in the case, and create a burden for the next judge, who likely will 'meet the same fate.'" Similarly, an advisory opinion warned federal judges against routine disqualification when litigants file complaints because it would "permit and might even encourage litigants to manipulate and abuse the judicial process" and "undermine public confidence." *United States Advisory Opinion 103* (2002). Judges should also keep in mind that, although "an easy and 'safe' way out may be for the judge to disqualify himself or herself . . . consideration must be given to the system being served. Another judge might not always be available." *Illinois Advisory Opinion 95-5* (attorney filed a suit or complaint against the judge).

Additional factors

Although a judge is not automatically disqualified when a litigant or attorney has filed a complaint, additional factors may require disqualification. The Illinois advisory committee set out three considerations to guide judges in deciding whether to recuse when a complaint has been filed against them. *Illinois Advisory Opinion 95-5*. First, a judge should consider her own personal bias, consulting "her own emotions and conscience." Second, a judge should "attempt an objective appraisal of whether the subject matter is a proceeding in which . . . her impartiality might reasonably be questioned." Third, a judge should consider whether the complaint or lawsuit "is a ploy, an act of 'judge-shopping.'" *See also New Mexico Advisory Opinion 08-3* (judge who has been presiding in a case may conduct a hearing to consider whether an amended complaint that names the judge as a defendant is a sham or frivolous pleading; if it is a sham, the judge need not recuse; if it is not a sham, the judge should disqualify). The

advisory committee for federal judges also directed a judge, when a party files a complaint against him, to consider "the nature of the complaint, the applicable law, the possibility of factual issues involving the credibility of the named judge or judges, and any other circumstances that might provide a reasonable ground for questioning the impartiality of the assigned judge." *United States Advisory Opinion 103* (2002).

The Arizona judicial ethics committee suggested that a judge consider five guidelines when determining whether disqualification from a pending case is necessary when a party files a complaint with the Commission on Judicial Conduct:

1. Has the complaint previously been presented [as a grounds for disqualification] under the statutes and rules governing removal of a judge for cause and ruled upon by a neutral judge? If so, the judge may usually rely on such ruling and the party will have a remedy by appeal if appropriate.
2. Does the complaint allege bias based upon the judge's rulings in the pending case or the judge's perceived attitude toward counsel for a litigant? If the complaint arises out of previous adverse rulings in the course of the proceedings or from enforcement of court orders, then recusal is generally not warranted. If the complaint concerns the judge's perceived attitude toward a litigant's lawyer, this also is generally not a basis for recusal.
3. Does the complaint lack merit on its face and appear to be a tactical maneuver designed merely to remove the judge from the particular case? If so, recusal is generally not warranted. In fact many complaints are dismissed by the commission after an initial contact with the judge.
4. Does the complaint cause any actual personal bias that will interfere with the judge's impartiality? If so, the judge must recuse himself or herself.
5. Does the complaint allege specific facts and information regarding matters extrajudicial to the pending proceeding as the basis for the complaint? If so, does the complaint, even if believed by the judge to be untrue or erroneous, contain specific facts which would cause a reasonable person to question the judge's impartiality or create an appearance of impropriety to a reasonable person if the judge remains on the case? If the answer is yes, the judge must recuse himself or herself. Here the judge must take into account the risk of injustice to the parties in the particular case and the risk of undermining public confidence in the judicial process.

Arizona Advisory Opinion 98-2.

The North Dakota judicial advisory committee also suggested a five-part analysis.

(1) Was a nonfrivolous complaint filed with the Judicial Conduct Commission?

- If yes (i.e., nonfrivolous), the trial judge should continue the recusal analysis.

- If no (i.e., frivolous), there is probably no recusal issue, and the judge should remain in the proceeding.

(2) Does the complaint allege judicial bias with specific facts and information?

- If yes, the trial judge should continue the recusal analysis.

- If no, the trial judge should probably remain in the proceeding.

(3) Does the alleged judicial bias arise out of rulings during the course of trial or enforcement of the trial order?

- If yes, the trial judge should probably remain in the proceeding. At this stage of the recusal analysis, the trial judge may consider the reasonableness standard discussed in question 4.

- If no (the bias results from an extrajudicial source), the trial judge should continue the recusal analysis.

(4) Under the reasonableness standard, would a reasonable person considering all the relevant facts and circumstances, not merely those known to the parties or public, question the trial judge's impartiality?

- If yes, the trial judge should continue the recusal analysis.

- If no, the trial judge should probably remain in the proceeding.

(5) Is the complaint so general that it could apply to any judge?

- If yes, under the rule of necessity, the judge should remain in the proceeding.

- If no, the judge should recuse himself or herself.

North Dakota Advisory Opinion 93-1.

Exceptions

Although the filing of a complaint by a litigant or attorney with the conduct commission does not require recusal, if the complaint is not dismissed and eventually the commission files formal charges based on that complaint, the judge is required to recuse from the complainant's cases. The New York advisory committee stated that, when the district attorney had filed a complaint against a judge with the State Commission on Judicial Conduct, the judge may preside in criminal cases being handled by the district attorney's office "unless and until the Commission, following its investigation, serves a formal written complaint and directs that a hearing be held. At that point, the judge should recuse himself or herself so as to avoid even "the appearance of impropriety [and thereby] promote public confidence in the integrity and impartiality of the judiciary." *New York*

Advisory Opinion 97-102. Recusal should be mandatory, the committee advised, until the commission's charges are resolved. Similarly, the federal advisory committee stated that, if a chief judge decides not to dismiss a complaint but to initiate an investigation, the judge who is the subject of the complaint should ordinarily recuse from the case. *United States Advisory Opinion 103* (2002).

As noted above, if the filing of a complaint or lawsuit causes the judge to become personally biased against the complaining litigant or attorney, a subjective analysis, the judge is disqualified. *In re Schenck* provides an extreme example of such bias. The Oregon Supreme Court upheld the Commission on Judicial Fitness and Disability's recommendation to suspend Judge Schenck without pay for, in addition to other misconduct, failing to disqualify himself in cases involving an attorney with whom the judge had an ongoing, adverse relationship. 870 P.2d 185 (Oregon 1994).

Attorney Bruce Anderson first filed a complaint with the Commission against Judge Ronald Schenck because he believed that the judge's denial of a motion to disqualify violated the code of judicial conduct. The next day, in a telephone conversation, the judge asked Anderson, "Who in the hell made you God's gift to the legal profession?" Nine days later, the judge sent a copy of Anderson's complaint to the members of two county bar associations with a letter "characterizing the complaint as 'pathetic' and 'a petulant response.'"

Anderson later appeared before Judge Schenck representing different clients in unrelated cases. In both cases, Anderson moved to disqualify Judge Schenck based on the prior adverse relationship between them, but the judge denied the motions in both cases.

The court agreed with the Commission that a judge is not required to disqualify merely because an attorney has filed a complaint against the judge with the Commission or because the judge and lawyer have exchanged "harsh words." However, the court held:

where the judge takes affirmative action to make public the dispute between an attorney and himself, the balance tips heavily in favor of requiring recusal. The cumulative effect of the complaint filed with the Commission, the harsh words [the Judge] had for attorney Anderson in their private conversation, and the Judge's affirmative effort to publicize both the complaint and his opinion of the complaint and of Mr. Anderson, was to create a reasonable basis for questioning [the Judge's] impartiality.

The court concluded that Judge Schenck should have disqualified himself in both cases. 

Ms. Murphy is a third year law student at Drake University School of Law and former intern at AJS.

When a Family Member is Running for Political Office *continued from page 1*

a family member/candidate in any way. *California Advisory Opinion 49* (2000). A judge may not on behalf of a relative who is a candidate:

- give speeches (*Alabama Advisory Opinion 82-142*; *Ohio Advisory Opinion 2001-1*);
- solicit votes (*Michigan Advisory Opinion JI-30* (1990));
- solicit funds or support through personal appearances, by telephone, or through the media (*Louisiana Advisory Opinion 52* (1981));
- inform friends of the relative's candidacy even without soliciting votes or support (*Florida Advisory Opinion 87-22*);
- hand out campaign literature (*Alabama Advisory Opinion 82-142*; or
- solicit persons to display campaign signs in their yards, erect those signs, or hand out campaign signs or posters (*Michigan Advisory Opinion JI-30* (1990); *West Virginia Advisory Opinion* (February 25, 1994)).

But see New Mexico Advisory Opinion 96-2 (judge may solicit signatures for his spouse's nominating petition and assist the spouse in door-to-door campaigning as long as the judge does so as a private person outside of his normal business hours).

A judge is also prohibited from displaying support for a relative's candidacy by, for example, wearing a campaign button in public or in chambers or maintaining a relative's campaign sign in chambers, in plain view. *Ohio Advisory Opinion 2001-1*. A judge may not drive a car that displays her spouse's campaign sticker even if the car is normally driven by the spouse and even if the title for the car is in the spouse's name. *Delaware Advisory Opinion 2008-1*; *Florida Advisory Opinion 87-22*; *Michigan Advisory Opinion JI-30* (1990). *Cf.*, *New York Advisory Opinion 06-94* (judge may drive a car registered in the spouse's name when it is necessary or particularly convenient even if the car displays a bumper sticker supporting the spouse's candidacy).

The restriction extends to behind-the-scenes activities in support of a relative's campaign. Therefore, a judge may not:

- do "leg work" for the campaign (*Florida Advisory Opinion 87-22*);
- compile voter or contribution lists (*Maine Advisory Opinion 94-3*);
- stuff envelopes (*Maine Advisory Opinion 94-3*);
- drive the candidate to events (*Maine Advisory Opinion 94-3*); or

- deliver or pick up campaign materials from printers or commercial advertisers (*West Virginia Advisory Opinion* (February 25, 1994)).

But see Michigan Advisory Opinion JI-30 (1990) (judge may perform behind-the-scenes campaign activities for candidates including relatives, such as stuffing envelopes, participating in voter registration drives, placing ads, writing speeches, and building yard signs); *South Carolina Advisory Opinion 9-2002* (judge may drive his wife to set up signs for her campaign).

Finally, a judge may not act or appear to act as a political advisor for a family member's campaign. *Delaware Advisory Opinion 2008-1*; *New Hampshire Advisory Opinion 78-3*; *Application of Gaulkin*, 351 A.2d 740 (New Jersey 1976); *New York Advisory Opinion 92-129*. *But see Massachusetts Advisory Opinion 03-8* (judge may discuss with his son in the privacy of the parent/child relationship the association of various individuals in the son's campaign for city council; public issues of concern in the community; sources for information that might be useful for his campaign; financial contributions from family members; the son's performance in public campaign events; positions taken on campaign issues; and the performance of other candidates).

Use of the judge's home

Most opinions on the issue advise that a judge's spouse may use the home they jointly own as headquarters for the spouse's campaign and, as long as the judge does not attend or participate, hold a fund-raiser, campaign strategy meeting, or constituent event at the home. *See Florida Advisory Opinion 87-22*; *New York Advisory Opinion 06-147*; *Washington Advisory Opinion 86-8*; *U.S. Advisory Opinion 53* (1998). *But see Delaware Advisory Opinion 2008-1* (judge whose spouse is running for the general assembly should not permit any campaign-related activity in the home they share); *Michigan Advisory Opinion JI-30* (1990) (campaign events for a spouse/candidate may not be held at a judge's home or at other property owned jointly by the judge and the spouse/candidate). To disassociate himself from any political event held in the judge's home, the judge should not be identified on invitations (*Washington Advisory Opinion 86-8*), assist in the preparations (*Washington Advisory Opinion 86-8*), or serve as host by greeting guests, mingling with visitors, pouring coffee, or serving cake. *Florida Advisory Opinion 87-22*.

The Ohio advisory committee stated that a judge whose

spouse is a candidate for elected public or judicial office may allow campaign signs promoting the spouse's candidacy to be placed on real estate jointly owned by the judge and her spouse. *Ohio Advisory Opinion 2000-1*. The committee explained: "Placement of a spouse's campaign sign on property co-owned by a judge and spouse does not constitute a 'public endorsement' by the judge." See also *New York Advisory Opinion 06-94* (judge is not obligated to discourage her spouse from displaying a campaign sign supporting his own election on the lawn of their marital residence).

Campaign literature

In most states, a family member's campaign materials may include the judge's name or include the judge in a family photograph as long as there is no reference to the judge's title or position. See *California Advisory Opinion 49* (2002); *Colorado Advisory Opinion 05-5*; *Florida Advisory Opinion 07-13*; *Kansas Advisory Opinion JE-3* (1984); *Maine Advisory Opinion 94-3*; *New Mexico Advisory Opinion 96-2*; *New York Advisory Opinion 06-94*; *South Carolina Advisory Opinion 2003-14*; *Vermont Advisory Opinion 2728-10* (2004); *Washington Advisory Opinion 02-2*; *West Virginia Advisory Opinion* (December 30, 2002). But see *Alabama Advisory Opinion 82-143* (family member's campaign materials cannot use the relative/judge's picture); *Texas Advisory Opinion 180* (1995) (family member's campaign materials cannot use the relative/judge's name and title).

In some states, a family member's campaign literature may identify the candidate's relative as a judge as long as the judge's office or title are not used or his or her judicial duties discussed, the occupations of other family members are also identified, and the judge is not pictured in robes. *Massachusetts Advisory Opinion 99-16*; *New Mexico Advisory Opinion 89-2*; *Ohio Advisory Opinion 2001-1*.

The Massachusetts advisory committee stated that, if a judge participates in an interview related to her husband's campaign for the United States Senate, the judge should keep the interview brief, limit her remarks to personal matters about marriage and family, and avoid focusing on judicial duties or weighing in on issues in the campaign or why the voters should vote for her husband. *Massachusetts Advisory Opinion 99-16*. Although the judge may be identified as a judge, the opinion cautioned, the judge should not allow the interviewer to use her title as a manner of address, appear in judicial robes, or conduct the interview at the courthouse. If the interviewer asks a question that the judge should not answer, the committee advised, the judge should change the subject or stop the interview no matter how awkward.

Events

Whether a judge can escort his spouse to political events when the spouse is a candidate varies from state-to-state, depending, at least in part, on whether the judge is prohibited by the code from attending political events.

In some states, a judge may attend political events with a spouse/candidate, including fund-raisers. For example, the Kansas advisory committee stated that a judge whose spouse is a candidate for a county office may accompany her to fund-raisers for her campaign or for her political party, purchase tickets for and attend functions of her political party, and attend candidate forums. *Kansas Advisory Opinion JE-62* (1996). Accord *California Advisory Opinion 49* (2000); *Illinois Advisory Opinion 96-12*; *Michigan Advisory Opinion JI-30* (1990); *South Carolina Advisory Opinion 2003-14*.

In other states, a judge may accompany a spouse/candidate to a campaign event other than a fund-raiser. For example, the Washington judicial ethics committee advised that a judge may attend a campaign event for his spouse if the event is not a fund-raiser, is not sponsored by a political organization, and is not attended only by members of a particular political organization. *Washington Advisory Opinion 02-2*. See also *New Mexico Advisory Opinion 89-2* (judge may attend non-fund-raising political functions with spouse); *Texas Advisory Opinion 180* (1995) (judge may attend campaign functions with spouse); *West Virginia Advisory Opinion* (February 25, 1994) (judge may attend campaign rallies and social functions with spouse).

Advisory opinions are split on whether a judge may attend events such as campaign announcements or post-election celebrations for a family member's campaign. Compare *Colorado Advisory Opinion 05-5* (should not attend campaign kick-off) and *New York Advisory Opinion 06-147* (may not attend spouse's post-election "festivities") with *Maine Advisory Opinion 05-4* (may attend and speak in non-judicial capacity at spouse's announcement of candidacy for governor); *Pennsylvania Informal Advisory Opinion 1/11/05* (may appear next to spouse at announcement of candidacy for judicial office); *South Carolina Advisory Opinion 2003-14* (may attend spouse's announcement of candidacy and be present on election night as long as the judge makes clear that she is not present in a judicial capacity and is not supporting the spouse's candidacy).

Even those advisory committees that allow a judge to escort his spouse to campaign events note that the judge should take certain precautions:

- If the judge is introduced, the judge's position may not be mentioned. *Kansas Advisory Opinion JE-62* (1996); *Louisiana Advisory Opinion 52* (1981); *New*

(continued on page 8)

When a Family Member is Running for Political Office *continued from page 7*

Mexico Advisory Opinion 89-2; Washington Advisory Opinion 02-2.

- The judge's appearance must be discreet and low-profile. *West Virginia Advisory Opinion* (June 19, 1991).
- The judge may not make comments that concern the candidate's position relating to the judiciary. *New Mexico Advisory Opinion 89-2*.
- The judge may not solicit votes or financial support for the spouse. *Louisiana Advisory Opinion 52* (1981).
- The judge may not speak on behalf of or endorse the spouse's candidacy. *Texas Advisory Opinion 180* (1995); *Washington Advisory Opinion 02-2*.

Community events

In some jurisdictions, a judge may not accompany a spouse/candidate to any political event such as cocktail parties in support of the candidacy (*Colorado Advisory Opinion 05-5*) or non-partisan "meet and greet" campaign gatherings at the judge's home and the homes of friends and neighbors (*Florida Advisory Opinion 07-13*). The Massachusetts advisory committee stated that prohibited events are those "that are partisan in nature, that is, designed to enhance the electability of, to pay homage to, to rally support behind, or to raise funds for, a particular candidate," or to show solidarity against the opposing party. *Massachusetts Advisory Opinion 99-16* (judge may not attend a cook-out hosted by her husband's campaign for members of the general assembly, state political party committee, or labor leaders even if the judge's husband is running for an office in another state and the event is not a fund-raiser). *Accord New York Advisory Opinion 06-147* (judge may not escort his spouse to an out-of-state partisan dinner hosted by a high-ranking congressional leader that is paid for out of the congressional leader's campaign funds);

Vermont Advisory Opinion 2728-10 (2004) (judge may not attend spouse's strategy sessions with supporters and advisors). *See also Delaware Advisory Opinion 2008-1; Application of Gaulkin*, 351 A.2d 740 (New Jersey 1976).

Even those advisory committees that prohibit a judge from escorting her spouse/candidate to any political event allow a judge to attend events with her spouse that are essentially civic, social, religious, community, cultural, or recreational even if the spouse engages in some personal campaigning during the events if the judge would have attended the event if her spouse were not a candidate. The Massachusetts judicial ethics committee stated that a judge whose spouse was running for office could, for example, attend purely ceremonial events with a spouse/candidate (e.g., a state funeral, an inauguration, or a swearing-in ceremony) and may attend a candidate forum sponsored by Common Cause that was not designed to garner support for one candidate but to inform the electorate of the positions of all the candidates. *Massachusetts Advisory Opinion 99-16*. *See also New York Advisory Opinion 00-75* (judge may accompany spouse to a meeting of a fraternal organization and to a public forum not sponsored by political organizations); *Vermont Advisory Opinion 2728-10* (2004); *Washington Advisory Opinion 02-2*.

When attending a community event, the judge should be careful not to be introduced by title or to participate in any activity that could be seen as campaigning on behalf of the spouse, such as speaking, carrying a sign, passing out literature, or encouraging people to vote for her spouse. *Vermont Advisory Opinion 2728-10* (2004). For example, while a judge may attend a local parade or community fair, the judge should not march beside her spouse under a campaign banner or work the crowd with him. *Maine Advisory Opinion 94-3*. *See also New York Advisory Opinion 06-147*

Judges who have become involved in a family member's campaign have been disciplined. The Florida Supreme Court found that a judge should not have contacted attorneys to seek help for his son's candidacy for county court judge or asked an individual why he was backing his son's opponent. *Inquiry Concerning Turner*, 573 So. 2d 1 (Florida 1990) (reprimand for this and other misconduct). Another Florida judge was disciplined for delivering campaign signs, erecting signs along a highway, and attaching political disclaimers to signs for his wife's campaign for county court clerk. *In re McGregor*, 614 So. 2d 1089 (Florida 1993) (public reprimand). The West Virginia Supreme Court of Appeals disciplined a judge who encouraged several people to vote for his wife, who was campaigning for judicial office. *In the Matter of Codispoti*, 438 S.E.2d 549 (West Virginia 1993) (censure for this and other misconduct). The New York State Commission on Judicial Conduct sanctioned a judge for attending two fund-raisers for his wife's campaign for county clerk. *In the Matter of Rath*, Determination (New York Commission on Judicial Conduct February 21, 1989) (www.scjc.state.ny.us) (admonition for this and other misconduct).

(judge may march in a parade with other dignitaries and judges but not with his campaigning spouse). If the line is difficult to draw, the judge should err on the side of caution and avoid any activity that could be construed as campaigning on behalf of his spouse. *Maine Advisory Opinion 94-3*.

Campaign contributions

Whether a judge can make a financial contribution to the campaign of a spouse or other family member depends on the jurisdiction's rule regarding political contributions by judges. In Michigan, for example, where a judge is permitted to contribute to a political candidate at any time, the Michigan advisory committee stated that a judge may personally contribute to her spouse's campaign. *Michigan Advisory Opinion JI-30* (1990).

In contrast, in states where a judge is prohibited from political activity (except while a candidate for office), a judge cannot contribute to her spouse's campaign for political office. See *Delaware Advisory Opinion 2008-1*; *New York Advisory Opinion 00-75*. Cf., *Florida Advisory Opinion 87-22* (spouse/candidate may withdraw funds from a joint account and place it into a campaign account).

In addition, a judge's spouse may not knowingly accept campaign contributions from attorneys or litigants who are appearing or are likely to appear before the judge. *Delaware Advisory Opinion 2008-1*. See also *Application of Gaulkin*, 351 A.2d 740 (New Jersey 1976) (contributions to a judge's spouse's campaign from attorneys or litigants who are appearing or may appear before the judge "would be particularly offensive from an ethical standpoint").

The Delaware committee further advised that a judge should recuse from any matter involving an individual or entity that the judge discovers has contributed to her spouse's campaign. *Delaware Advisory Opinion 2008-1*. The committee acknowledged that there may be instances where the spouse's campaign receives a contribution from an individual or entity that has appeared or likely may appear before the judge without knowing that this is the case or that a litigant may appear before the judge without the judge knowing that the litigant has supported the spouse's campaign. The committee concluded, however, that the canons prohibit only knowing or reckless viola-

Campaign representations about incumbency *continued from page 3*

may use title "judge" in her campaign for circuit judge as long as she identifies current judicial position or indicates that she is not the incumbent in the current race); *New Mexico Advisory Opinion 02-1* (probate court judge who is running for magistrate court should not advertise himself as a judge without identifying the court position that he currently holds); *West Virginia Advisory Opinion* (December 21, 2007) (family court judge may use the term "judge" when running for circuit court as long as she clearly identifies the position that she currently holds). Similarly, the term "re-elect" is misleading in a judge's campaign for a different office or if the judge had been appointed. *Florida Advisory Opinion 02-7* (where a judge is in a contested election immediately after the judge's gubernatorial appointment, she may not use the word "re-elect" in campaign advertisements but may use the term "retain"); *Nevada Advisory Opinion JE08-6* (candidate for a district court seat may refer to his service as an alternate municipal judge in campaign materials so long as the materials do not use the terms "retain," "retention," "re-elect," "re-election").

Similarly, a non-judge candidate's campaign materials should use language such as "elect" or "for" (for example, "Elect John Doe District Judge" or "John Doe for District Judge") in lettering of sufficient size to be clearly visible to

the public. *Order of Private Reprimand* (Kentucky Judicial Retirement and Removal Commission August 20, 1992) *Accord New Mexico Advisory Opinion 92-3* (phrase "for judge" should be used after a non-incumbent candidate's name with "for" in the same or almost the same size type as the name and "judge"); *South Dakota Advisory Opinion 06-4* (campaign advertisement of a non-judge may depict a gavel and the candidate's name and the phrase "Elect Circuit Court Judge" but should insert "for" before "circuit court judge").

Wearing a robe in campaign materials has the same potential for misleading voters and is subject to the same rules. See *Florida Advisory Opinion 2008-10* (judicial candidate who has retired from circuit bench may not wear a robe in campaign literature); *Nevada Advisory Opinion JE08-006* (candidate who has served as an alternate municipal court judge may not wear judicial robe in campaign materials); *New Mexico Advisory Opinion 92-3* (candidate who is a judge in a different court may wear a robe if it is clear what judicial position the candidate currently holds).

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

Confidentiality of complaints *continued from page 3*

The court also found that the Commission overstated “the degree to which publication of the fact that a complaint has been filed will lead the people to believe that the complaint is likely to be true,” noting the complainant may freely disclose the facts underlying the complaint.

Acknowledging that the Commission “has an interest in facilitating the effective investigation of complaints,” the court held that the Commission had “failed to cite any evidence that the confidentiality rule furthers such an interest.” In fact, the court suggested, the publication of a complaint may further the investigation “by creating awareness of the complaint on the part of third-party witnesses who may then come forward and testify before the JQC.” Finally, the court rejected the Commission’s argument that the confidentiality rule is justified by a governmental interest in protecting a judge’s right of privacy.

Limited ban

In contrast, the United States Court of Appeals for the Second Circuit held that a limited ban on disclosure of the filing a complaint during an investigation of the Connecticut Judicial Review Council did not violate the First Amendment. *Kamasinski v. Judicial Review Council*, 44 F.3d 106 (2nd Circuit 1994). The court concluded that the decision in *Doe* “failed to adequately recognize the manner in which the state’s interests are furthered by limited confidentiality.”

The Second Circuit believed that allowing complainants to make the fact of a complaint public would enable complainants to engage in a campaign of harassment that might “lead to the loss of judicial independence as well as an overburdening of the JRC with frivolous complaints.” The Second Circuit also concluded that a “common result of publication will be that witnesses otherwise willing to speak candidly will decline to do so, in the knowledge that the media and others will pursue them to inquire whether they have in fact testified.” Finally, the Second Circuit found that the state had a “significant interest in encouraging infirm or incompetent judges to step down voluntarily, a likelihood that is greatly reduced after publication that complaints have been filed against them.”

However, the court did state that “whether the state may prohibit the disclosure of the substance of an individual’s complaint or testimony merits little discussion. Penalizing an individual for publicly disclosing complaints about the conduct of a government official strikes at the heart of the First Amendment, and . . . such a prohibition would be unconstitutional.”

Moreover, the court held that a ban on disclosure of the

filing of a complaint is constitutional only as long as the Council “acts in its investigatory capacity. Once the JRC has determined whether or not there is probable cause that judicial misconduct has occurred, even Connecticut’s most compelling interests cannot justify a ban on the public disclosure of allegations of judicial misconduct.” In other words, a complainant can say “Judge Smith treated me discourteously” at all times; if a commission determines there is no probable cause, the complainant may then say, “Judge Smith treated me discourteously, I filed a complaint with the commission, and the commission dismissed my complaint.”

* * *

See also *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (statute making it a crime for third persons who are strangers to proceedings of the Judicial Inquiry and Review Commission, including news media, to divulge or publish truthful information regarding confidential proceedings of the Commission violates the First Amendment); *Baugh v. Judicial Inquiry and Review Commission*, 907 F.2d 440 (4th Circuit 1990) (compelling state interest test should be applied to challenge to restriction on factual statement that a complaint had been filed and that commission had taken action); *First Amendment Coalition v. Judicial Inquiry and Review Board*, 784 F.2d 467 (3rd Circuit 1986) (rule violated the First Amendment to the extent it prevented subpoenaed non-party witnesses from disclosing their own testimony before the Pennsylvania Judicial Inquiry and Review Board, but not to the extent it prevented witnesses from revealing testimony of other witnesses or comments of Board members). 

Judicial Conduct Reporter

Summer 2008

Seth S. Andersen
Executive Vice President

Published quarterly,
\$36 per year, single copy \$10

Cynthia Gray
Director
Center for Judicial Ethics
cgray@ajs.org

© 2008
American Judicature Society
ISSN: 0193-7367

American Judicature Society
The Opperman Center
at Drake University
2700 University Avenue
Des Moines, IA 50311

To subscribe or if you have a
change of address or questions
about your subscription, contact
515-271-2285 or llieurance@ajs.org

*An index to the Judicial Conduct Reporter is available on the AJS web-site
at www.ajs.org/ethics/.*

Derogatory statements

The Mississippi Supreme Court publicly reprimanded a former judge for derogatory statements at a National Drug Court Institute training conference in Dallas. *Commission on Judicial Performance v. Boland* 975 So.2d 882 (Mississippi 2008). The judge attended the conference as part of a six-member team. During one session, the judge went into a 10-15 minute “tirade,” telling the group that she felt she was not getting any support for the drug court from other justice court judges or the board of supervisors. The judge said the members of the board of supervisors were not intelligent and that some justice court judges did not have degrees. Finally, the judge stated: “As far as I’m concerned, the African-American community in Hinds County can go to hell.”

As a result of the judge’s remarks, many of the Mississippi participants left the conference and flew home. Several participants received letters of apology from the judge but felt that the letters lacked sincerity.

The judge argued that her comments were protected free speech. Stating it did not condone her comments concerning the supervisors and other justice court judges, the court concluded these comments were not sanctionable because they were an expression of her personal opinion. However, the court held that the judge’s comment about African-Americans in Hinds County was judicial misconduct and not protected by the First Amendment. Emphasizing that the judge was acting in her judicial capacity at the conference, the court stated that “her comment was an insult to individuals in the community in which she worked as a justice court judge . . . not an expression of political or religious speech.”

Use of profanity

Based on a stipulation and agreement, the Washington State Commission on Judicial Conduct publicly censured a judge for abusive verbal confrontations at a drug court conference in Los Angeles, sponsored and paid for by the U.S. Department of Justice in collaboration with the National Council of Juvenile and Family Court Judges. *In re Wulle, Stipulation, Agreement, and Order* (December 7, 2007) (www.cjc.state.wa.us/). Attending the conference as part of a team, the judge repeatedly interrupted team discussion with profanity and expletives to express his disapproval of or indifference to federal funding. When the team’s facilitator introduced himself to the group, he said he was from San Francisco, a city he characterized as very liberal and litigious. The judge interjected, “Yeah, and very gay.” After the facilitator, who is African American, mentioned he would conduct a follow-up visit with the team in Clark County, the judge suggested the community was “awfully white,” and

used the term “BIV,” which stands for “black in Vancouver,” locally understood as referring to perceived problems with racial profiling in the city. After the facilitator wrote a star on an assignment the team had completed, the judge said, “I don’t need a star, I’m not a Jew.” After a team member asked the judge to lower his voice during a session, he raised his middle finger at the team member. Becoming frustrated with a discussion, the judge announced it was time to move to the next topic, and when a fellow team member said, “No judge, this is important, we need to work through this,” the judge yelled, “F— you!,” threw his pen down on a table, and left the room. Several witnesses noted they smelled alcohol emanating from the judge. The judge denies consuming alcohol during the conference. The parties agreed that the dispute did not materially affect the facts conceded by the judge.

The Commission noted that the judge’s inappropriate behavior significantly undermined the team’s respect for him, was discussed with their colleagues and supervisors when they came home, and was reported to the agencies sponsoring the conference.

The Commission found that the judge’s conduct appeared to be an aberration and that the witnesses

did not believe the judge to be racist, homophobic, or anti-Semitic. However, the Commission also found that the judge failed to demonstrate an appreciation for the seriousness of his actions, never apologized, dismissed concerns about his behavior, minimized his responsibility, or blamed others. The judge had answered the statement of allegations by questioning how anyone could interpret his words or conduct as demeaning to others and by making several inaccurate or evasive statements. “At a minimum,” the Commission stated, the judge’s “response to the Commission demonstrates his lack of insight into his own behavior and a failure to appreciate the requirement that his answers to the Commission must be complete and accurate. From the Commission’s perspective any failure to be forthright with the Commission threatens the integrity of this disciplinary process and is a serious aggravating factor.”

Over-indulgence in alcohol

The Tennessee Court of the Judiciary publicly censured a judge for his behavior at a Juvenile Justice Conference in Memphis after he over-indulged in alcohol. The judge made disparaging references about the race and ethnicity of an African-American conference attendee. The judge also profanely referred to an attendee from Pennsylvania and physically pushed the person. Later, the judge tried to coax a female attendee to dance with him; when she resisted, the judge made a crude sexual remark. *Jackson, Public Censure* (May 24, 2007). 

RECENT DECISIONS



The Opperman Center
at Drake University
2700 University Ave.
Des Moines, Iowa 50311

Nonprofit Org.
U.S. POSTAGE
PAID
Chicago, Illinois
Permit No. 2482

JUDICIAL CONDUCT REPORTER



The 21st National College on Judicial Conduct and Ethics

Chicago, Illinois • October 29–31, 2008

Register on-line at
www.ajs.org