

JUDICIAL CONDUCT REPORTER

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Nepotism by Cynthia Gray

Judges are directed to “avoid nepotism and favoritism” in Canon 3C(4) of the 1990 American Bar Association *Model Code of Judicial Conduct* and Rule 2.13(A) (2) of the 2007 model code. Comment 2, added in 2007, states that, “unless otherwise defined by law, nepotism is the appointment or hiring of any relative within the third degree of relationship of either the judge or the judge’s spouse or domestic partner, or the spouse or domestic partner of such relative.”

Because the specific language is that a judge “shall avoid nepotism,” rather than that a judge “shall not engage in nepotism,” the provision has been interpreted as less than an absolute bar to employment of a relative by a judge. In other words, employment of a relative by a judge may not be a per se violation of the code as long as “the prospective employee’s merit and concerns for the proper administration of

justice [are] paramount in the decision.” *Indiana Advisory Opinion 2-98*. See also *Caudill v. Judicial Ethics Committee*, 986 S.W.2d 435 (Kentucky 1998) (under a provision stating that a judge “should” avoid nepotism, a judge may employ his or her spouse as a secretary as long as the spouse has “the skills and competence” required to perform the job).

To avoid nepotism as required, however, a judge cannot simply hire a qualified relative but must take steps to ensure that any relative hired is the most qualified person available. Thus, the position “must be announced or advertised to the public in the same manner other vacancies within the court are announced or advertised, and other qualified applicants must be considered.” *Indiana Advisory Opinion 2-98*. See *In re Dumas*, Reprimand (Tennessee Court of the Judiciary

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Taking action after disqualification by Cynthia Gray

After a judge has been disqualified from a case, the judge is prohibited from taking further action in the case except for ministerial steps necessary for the case to be re-assigned to another judge. That bar applies even to uncontested motions or stipulated actions. See *Maryland Advisory Opinion 2009-18* (a judge who has recused herself from cases involving certain attorneys due to personal relationships with them and their families should abstain even from uncontested aspects of the cases, absent waiver or necessity); *New York Advisory Opinion 12-25* (a judge who is disqualified from matters in which a particular attorney appears may not enter “so-ordered” discovery stipulations by that attorney).

Judges have been disciplined for re-inserting themselves into cases following disqualification. For example, in *In the Matter of McBee*, 134 P.3d 769 (New Mexico 2006), Judge

McBee had disqualified himself from a criminal case at the suggestion of the chief judge because Judge McBee had a relationship with the defendant’s attorney. The case was re-assigned to another judge, but Judge McBee subsequently revoked his recusal, contrary to his agreement with the chief judge, and sentenced the defendant.

In *Commission on Judicial Performance v. Skinner*, 2013 WL 3945902 (Mississippi Supreme Court August 1, 2013), Judge Skinner had recused himself from cases involving six minor children because a court employee was related to their parents. Although a special judge was appointed to preside in the cases, Judge Skinner subsequently issued bench warrants for the arrests of both parents for contempt for violating a no-contact order. The Mississippi Supreme

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- A lawyer who is a former judge may truthfully refer to his past judicial position. *Michigan Opinion RI-362* (2013).

A former judge may describe her past judicial service and experience in biographical sketches, resumes, curricula vitae, and similar communications but may not use her former judicial title while practicing law, engaging in law-related or other business activities, working in government or other public sector positions, or engaging in activities with charity or community groups. Judges must make reasonable efforts to ensure that former judges are not addressed by judicial titles in court proceedings. *Ohio Opinion 2013-3*.

- A judge may use the internet to educate himself on general topics and verify facts about which he may take judicial notice but not to independently research issues in specific cases without first notifying the parties and inviting input. *California Judges Association Opinion 68* (2013).

- A judge who received an anonymous note with a \$20 bill should notify court security and turn the note and the money over to the sheriff. *West Virginia Opinion* (December 5, 2012).

- A judges' association may permit non-judicial co-sponsors of an educational conference to raise funds from foundations, bar associations, law schools, and members of the bar. *New York Opinion 12-86*.

- A judge may participate in an educational panel on under-age drinking that is not likely to be perceived as a law enforcement program. *New York Opinion 12-74*.

- A judge may speak on a law-related topic at a TEDx conference for students, faculty, and staff at a non-profit educational institution. *Connecticut Informal Opinion 2013-23*.

- A judge may not be a panelist at a for-profit summit for Hispanic businesswomen that is sponsored by a media company and funded by sponsorships, particularly as the judge's participation will be widely publicized. *Connecticut Formal Opinion 2013-28*.

- A drug court judge may cooperate with a newspaper on a series of articles that will follow two drug court clients until their anticipated graduation. *Arkansas Opinion 2013-1*.

- A judge may not allow sessions in his court and other activities in the courthouse to be filmed for a for-profit TV program. *Arkansas Opinion 2013-2*.

- A judge may submit to a newspaper without comment her decision in a criminal case after she files the decision with the clerk. *New York Opinion 12-146*.

- A judge may be a judicial fellow in the American Academy of Matrimonial Lawyers or the American Academy of Appellate Lawyers, but, if another member appears before him, he should disclose the relationship; if an issue comes before the judge on which the academy has taken a public position (by adopting a resolution or

filing an amicus curiae brief, for example), he should consider whether recusal is necessary. *Connecticut Informal Opinions 2013-17 and 2013-18*.

- A judge may not accept an award from a non-profit organization at a candlelight vigil for victims and survivors of domestic violence. *Connecticut Emergency Staff Opinion 2012-29*.

- A judge may create public service announcements soliciting volunteers to serve as foster parents or adoptive families for children in the dependency system. *Florida Opinion 2013-10*.

- To secure volunteers, a judge may educate friends, family, and members of the community about dependency court and the guardian ad litem program. *Florida Opinion 2013-9*.

- A judge may discuss with a non-profit organization the establishment of alternative community corrections pilot projects for high risk young men in her department. *Massachusetts Opinion 2012-1*.

- A judge may not assist with a mock trial organized by the district attorney's office or a law enforcement agency to train law enforcement officers to testify in court. *New Mexico Opinion 12-13*.

- A judge or the judge's court clerk may not distribute to defendants a packet the district attorney has prepared about how to request a reduction of a traffic law violation. *New York Opinion 12-68*.

- A judge is not disqualified based solely on having "friended" on social media individuals who have some role in a case. *New York Opinion 13-39*.

- A judge running for re-election may have a campaign Twitter account, but, to be prudent, his campaign committee or manager should maintain the account. *Florida Opinion 2013-14*.

- A judge is not disqualified from a foreclosure action filed by a bank or a civil action filed by the respondent-debtors against the bank based on the judge's interest in a public employee retirement association that holds investments in the bank even though a similarly situated judge had previously recused; even if there was the appearance of partiality, the rule of necessity would override the disqualification. *Colorado Opinion 2013-3*.

- A judge may serve on the board of directors of (1) a non-profit organization that advances the resolution of environmental challenges and supports stockholder-driven solutions to environmental challenges and (2) a non-profit organization that is hosting an antelope hunt to raise awareness about economic self-sufficiency issues for women. *Wyoming Opinion 2012-2*.

- A judge may form a club with other hot air balloon enthusiasts even if it would be organized as a limited liability company. *New Mexico Opinion 12-9*. ★

Recent advisory opinions

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

Letter to parole board

Accepting an agreed statement of facts and stipulation, the New York State Commission on Judicial Conduct admonished a judge for sending an unsolicited letter on judicial stationery in support of the parole request of the son of a family acquaintance. *In the Matter of Smith, Determination* (June 19, 2013) (<http://www.cjc.ny.gov/Determinations/S/Smith.Nancy.E.htm>).

Craig Cordes was sentenced to state prison after being convicted of vehicular manslaughter for driving a boat into another boat, resulting in the death of two people. The judge has never met Cordes. She played no role in his criminal case. Her brother-in-law's sister is a friend of Cordes's mother.

The judge spoke with Cordes's mother about his case and incarceration. She began communicating with Cordes by letter and, over time, formed the opinion that he recognized the gravity of his crime, had gained insight as to the harm he had caused, and was genuinely contrite. At the request of Cordes's mother, the judge agreed to write to the New York State Division of Parole on his behalf.

In a letter on her judicial stationery to the Division of Parole, the judge identified herself as a judge and stated that Cordes was her "friend" without disclosing that she had never met him. She expressed her support for his release and set forth factors that she believed demonstrated his rehabilitation.

The Commission concluded:

With her judicial stationery underscoring the impact of her professional clout, respondent acted as an advocate for an inmate who was seeking release on parole, describing him as her "friend" and "a good person" (although she had never met him), citing his worthy activities while incarcerated, and stating that she was "confident" of his exemplary behavior if released. Respondent's letter was clearly intended to influence the Parole Board to give favorable consideration to the inmate's application. The favoritism inherent in her letter, which she sent at the request of the inmate's mother (a friend of respondent's relative), subverts the fair and proper administration of justice since the inmate is the beneficiary of an influential plea from a sitting judge based on personal connections, a benefit not available to others who have no such connections.

The Commission emphasized that the judge "should have recognized the likelihood that she was asked to write on Cordes's behalf primarily because her status as a high-ranking judge would give clout to her expression of support," noting the information she provided was not based on her personal knowledge and could have been provided by others.

The Commission also concluded that "the entire letter is misleading," noting that describing Cordes "as her

'friend' was deceptive and disguises the limited nature of the relationship Since respondent's letter, unlike character testimony, was not under oath or subject to cross-examination, the Parole Board would not have known that her optimistic assessment of his character and rehabilitative prospects was based entirely on correspondence with him . . . and hearsay."

The Commission stated that the fact that the judge had written many other letters offering her opinions about inmates to the Division of Parole was irrelevant, noting those letters were in response to direct inquiries by the Division of Parole and involved inmates over whose trials she had presided and/or whom she had sentenced. The Commission stated that the judge "should have recognized that sending an unsolicited letter to help someone based on personal connections is critically different from responding to an official request for her views."

Recent cases

Ex parte sidebar with prosecutor

Adopting the findings and recommendation of the Advisory Committee on Judicial Conduct, which the judge accepted, the New Jersey Supreme Court publicly reprimanded a judge for an ex parte conversation in which he advised the prosecutor on issues relevant to the admission of evidence in a pending DWI matter. The Court's order does not describe the judge's misconduct; this summary is based on the Committee's presentment. *In the Matter of Diamond, Order* (July 11, 2013) (<http://www.judiciary.state.nj.us/pressrel/2013/pr130711a.html>).

Christopher Baxter was representing Eugene Foxworth on charges of driving while intoxicated. Prior to appearing before the judge one day, and consistent with the court's practice, Baxter met with the prosecutor, Donna Platt, in a conference room adjacent to the courtroom. They discussed the defenses Baxter anticipated raising.

Exiting the conference room and entering the courtroom, the prosecutor then engaged in a five-minute ex parte conversation with the judge about the Foxworth matter, at sidebar. The judge and the prosecutor chiefly discussed the chain-of-custody issues that Baxter raised and the witnesses that the prosecutor needed to produce to address those issues, focusing on the defendant's expert's report. Several times during the conversation, the judge used the term "we" when referring to the prosecution's case. For example, the prosecutor asked the judge if, as a first step, he wanted her to subpoena all four officers involved in the chain of custody, and the judge responded, "I think it's the only way we can really put it on the record, especially if it's a high reading." The judge and the prosecutor also briefly discussed the expired

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July 16, 2010) (<http://www.tsc.state.tn.us/boards-commissions/court-judiciary/disciplinary-actions>) (judge hired her daughter as her court officer without competitive consideration of other qualified applicants).

Further, to determine whether hiring or appointing a relative over other applicants would constitute impermissible nepotism, a judge should consider:

- The comparative qualifications of the applicants,
- The degree, extent, or depth of the relationship of the prospective employee to the judge,
- The degree of day-to-day supervision and contact the judge would have with the relative if employed,
- Whether the position is a deputy or supervisory position, and
- Whether the position is relatively lucrative or voluntary, full-time or part-time, and permanent or temporary.

See *Arkansas Advisory Opinion 91-4*; *Delaware Advisory Opinion 04-4*; *Indiana Advisory Opinion 2-98*.

Those factors are reflected in advisory opinions that disapprove a judge's hiring of a close relative for a position closely supervised by the judge.

- A judge may not appoint his spouse or another member of his immediate family as his personal secretary. *Georgia Advisory Opinion 68* (1985).
- A judge may not hire a relative within the third degree of consanguinity as a law clerk. *Nevada Advisory Opinion 05-2*.

Similarly, many advisory opinions that allow a judge to hire a particular relative for a specific position involve a more distant relative and/or a more distant working relationship.

- A judge may use her first cousin or daughter-in-law as a court reporter on a temporary or case-by-case basis. *Alabama Advisory Opinion 94-513*.
- A judge may appoint her second cousin once removed as her bailiff. *Alabama Advisory Opinion 87-291*.
- A judge may appoint her second cousin, who is highly competent and qualified, as her secretary. *Alabama Advisory Opinion 86-256*.
- A judge may consider the spouse of her first cousin for appointment as court clerk. *Arkansas Advisory Opinion 99-5*.
- A judge may employ her niece-in-law as a judicial assistant. *Florida Advisory Opinion 98-4*.
- A judge may appoint the child of her spouse's cousin as an unpaid summer intern. *New York Advisory Opinion 88-8*.

Analysis

Applying the factors, an advisory opinion from the Indiana Judicial Qualifications Commission explained that "the

employment or appointment of a spouse likely will never be appropriate . . ." *Indiana Advisory Opinion 2-98*. It continued:

Employing a relative as a temporary filing clerk during another employee's leave of absence . . . is unlikely to threaten the public's trust, whereas a judge who confers upon a sibling, child, parent, or member of the judge's household a key post in the judiciary likely will be scrutinized by the Commission. . . .

A judge who hires, for example, a niece or nephew as bailiff without the Commission's approval invites public criticism and a Commission inquiry, whereas the Commission may be inclined to approve the employment of the same relative as, for example, a secretary in the probation department.

The Commission urged judges to seek its approval before hiring or appointing a relative to any position. See *Public Admonition of Huizenga* (Indiana Commission on Judicial Qualifications June 22, 2009) (www.in.gov/judiciary/jud-qual/docs/admonitions/huizenga-062209.pdf) (judge employed his wife as court clerk without contacting the Commission).

The Delaware advisory committee stated that "as a rule of thumb, . . . [a] judge should avoid hiring a relative, or the spouse of a relative, within the third degree of consanguinity, to the judge or the judge's spouse . . . even if the relative was objectively qualified for the position." *Delaware Advisory Opinion 04-4*. Addressing the specific inquiry it had received, however, the committee stated that the judge could hire the daughter of his sister-in-law's brother as his law clerk. The committee noted that "brother's 'niece-in-law' falls well outside of the third degree of consanguinity" and the judge did not have "a close social relationship with this young woman or with her immediate family." Noting the potential law clerk had distinguished herself academically at college and law school and had "obtained substantive work experience at a top-tier New York law firm," the committee also concluded that "it is difficult to imagine how anyone reasonably could question her qualifications for the job." "Given the degree of familial separation" and her "objectively strong qualifications," the committee concluded that the fact that the law clerk would be compensated and would be closely supervised by the judge "should be afforded little weight." The committee did note those factors "may be more relevant . . . where the applicant is closer in relation to the judge or less qualified for the position."

The Arkansas advisory committee was "unable to opine" that a judge could not appoint his wife as an unpaid deputy clerk but advised that "the best approach" was not to do so to avoid the appearance of nepotism. *Arkansas Advisory Opinion 91-4*. The code in Arkansas provides that, "No judge shall employ a spouse or other relative unless it has been affirmatively demonstrated to the Arkansas Judicial

Discipline and Disability Commission that it is impossible for the judge to hire any other qualified person to fill the position.”

Stricter rules

Some states have provisions that impose a more restrictive requirement than the “avoid” language of the model code. The New York code of judicial conduct, for example, states that “a judge shall not appoint . . . as a member of the judge’s staff . . . a relative within the fourth degree of relationship of either the judge or the judge’s spouse or the spouse of such a person.”

Other states have anti-nepotism statutes that judges, as well as other public officials, are required to comply with in hiring. In a comment, the Arizona code of judicial conduct reminds judges that the state’s anti-nepotism statute “applies to judicial officers.” That statute makes it a misdemeanor “for an executive, legislative, ministerial or judicial officer to appoint or vote for appointment of any person related to him by affinity or consanguinity within the third degree to any clerkship, office, position, employment or duty in any department of the state, district, county, city or municipal government of which such executive, legislative, ministerial or judicial officer is a member, when the salary, wages or compensation of such appointee is to be paid from public funds or fees of such office . . .”

The Alabama committee stated that the code’s rule on nepotism read with a statute prohibiting appointment of any person related within the fourth degree prohibits a judge from appointing the judge’s child as a bailiff or clerk (*Alabama Advisory Opinion 90-394*), the judge’s uncle by marriage as bailiff (*Alabama Advisory Opinion 76-13*), or the judge’s niece or nephew as law librarian. *Alabama Advisory Opinion 86-250*. The West Virginia committee advised that, under a statute, a judge may not appoint a cousin or other relative within the sixth degree as a probation officer (*West Virginia Advisory Opinion* (February 18, 2005)) or a niece, a son-in-law, or a brother-in-law as her assistant. *West Virginia Advisory Opinion* (October 20, 2008); *West Virginia Advisory Opinion* (March 26, 2007); *West Virginia Advisory Opinion* (January 5, 1993).

Hiring or appointing other judges’ relatives

In the absence of a stricter anti-nepotism statute, under the code of judicial conduct, a judge may usually hire another judge’s relative as long as the decision is based on merit.

- An associate justice of the supreme court or a judge of the court of appeals may employ the second cousin of the chief justice as a law clerk. *Arkansas Advisory Opinion 96-8*.
- A new judge’s wife may continue to serve as the secretary to another judge in the same court facility. *Florida Advisory Opinion 76-24*.
- A district’s administrative judge may employ as an administrative assistant the son-in-law of a superior court

judge in the district. *Georgia Advisory Opinion 14* (1977).

- A judge may hire another judge’s child as a secretary. *Illinois Advisory Opinion 97-18*.

- A judge may hire as clerk the child of a judge in the same circuit. *Missouri Advisory Opinion 55* (1981).

- An appellate court judge may hire a trial judge’s child as a law clerk as long as she disqualifies from any matters involving the clerk’s parent. *New York Advisory Opinion 89-144*.

To ensure that the hiring decision is based on merit both in fact and in appearance:

- The hiring judge should interview other applicants and preserve a record demonstrating that the judge’s relative is qualified for the position (*Illinois Advisory Opinion 97-18*);

- The prospective employee’s judge/relative must not participate in any way in the selection process (*Arkansas Advisory Opinion 96-8*); and

- The hiring judge should examine his or her personal and formal contacts with the applicant’s judge/relative (*U.S. Advisory Opinion 64* (2009)).

The advisory committee for federal judges issued an opinion on whether a federal judge may employ as a law clerk the son or daughter of another federal judge in three circumstances: when the judges are on the same court, when they are on unrelated courts, and when they are on different courts within the same circuit. *U.S. Advisory Opinion 64* (2009). Noting “the children of judges already bear some of the sacrifices of the offices held by their parents,” the committee stated that it is unfair “to visit upon them a blanket disability from seeking an employment that is often the reward of academic excellence.”

The committee advised that a federal judge should not hire as a law clerk the son or daughter of a judge sitting on the same court. *See also Louisiana Advisory Opinion 154* (1998) (a judge may not appoint as her law clerk the son-in-law of a judge on the same court). However, the federal committee stated that a judge may hire the son or daughter of a judge sitting on a court that has no jurisdictional connection with the court of the employing judge. For example, a judge on the District Court of Idaho may hire as a law clerk the son or daughter of a judge on the District Court of Maine, or a judge on the Court of Appeals for the First Circuit may hire the child of a judge on the District Court of Idaho.

Finally, the committee advised that a judge may, “with the exercise of care and discretion,” hire as a law clerk the son or daughter of a judge of a court that has a jurisdictional connection with the court of the hiring judge, for example, a circuit court judge may hire the son or daughter of a judge on a district court within the circuit or vice versa. There are disqualification implications for such relationships,

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however, and the committee outlined factors a judge should consider.

A circuit judge, before making the decision to hire a clerk who is related to a district judge whose work will be reviewed, should consider whether it will be necessary to insulate the clerk from case participation with frequency and, if so, whether such insulation will disrupt orderly procedures within the reviewing judge's chambers or court.

If the hiring judge has considered these factors and finds no ground for concern either that favoritism will occur or that impartiality or orderly procedures will be undermined, a circuit judge may, with propriety and without violating Canons 2 and 3, hire as a law clerk the son or daughter of a judge from a district court even if there is a jurisdictional relation between the courts.

(The committee added that "the same considerations govern a circuit judge's decision whether to hire the child of a bankruptcy or magistrate judge in the same circuit.")

The committee noted that the need for a district judge to isolate a law clerk whose parent is a circuit judge in a related court "will arise only infrequently; that is, only when a case is returned by that circuit judge to the district judge." However, the committee stated that a circuit judge "should ordinarily recuse in appeals of cases that were decided by the district judge at the time the circuit judge's child was a law clerk in the district judge's chambers" and should even consider recusing in appeals while the child serves as a law clerk even in cases that were not decided by the district judge during the child's clerkship. Thus, the committee stated, a "district judge should consider that hiring the child of a circuit judge in the same circuit will necessitate the latter's recusal in many cases." Although most circuits are large enough that those recusal might not be overly burdensome, the committee noted, "the circuit en banc would be one judge short with respect to appeals from the decision of a district judge who hired as a law clerk the child of a circuit judge." (The committee added that "the same considerations govern a bankruptcy or magistrate judge's decision whether to hire the child of a circuit judge in the same circuit.")

Court hiring

Authorities are divided on the related issue of whether a judge's court may hire a judge's relative as long as the judge/relative does not participate in the hiring decision. A West Virginia advisory opinion stated that a judicial

circuit may hire as a probation officer the grandchild of one of the judges in the circuit if (1) the judge/grandfather is not involved in any manner in the selection process; (2) the selection criteria do not show favoritism; (3) the same objective standards are applied to all candidates; (4) the selection is based on merit; and (5) the grandchild will not appear before his grandfather or handle any cases in which he presides. *West Virginia Advisory Opinion* (August 29, 1997). See also *New York Advisory Opinion 08-180* (a judge's sibling may be appointed as an arbitrator or small claims

assessment review officer if the sibling is otherwise eligible and the judge is not involved in any way in the process).

In contrast, the Louisiana code of judicial conduct expressly provides that "no spouse or member of the immediate family of a judge shall be employed in the court to which that judge

was elected." Similarly, the Rules of the Chief Judge of New York provides that "no person shall be appointed to a position in any state-paid court of the Unified Court System if he or she is a relative within the fourth degree of relationship, or the spouse of such relative, of any judge or the spouse of such judge of the same court within the county in which the appointment is to be made."

The Florida advisory committee stated that, although the other judges in a circuit would not violate the anti-nepotism rule by voting to hire their colleague's spouse as a court program specialist, that hiring decision would create the appearance of "hiring favoritism . . . in the mind of the public and other candidates for the position . . ." *Florida Advisory Opinion 99-10*. See also *Florida Advisory Opinion 2002-2* (the spouse of a judge of the family law division may not be employed by the court administrator's office as a case manager in the family law division).

The Washington advisory committee has distinguished between permissible and impermissible court employment depending on how close the family relationship is and how independent the hiring official is. The committee advised that a judge should not permit the court director to hire the judge's child for even a part-time, temporary position in the clerk's office in the judge's court if the court director is an at-will employee of the court's judges. *Washington Advisory Opinion 05-6*. In subsequent opinions, however, the committee stated that a judge's child may be employed temporarily in the judge's court by the independently elected county clerk over whom the judge has no supervisory control. *Washington Advisory Opinion 05-9*. Similarly, the committee

To avoid nepotism as required, a judge cannot simply hire a qualified relative but must take steps to ensure that any relative hired is the most qualified person available.

stated that the niece of a judge's spouse may be employed by the judge's court and supervised by an at-will employee if the judge and the niece do not have a close relationship, if there is no appearance that she received the job because of the relationship, and if she will not be involved in the judge/relative's cases or supervised by the judge/relative. *Washington Advisory Opinion 06-5*.

There may be an exception to the nepotism rule if a current court employee becomes related to a judge – if the court employee marries a judge or a judge's relative, if the judge marries into the court employee's family, or if a court employee's relative becomes a judge. In other words, anti-nepotism provisions may only apply prospectively to new employment, not retroactively to former hiring. *Compare Alabama Advisory Opinion 84-200* (a judge's secretary may continue her employment after marrying the judge), *with Ohio Advisory Opinion 89-1* (retaining a long-term court employee who is now married to a judge of that court may raise the question of nepotism but is not per se nepotism), *and West Virginia Advisory Opinion* (December 11, 1997) (a court reporter may not continue in that employment after marrying a judge of the court).

Protocol

When the nepotism rules allow a relative of a judge to be a court employee, the Washington advisory committee recommended that the court adopt a protocol to guard against any appearance of favoritism. *Washington Advisory Opinion 05-9*. The committee suggested that the protocol provide that the employee/relative will have no contact with the judge/relative in any employment capacity and that other judges, court employees, and other affected persons will be advised of the supervisory and reporting relationships in the court office where the relative is employed. The committee added that a judge/relative may not serve as the presiding judge if the presiding judge has supervisory authority over court personnel including the employee/relative.

In courts in which the court administrator or court

director are judicial employees who report to the presiding judge, the committee stated, the presiding judge should develop a hiring process based on merit, avoiding favoritism and nepotism. In courts where the clerk's office is under the direction of an elected court clerk, the committee advised, the presiding judge should strongly encourage the clerk to develop a hiring process based on merit. If a court does not have a clear hiring process based on merit, the committee stated, judges should discourage family members residing in their households and others with whom they share a close personal relationship from seeking court employment.

Appointments

The nepotism rule prohibits a judge from appointing a relative as counsel for indigent defendants in criminal or other cases. *Kansas Advisory Opinion JE-11* (1984) (a judge may not appoint his wife, who is also his former law partner, in any criminal or civil matter); *Missouri Advisory Opinion 38* (1980) (a judge may not appoint her son as an attorney for indigent defendants even if assignments had been customarily rotated among all members of the bar); *Ohio Advisory Opinion 93-4* (a judge may not appoint an attorney related to the judge or the judge's spouse within the third degree of consanguinity to represent indigent parties indicted by a grand jury); *West Virginia Advisory Opinion* (February 25, 1994) (a judicial officer may not appoint a nephew by marriage to represent indigent persons charged with criminal offenses). *See also Alabama Advisory Opinion 99-742* (a judge may not appoint a cousin as counsel for indigent defendants even in cases on colleagues' dockets); *Alabama Advisory Opinion 87-316* (a judge may not appoint his niece's husband to represent indigent defendants in criminal cases); *Alabama Advisory Opinion 82-138* (a judge may not appoint an attorney related within the fourth degree to the judge or the judge's spouse to represent indigent criminal defendants).

Failure to follow that rule can lead to judicial discipline.

- A judge should not have appointed his father as counsel for indigent defendants in 238 cases, then recused himself from each case because of the relationship. *In re Davis*, 865 So. 2d 693 (Louisiana 2004) (suspension without pay for 90 days for this and other misconduct).

- A judge should not have appointed his son to represent criminal defendants in nine cases or to represent 16 persons before the court on mental commitments, ordering \$3,575 in attorney fees to be paid from public funds, or as an attorney ad litem to represent a minor in a personal injury case, approving an agreed fee of \$750 from private funds. *Public Admonition of Jarvis* (Texas State Commission on Judicial Conduct October 22, 1999).

- A judge should not have signed a perfunctory order

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James J. Alfini
Interim Executive Director

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

American Judicature Society
Center Building
2014 Broadway
Suite 100
Nashville, TN 37203

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271-2285 or llieurance@ajs.org

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appointing his daughter, the county public defender, as counsel for an indigent murder suspect at an initial appearance. *Commission on Judicial Performance v. Peyton*, 812 So. 2d 204 (Mississippi 2002) (suspension without pay for this and other misconduct).

Similarly, a judge may not appoint a relative to serve in positions such as guardian ad litem, receiver, trustee, administrator, referee, master, mediator, commissioner, or pro tem judge.

- A judge may not appoint the judge's relative within the fourth degree by blood or marriage as a guardian ad litem even if the minor nominates the relative and will remit disqualification. *Alabama Advisory Opinion 97-661*.
- A judge may not refer cases to his father for mandatory mediation unless the parties request the judge's father and waive the conflict in writing. *Florida Advisory Opinion 96-13*.
- A judge may not appoint a relative as a guardian ad litem, receiver, or master. *Florida Advisory Opinion 82-13*.
- A judge may not appoint her spouse to a position such as referee or magistrate. *Michigan Advisory Opinion JI-31* (1990).
- A judge may not appoint his son as guardian ad litem, appraiser, referee, or trustee. *Missouri Advisory Opinion 38* (1980).
- A judge may not appoint her child to serve occasionally as her pro tem substitute. *Washington Advisory Opinion 92-11*.

See also *In the Matter of Fine*, 13 P.3d 400 (Nevada 2000) (judge removed for, in addition to other misconduct, appointing her first cousin as a mediator in a case without informing the parties of the relationship); *Kane v. State Commission on Judicial Conduct*, 406 N.E.2d 797 (New York 1980) (judge removed for, in addition to other misconduct, appointing his son as a referee in four cases and confirming his reports); *In re Jenkins*, 419 P.2d 618 (Oregon 1966) (part-time judge suspended as a member of bar for two years for appointing his wife as administrator of four estates, passing upon her accountings, and setting and allowing her fees, in addition to other misconduct).

A judge may appoint another judge's relative as a guardian ad litem or to similar positions as long as the decision is based on merit. *Hawaii Advisory Opinion 4-96* (a judge may appoint the spouse of another judge as a commissioner in a foreclosure action); *New York Advisory Opinion 92-87* (a judge may appoint the spouse of another judge as a successor trustee); *New York Advisory Opinion 95-166* (a judge may appoint a relative of another judge as a law guardian provided the appointment is made from the current list of approved law guardians).

"Cross nepotism" or even the appearance of cross nepotism, however, is not permitted. In *Spector v. Commission on*

Judicial Conduct, 392 N.E.2d 552 (New York 1979), Judge Spector had appointed the sons of two other judges in 12 cases to serve as a guardian ad litem, receiver, or referee, while those other judges appointed his son 15 times. Admonishing the judge, the New York Court of Appeals stated: "Nepotism is to be condemned, and disguised nepotism imports an additional element of evil because the actor seeks to conceal what he is really accomplishing." See also *Kane v. State Commission on Judicial Conduct*, 406 N.E.2d 797 (New York 1980) (judge removed for, in addition to other misconduct, appointing the brother of another judge as a referee in 33 cases, while aware that the other judge was contemporaneously appointing his son in similar proceedings).

Attorney affiliated with a relative

A judge may not make appointments to an attorney who is affiliated with a relative in a law practice. See *New York Advisory Opinion 87-7* (a judge should not appoint as guardians ad litem the partners in a law firm where the judge's child is employed as an associate); *Texas Advisory Opinion 83* (1986) (a judge may not appoint to represent the indigent an attorney employed at a law firm comprised of the judge's father, brother, and the attorney); *U.S. Advisory Opinion 61* (1998) (a judge may not appoint as a special master to supervise discovery in a case a partner in a law firm in which the judge's nephew is also a partner). Compare *Kane v. State Commission on Judicial Conduct*, 406 N.E.2d 797 (New York 1980) (judge removed for, in addition to other misconduct, appointing his son's law partner as a receiver in two cases, enabling the law partner and the son to share over \$51,000 in fees), with *New York Advisory Opinion 88-21* (a judge may appoint partners and associates of the judge's first cousin to fiduciary positions provided the cousin does not share in fees).

The advisory committee for federal judges reasoned:

The propriety of appointing to compensable positions attorneys who are law partners of a judge's relative cannot turn upon "an individual assessment of the professional competence of the attorney to be appointed." Even if the attorney is not obliged to share fees with the judge's relative, a judge should not have the opportunity to determine the compensation of a partner of the judge's relative.

U.S. Advisory Opinion 61 (2009). Moreover, even if the appointee waives compensation, appointment of an attorney affiliated with a judge's family member is not advised, the committee explained, because "the appointment would likely be regarded in the community as conferring a monetary benefit" and "waiver of compensation would raise the additional issue of the impropriety of a law firm performing costly favors for the court." ★

Court stated, “having recused himself from a case, a judge has no more authority to take action in that case than does the ordinary citizen on the street.”

See also *Lusk*, No. 08-322, Order (Arizona Commission on Judicial Conduct April 7, 2009) (<http://www.azcourts.gov/ethics/JudicialComplaints/2008.aspx>) (after a timely motion for change of judge was filed and a criminal case was re-assigned, judge set the case for trial); *In the Matter Concerning Edwards*, Decision and Order (California Commission on Judicial Performance April 12, 2010) (<http://cjp.ca.gov/>) (judge disqualified himself from assault case against the mother of his godchild but later arraigned her, appointed the public defender, set bail, and set the matter for a bail review and preliminary hearing); *Commission on Judicial Performance v. Roberts*, 952 So.2d 934 (Mississippi 2007) (despite recusing himself at the defendant’s request, judge subsequently heard a probation revocation matter, over the objections of the defendant’s attorney and even though another judge had been asked to hear it); *Inquiry Concerning Rodella*, 190 P.3d 338 (New Mexico 2008) (judge drafted a document recusing himself from the trial in a domestic violence case; after the state’s other witnesses left, the complaining witness appeared, and the judge recalled the case and dismissed it without prejudice); *In the Matter of Canfield*, Determination (New York State Commission on Judicial Conduct September 19, 2003) (www.cjc.ny.gov) (judge issued an amended order of protection based on an ex parte communication with the victim after previously disqualifying herself); *Ohio Bar Association v. Goldie*, 837 N.E.2d 782 (Ohio 2005) (after another judge granted a motion to disqualify her because she had represented the defendant’s husband in their divorce, judge issued a judgment entry explaining why she believed her removal was unjustified, scheduled the case for trial, denied a request for continuance based on the disqualification order, found the defendant guilty, and imposed a sentence); *Complaint Against Rich* (Tennessee Court of the Judiciary October 10, 2008) (www.tsc.state.tn.us/sites/default/files/docs/rich_charles_judge_publicreprimand.pdf) (judge, after disqualifying himself from juvenile court proceedings involving a particular mother, signed two orders in one matter and ordered her incarceration for failure to pay child support).

* * *

Other judges have been disciplined for stating at the beginning of a hearing that they were disqualifying but then continuing to preside over the hearing and even to issue rulings as if the disqualification had never taken place. See *In re Cummings*, 211 P.2d 1136 (Alaska 2009) (after he recused himself because he had engaged in an ex parte communication, judge continued to preside over a trial); *Commission on Judicial Performance v. Osborne*, 16 So. 3d 16 (Mississippi 2009) (after recusing himself during a detention

hearing because the minor’s attorney was representing someone suing him in an unrelated case, judge committed the minor to detention and took other action in the same post-hearing order in which he memorialized his recusal); *Inquiry Concerning Schwartz*, 255 P.3d 299 (New Mexico 2011) (after initiating a romantic relationship with a public defender, judge announced at a docket call he would recuse from two cases in which she was representing the defendant but also withdrew his previous denial of a defense motion to dismiss in one case and granted an uncontested motion to release the defendant on his own recognizance in the other case); *In the Matter of Watkins*, 2013 WL 1285995 (West Virginia Supreme Court of Appeals March 26, 2013) (judge stated, “I’m going to recuse . . . I tell you I’m too angry to even be appropriate in this case,” then continued presiding over the hearing). See *In re Porter*, Stipulation, Agreement, and Order (Washington State Commission on Judicial Conduct May 10, 2013) (www.cjc.state.wa.us/Case%20Material/2013/7112%20Porter%20Stipulation.pdf) (until contacted by the commission, the judge’s court did not have an adequate process to ensure that he did not, during a pay-or-appear calendar, hear cases in which an affidavit of prejudice had been filed disqualifying him; in 2012, the judge signed arrest warrants in 10 cases from which he had been disqualified).

Ministerial acts

Although judges may take non-discretionary, housekeeping actions after disqualification to ensure that the case is re-assigned, the ministerial acts exception is limited. For example, in *In the Matter of Lyons*, Reprimand (New Hampshire Judicial Conduct Committee April 16, 2013) (www.courts.state.nh.us/committees/judconductcomm/docs/In-the-matter-of-Justice-Lyons.pdf), after disqualifying himself from a criminal case in which his brother-in-law was the victim, the judge had approved motions for interpreter services, reasoning that his orders were purely ministerial acts and not a violation of the recusal order. The New Hampshire Judicial Conduct Committee concluded that the judge should not have made those rulings after disqualifying and advised him, in the future, to avoid taking action in a case after disqualifying except the necessary ministerial acts to have the case transferred to another judge. (However, the Committee determined that the judge’s rulings in that case did not constitute judicial misconduct because they were not “motivated by bad faith and were based upon a reasonable interpretation of the law and a reasonable view of the facts.”)

Involvement other than rulings may also be considered inappropriate interference by a judge in a case from which he or she is disqualified. In *Gubler v. Commission on Judicial*

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Taking action after disqualification continued from page 9

Performance, 688 P.2d 551 (California 1984), the California Supreme Court stated that “the right to disqualify a judge . . . would be undermined and perhaps vitiated if the disqualified judge were permitted to circumvent the disqualification by initiating advice to another judicial officer on how to decide the matter.” The judge had written a note on a case file suggesting the amount of the fee that should be ordered for the public defender’s office after the public defender had filed a declaration of prejudice against him.

In *In re Perskie*, 24 A.3d 277 (New Jersey 2011), after recusing himself from a case because he had a longstanding, continuing business relationship with a central witness, the judge appeared in the back of a courtroom when the case was being tried, speaking with one of the plaintiff’s attorneys during his second appearance. The New Jersey Supreme Court found that the judge had deviated from the complete separation from a case demanded by recusal and created, at a minimum, the unacceptable appearance that he still had an interest in the case.

In *In the Matter of Lomnicki*, Determination (New York State Commission on Judicial Conduct October 5, 1990) (www.cjc.ny.gov), Judge Lomnicki disqualified himself from a disorderly conduct case because he had talked to the defendant, a teacher’s aide at the school where he taught, about her dispute with the complaining witness. The case was re-assigned to Judge Powers. Judge Powers approached

Judge Lomnicki and told him that she was nervous about presiding over her first trial and questioned him about procedures. Judge Lomnicki asked Judge Powers whether she would like him to sit with her at the trial as a “friend of the court” and to advise her as to trial procedures, and she agreed. Neither attorney objected.

During the trial, Judge Lomnicki sat in a chair to Judge Powers’ left and about a foot behind her. He was wearing his judicial robe; Judge Powers was not wearing a robe. When defense counsel began by stating, “we’ve got a lot of disappointed citizens in the Village. . .,” Judge Lomnicki interrupted and said, “As a friend of the court, I’m not going to let you make political statements in this court, Mr. Jones.” When Jones again attempted to speak, the judge declared, “You will say something in this court when and if you are given permission to, but I will not allow you to say whether these citizens are disappointed or not. That’s up to them to decide later on.” Jones then challenged Judge Lomnicki’s jurisdiction to intervene. Judge Lomnicki referred to himself as “a friend of the court” and said, “I am not going to allow you to use a courtroom for your own political statements.” He was angry, spoke in a loud, harsh tone, and, at one point, rose from his chair, leaned forward, and pointed at Jones. Judge Powers eventually interrupted and subsequently dismissed the charge. ★

Recent cases continued from page 3

blood kit and the defendant’s blood alcohol level, which the prosecutor described as “pretty high.” The prosecutor also described Baxter to the judge as “a little challenging.”

The prosecutor exited the courtroom and advised Baxter of her *ex parte* conversation with the judge. Baxter was “taken aback” by the prosecutor’s disclosures. Eventually, the judge granted the defense motion to recuse based on the *ex parte* conversation.

The Committee found that Prosecutor Platt and the judge “share a degree of familiarity with each other” that creates “a measure of informality within the courtroom such that the necessary separation between their respective yet distinct functions has, at best, been blurred and, at worst, eroded.”

While we recognize that such familiarity is virtually unavoidable given their weekly professional interactions with each other, we cannot countenance Respondent’s apparent predisposition to engage in multiple *ex parte* conversations with Prosecutor Platt about pending matters under the guise of judicial efficiency and at the expense of judicial integrity and independence.

The Committee emphasized that the judge had done nothing to assure himself that Baxter knew of or consented to the *ex parte* conversation.

The Committee found judicial misconduct, not only in the fact of the *ex parte* communication, but in its content.

Respondent did not, as he contends, discuss only scheduling issues with Prosecutor Platt. Rather, he took that opportunity to critique Mr. Baxter’s case, specifically his expert’s opinion on the deficiencies in the State’s evidence with regard to the chain of custody of the blood sample. He then appeared to align himself with the State as he directed Prosecutor Platt on the proofs necessary to confront a chain of custody defense, and even used the term “we” when doing so. Such conduct creates the real and unacceptable risk that members of the public who may become aware of these types of conversations between Respondent and the municipal prosecutor will question Respondent’s impartiality and integrity, as occurred in the Foxworth matter.

The Committee rejected the judge’s contention that he was not “coaching” Prosecutor Platt, whom he claimed did not need to be coached given her experience in prosecuting DWI cases, and that he merely used “we” as ‘jargon’

intended to relate to scheduling.” The Committee stated:

Members of the public would not know of Prosecutor Platt’s experience in prosecuting DWI cases or appreciate Respondent’s innocuous intent in using the term “we” when discussing with the prosecutor the proofs necessary to substantiate a DWI charge. All the public sees and hears is a judge appearing to counsel the prosecution in the absence and to the possible detriment of the defendant, conduct which, by its very nature, undermines the integrity and impartiality of the Judiciary

Ex parte communication with grandmother

The Kentucky Judicial Conduct Commission publicly reprimanded a judge for summarily granting a verbal ex parte request by a paternal grandmother to take children involved in a domestic matter to a family gathering, despite an outstanding domestic violence order that prohibited the father from having visitation with the children. *In re Langford*, Findings of Fact, Conclusions of Law, and Final Order (June 17, 2013) (http://courts.ky.gov/commissionscommittees/JCC/Documents/Public_Information/FormalProceedingsLangford.pdf).

In the circuit court case *Allcock v. Allcock*, at the verbal request of Jason Allcock’s mother, the judge entered an order allowing the grandmother to take the children to the family Easter gathering without a hearing or notice to any party. When he entered the order, the judge was aware that the district court had previously ordered that Jason Allcock “shall not be permitted visitation with the parties minor children until further Court Order.”

The Commission found that the judge “allowed a non-party . . . to approach him and, without giving notice to either party, . . . entered an Order allowing the perpetrator of domestic violence to have visitation with his children, even though a previous Domestic Violence Order had restricted that visitation.” The judge argued that he was confronted with an emergency because the grandmother came to him two days before Easter. The Commission noted that, although the code of judicial conduct allows a judge to take certain acts in an emergency, “it does not allow matters of substance to be decided ex parte. This was clearly a matter of substance, as it was previously ordered by a Court that such visitation not take place.”

Reporting misconduct

The New York State Commission on Judicial Conduct censured a judge for failing to report to law enforcement and disciplinary authorities misconduct by the counsel for the public administrator (the attorney he had appointed to represent intestate decedents’ estates in his court). *In the Matter of Holzman*, Determination (December 13, 2012) (www.cjc.ny.gov/Determinations/H/Holzman.htm).

In 2006, based on conversations with the deputy public administrator and the public administrator’s accountant and an investigation by his chief court attorney, the judge

knew that Michael Lippman, counsel for the public administrator, was being paid legal fees in advance of accountings in violation of a court directive, that the fees paid Lippman in numerous estates exceeded guidelines, that estates had negative balances totaling \$300,000 to \$400,000, and that Lippman had commingled his private matters with the public administrator’s estates. The judge also knew that Lippman liked to gamble and that law enforcement entities were investigating him.

Despite that knowledge, the judge did not report Lippman to disciplinary or law enforcement authorities. Instead, the judge implemented a plan under which Lippman would repay the excess fees by transferring all fees that he earned going forward to estates he had previously overcharged.

The Commission found that, based on the knowledge he had in 2006, the judge had a duty to report Lippman to disciplinary authorities to protect the estates, stating that the probability of egregious misconduct by Lippman was so high that it seriously called into question his honesty, trustworthiness, and fitness to practice law. Further, finding that the information he had “also strongly pointed to larcenous conduct,” the Commission stated that the judge had a duty to share the information with law enforcement authorities. The Commission stated it was no defense that the full extent of Lippman’s malfeasance was not known until several years later. (In July 2010, based on five cases in which he represented the public administrator’s office, Lippman was indicted on state charges, including grand larceny.)

The Commission also concluded that their “long and close professional relationship” influenced the judge’s decision not to report or fire Lippman but to set up the “ill-conceived” repayment plan,” which conveyed the appearance of favoritism. The Commission found that the plan was not an appropriate response to Lippman’s “large scale taking of advance and excess fees” and “put at further risk the estates under his care.”

Part-time judge’s ad

Granting the recommendation of the Commission on Judicial Qualifications, the Iowa Supreme Court reprimanded a part-time judge for wearing his judicial robes and referring to his position in an advertisement for his services as an attorney. *In the Matter of Meldrum*, 2013 WL 3777653 (July 19, 2013). Beginning in 2009, the judge had placed advertisements for his law practice in phone books circulating in and around Council Bluffs that featured a photograph of him in his judicial robes; one of the ads also noted his position as an “Iowa Judicial Magistrate.” The Court held that “a magistrate who also practices as a private attorney violates the judicial code of conduct when the magistrate attempts to influence potential clients to use his services as an attorney by using his office as an indicator of his responsible and trustworthy nature.” ★



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