



GIVING LEGAL ADVICE TO FAMILY MEMBERS

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Reprint of Judicial Conduct Reporter Spring 1999 21 NO. 1 JCR 1

(The Judicial Family Institute has removed the names of disciplined judges from this article.)

Canon 4G of the 1990 American Bar Association Model Code of Judicial Conduct prohibits full-time judges from practicing law, and all states have similar or identical restrictions. The comparable prohibition in the 1972 model code was enacted because the “likelihood of conflicts of interest, the appearance of impropriety, and the appearance of a lack of impartiality--all have their greatest potential in the practice of law by a full-time judge.” Thode, Reporter’s Notes to [1972] Code of Judicial Conduct at 91 (ABA 1973). The practice of law includes rendering services that are legal in character, call for the skill and expertise of a lawyer, and constitute part of a lawyer’s professional services. Michigan Advisory Opinion J-2 (1989).

The 1990 model code allows two exceptions to the prohibition on practicing law. First, a judge “may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies.” Thus, judges may always act pro se and represent themselves in personal matters before tribunals or in negotiations to the same extent other persons may. Michigan Advisory Opinion J-2 (1989). For example, the Texas judicial ethics committee stated that a judge who is sued individually may represent himself or herself in the suit as attorney of record. Texas Advisory Opinion 226 (1998). Moreover, the Alabama advisory committee stated that a judge may prepare a contract and deed as part of a joint business venture with a realtor regarding land owned by the judge and the judge’s cousin. Alabama Advisory Opinion 88-327. The judge’s preparation of the documents was appropriate, the committee stated, because the judge was among the parties whose rights were secured by the documents even though the documents would be executed by the realtor, a third party who was not a family member.

Legal advice to family members

Under the second exception to the prohibition on practicing law, a judge “may, without compensation, give legal advice to and draft or review documents for a member of the judge’s family.” This exception was added to the 1990 model code to acknowledge that “judges are almost inevitably drawn to some degree into the legal affairs of their families ...” while still “prohibiting the evils of appearance of impropriety and neglect of judicial duties.” Milord, *The Development of the ABA Judicial Code* at 43 (1992). Under this exception, a judge may:

- provide limited legal advice or counseling to a son-in-law concerning a real estate transaction (Michigan Advisory Opinion J-2 (1989));
- attend a deposition or hearing with a family member to offer moral support (Michigan Advisory Opinion JI-15 (1989));
- discuss a real estate arbitration proceeding with the judge’s spouse who is a real estate broker and with the spouse’s attorney and attend the proceeding if the judge’s role is

limited to that of a spectator and the judge does not directly or indirectly lend advice or assistance (Missouri Advisory Opinion 117 (1985));

- represent the judge's spouse in settlement negotiations against their insurance company for claims arising from an automobile accident (Louisiana Advisory Opinion 81 (1990));
- offer informal legal advice to family members and friends as long as there is no attorney-client relationship (New York Advisory Opinion 91-5); and
- give incidental counseling regarding the probate of a family member's will (Texas Advisory Opinion 47 (1979)).
- Moreover, a judge may draft or review documents for members of the judge's family so long as it is without compensation. Thus, a judge may:
 - draft wills for family members (Michigan Advisory Opinion J-2 (1986)); and
 - draft or review documents incidental to a real estate transaction in which the judge is advising the judge's son-in-law (Michigan Advisory Opinion J-2 (1989)).However, noting that drafting of wills for close family members may raise attorney-client conflicts of interest, the Michigan advisory committee stated that a "judge engaged in permitted legal work is governed by the same rules as a lawyer and should proceed accordingly."

Appearing as counsel/negotiator for family members

While a judge may give legal advice to members of the judge's family, that exception does not allow a judge to make an appearance as counsel or function as an advocate or negotiator in a legal matter on behalf of a family member. Commentary, Canon 4G. That proscription applies even if the representation takes place in a different state and the judge receives no compensation. Michigan Advisory Opinion J-2 (1989). The Michigan judicial ethics committee reasoned that advocacy is inconsistent with the judicial office except in pro se matters.

Judges have been disciplined for acting as advocates for family members. For example, the Washington Commission on Judicial Conduct publicly censured a judge who had appeared on behalf of his sister-in-law at a motion hearing before a family law commissioner during regular court hours and at the same courthouse in which the judge performed his judicial duties. In . . . , No. 95-2066-F-59, Stipulation and Order of Admonishment (Washington Commission on Judicial Conduct February 2, 1996). The judge had informed the commissioner that he was not appearing as an attorney for his sister-in-law but as a fact witness. However, the judge personally addressed the court concerning several disputed issues, contending, for example, that his sister-in-law was not properly served.

The Supreme Court of New Jersey censured a municipal court judge who represented his son in a traffic violation. The judge cross-examined witnesses, presented legal arguments, and, after a verdict of guilty, filed an appeal. He had not advised the presiding judge that he was a judge. The court cited as mitigating factors that the judge had not attempted to use the power of his office to influence the outcome of the proceedings, that his conduct was motivated by concern for his son rather than by desire for remuneration as he had received no fee, and that his record was previously unblemished. . . . , 385 A.2d 234 (New Jersey 1978).

The Supreme Court of Virginia censured a judge for appearing in court to represent his son at trial on charges he had committed traffic violations and, in another instance, threatening to sue a defendant for an accident involving the defendant and the judge's son-in-law, sitting at the counsel table with and advising the state's attorney during the defendant's trial, and causing a

civil warrant to be served on the defendant for damages from the automobile accident. Judicial Inquiry and Review Commission of Virginia v. [name omitted], Record No. 730725 (Supreme Court of Virginia 1973).

Under the rule prohibiting a judge from acting as an advocate for a family member, a judge may not:

- act as a legal advisor for an adult son in negotiating with an insurance carrier (Illinois Advisory Opinion 95-19);
- act as an attorney for the executors of a parent's estate (Kansas Advisory Opinion JE-17 (1986));
- file documents or appear as a legal representative for a daughter and her husband in connection with the adoption of a child (Nebraska Advisory Opinion 92-2);
- represent his or her daughter in a real estate purchase (New York Advisory Opinion 92-118);
- act as counsel in the probate of the will of a family member (Texas Advisory Opinion 47 (1979)); or
- act as counsel for a spouse or a corporation owned by the judge and the judge's spouse in a suit even if the judge is representing himself/herself in the suit (Texas Advisory Opinion 226 (1998)).

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*Author Nancy Biro worked as a Center for Judicial Ethics project attorney on An Ethics Guide for Judges and Their Families, funded by the State Justice Institute, when the Center was part of the American Judicature Society (AJS). The Center for Judicial Ethics is now part of the National Center for State Courts.*

*This article like all other ethics articles on the Judicial Family Institute (JFI) website should be compared against your own current state code of judicial conduct. "No judicial conduct commission has jurisdiction over non-judge family members" "according to Cynthia Gray, Director of the Center for Judicial Ethics of the National Center for State Courts.*

**An Ethics Guide for Judges and Their Families** by Cynthia Gray is available free online through the National Center for State Courts at (<http://www.ncsc.org/Topics/Judicial-Officers/Ethics/Center-for-Judicial-Ethics/CJE-Publications.aspx>)

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