JUDICIAL CONDUCT REPORTER

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ADVOCATING INTEGRITY IN AMERICAN JUSTICE

A lawyer in the family—Part III Disqualification when a relative's law firm appears in a case by Cynthia Gray

Case-by-case analysis

The American Bar Association *Model Code of Judicial Conduct* takes a case-by-case approach to the question whether a judge is disqualified when a law firm with which a family member is affiliated as an attorney appears but the relative is not involved in the case. (If a relative is acting as a lawyer in a case, disqualification is required absent remittal.) Comment 4 to Rule 2.11(C) of the 2007 model code states that "the fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge," but adds that if "the judge's impartiality might reasonably be questioned . . . , or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding . . . , the judge's disqualification is required." (Commentary to Canon 3E(1)(d) of the 1990 model code was substantially the same.)

State judicial ethics advisory committees have identified factors that a judge should consider in determining whether to disqualify when a law firm with which a relative is affiliated appears in a case:

• Whether the relative's position is as partner, shareholder, associate, or of counsel (*Colorado Advisory Opinion 05-2*; *Illinois Advisory Opinion 94-18*; *Washington Advisory Opinion 88-12*);

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Recent cases

Failing to disqualify from friends' divorce

Accepting the recommendation of the Judiciary Commission, based on a stipulation, the Louisiana Supreme Court publicly censured a judge for failing to immediately self-recuse from a divorce case despite his long-standing, close friendship with both parties; continuing to socialize with the husband and having ex parte conversations with him when a custody dispute arose; and signing an ex parte custody order contrary to statutory requirements. *In re Badeaux*, 65 So. 3d 1273 (Louisiana 2011).

The judge and his wife (now ex-wife) had socialized with Mary and Cayman Sinclair for a number of years; the two couples had vacationed and celebrated birthdays and holidays together. When Mary Sinclair filed a petition seeking a divorce, the case was randomly allotted to Judge Badeaux, who did not recuse himself despite his close, personal friendship with both Sinclairs. While presiding over the case, the judge continued to talk by telephone and to socialize with Mr. Sinclair. For example, the judge was a weekend guest with Mr. Sinclair and his son at the home of Sinclair's sister and her husband and took a three-day trip to Sandestin, Florida with his girlfriend, Mr. Sinclair, and Sinclair's girlfriend.

Cayman and Mary Sinclair informally and amicably shared custody of their minor son, Cole, until the late summer of 2007, when Ms. Sinclair reminded Mr. Sinclair that she wanted to enroll Cole in school in Destin, Florida. Mr. Sinclair began to worry that, if his son attended school and lived in Florida for six months, his ex-wife could try to initiate formal custody proceedings there, and he could be disadvantaged.

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Recent advisory opinions

• A judge is not disqualified from a case because one of the parties testified against her at her legislative re-appointment hearing. *Connecticut Informal Opinion 2010-9.*

• A judge who is a member of the Audubon Society is not disqualified from a case involving environmental issues in which the Audubon Society is not a party or an intervenor. *Connecticut Informal Opinion 2011-24.*

• If a judge believes that he can be impartial, the judge is not required to disqualify himself when a former judicial colleagues appears as an attorney. *New York Opinion 10-135.*

• A judge who recently individually questioned prospective jurors during a voir dire and thanked each juror for his service is not disqualified from an unrelated case in which one of the jurors is a party and is not required to disclose the party's prior jury service. *New York Opinion 10-70.*

• A court may provide a box on a payment form to allow court-appointed arbitrators to designate a law-related organization to which they may choose to donate their fees, but the court must list all organizations that wish to participate. *Arizona Opinion 11-1.*

• A judge who learns of possible attorney misconduct is not obligated to investigate whether the misconduct is serious or minor. A judge may report a non-substantial violation. A judge who is satisfied that someone else has already reported an attorney's alleged misconduct is not required to take further action. *New York Opinion 10-122.*

• A judge may not serve on a statutory, multi-disciplinary team that will review domestic violence deaths. *Nevada Opinion JE11-007.*

• A judge may nominate a probation department employee for an award that acknowledges employees who significantly assist the court in the administration of justice. *New York Opinion 10-164.*

• A judge may not speak about the judge's veterans' court at a fund-raising dinner hosted by a political party even if the judge does not have to pay to attend. *Washington Advisory Opinion 11-2.*

• A judge may not speak to a conference of judges, court administrators, and others interested in the administration of justice about a trial the judge presided over if the case is being appealed. *Florida Opinion 2011-16.*

• As treasurer of a magistrates' association, a judge may notify other members that they must pay their dues or the admission price for an association function and direct that payments be sent to his attention. *New York Opinion 10-194.*

• A judge may not serve as a mentor in a bar association's mentorship program. *North Carolina Opinion 2011-3.*

• A judge may allow her name to appear, with others, on the letterhead of an invitation to members of the bar to join the alumni committee of a non-profit organization that provides pro bono legal services to indigent persons. *Maryland Opinion 2011-17.*

• A judge may provide a letter of recommendation for a personal friend who has applied to become a court-appointed special advocate. *Nevada Opinion JE11-010.*

• For an electronic answer board established by a non-profit, non-partisan organization to provide information on legal, constitutional, and procedural issues to help journalists understand the law and report more accurately, a judge may be listed as an expert, provide quotes, and include her judicial position as part of the personal description if she gives factual and instructive responses without commenting on any pending or impending matters, if she monitors the web-site to ensure that it does not link to commercial or advocacy group web-sites, if she stays informed of new features, and if she pre-approves the use of biographical information. *Connecticut Opinion 2011-14.*

• A judge may hold an internet social account, such as Facebook, Twitter, or Linkedin, and "friend" court staff but may not "friend" attorneys, law enforcement officers, social workers, and others who may appear in her court. *Oklahoma Opinion 2011-3.*

• A judge may write a column for a bar association's newsletter on evidentiary issues related to the county's "red light" camera program but may not suggest potential evidentiary issues or challenges that have not previously been raised and decided and should objectively describe previous motions and decisions without commenting on them. *New York Opinion 10-153.*

• A judge may, with the assistance of the Center for Court Innovation, organize a continuing legal education program on issues relating to family violence for lawyers and members of the courthouse staff and co-sponsor the program with an appellate division office of attorneys for children. *New York Opinion 10-166.*

• A judge may speak as a private citizen at public hearings and write to elected officials about natural gas drilling in a county where she owns property, but may not refer to her judicial office or use official stationery. *New York Opinion 10-156.*

• A judge may serve on a non-partisan committee that provides a reception to welcome and recognize U.S. military personnel returning from service in combat zones. *New York Opinion 10-174.*

• A new judge may not run for re-election to a board of commissioners for a fire district or serve out the remaining years of her term. *New York Opinion 11-22.*

• A judge may not display on her vehicle a magnetic sign that depicts the American flag and the text "Take Back America." *New York Opinion 10-128.*

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

When a relative's law firm appears in a case continued from page 1

• The size of the firm (*Colorado Advisory Opinion 05-2*; *Illinois Advisory Opinion 94-18*; *Tennessee Advisory Opinion 04-1*; *Washington Advisory Opinion 88-12*);

• Whether the firm's fee in the case is contingent or hourly (*Tennessee Advisory Opinion 04-1*);

• The potential impact on the firm if its client is awarded a large sum or substantial relief or if its client has such an judgment against it in the case (*Illinois Advisory Opinion 94-18; Tennessee Advisory Opinion 04-1*);

• The extent of the financial, professional, or other interest of the relative in the matter (*Wisconsin Advisory Opinion 00-1*);

• Whether the relative would receive a commission, contingency, or bonus from the case or from all of the firm's cases for a given period (*Alabama Advisory Opinion 93-500*);

• Whether the relative would receive a salary increase when the firm earns a certain dollar amount in a given time (*Alabama Advisory Opinion 93-500*);

• The degree of kinship between the judge and the relative (*Alabama Advisory Opinion 93-500*);

• The prominence of the relative's name in the firm name (*Colorado Advisory Opinion 05-2*);

• The number and geographic spread of the firm's offices (*Tennessee Advisory Opinion 04-1*);

• Whether the family member is assigned to a division of the law firm that handles the type of case before the judge (*Illinois Advisory Opinion 96-18*);

• The possibility that litigants may be drawn to the firm if they believe the judge would sit on the firm's cases (*Nevada Advisory Opinion JE07-004*);

• The frequency of the firm's appearance in the judge's court (*Alabama Advisory Opinion 93-500; Colorado Advisory Opinion 05-2*);

• The nature of the matter (*Tennessee Advisory Opinion 04-1*);

• The size of the community (*Colorado Advisory Opinion 05-2*);

• The size of the court (*Colorado Advisory Opinion 05-2*);

• The administrative burden of the recusal on the courts (*Colorado Advisory Opinion 05-2*; *Wisconsin Advisory Opinion 00-1*);

• Any other connections, dealings, or relationships between the judge and other members of the firm (*Alabama Advisory Opinion 93-500*); and

• The appearance to the general public and to other attorneys, judges, and members of the legal system if the judge does not recuse (*Colorado Advisory Opinion 05-2*; *Wisconsin Advisory Opinion 00-1*).

See also Ohio Advisory Opinion 91-8; *Texas Advisory Opinion 29* (1978). *Cf., U.S. Advisory Opinion 58* (2009) (if a relative is employed by a law firm as either an associate or a non-equity partner, a judge's recusal is not mandated but other circumstances may warrant recusal).

For example, the Illinois advisory committee explained:

> Obviously, if the relative is a partner in a two-person law firm, and the case could generate substantial attorneys' fees, the relative's interest is more than de minimis. On the other hand, if the relative is a beginning associate in a 200-person law firm, and the case involves a fee of only a few thousand dollars, the relative's interest is de minimis. In most cases, the facts will fall somewhere between these extremes and the judge will be required to make a reasoned assessment of the extent of the relative's interest.

Illinois Advisory Opinion 94-18. The advisory committee stated that disclosure was recommended but not required. *See also Illinois Advisory Opinion 96-18* (when a judge's daughter is a first year associate in a firm with well over 100 lawyers, her financial interest in a case would probably be considered de minimis).

The Tennessee committee also gave examples:

> It is unlikely that the judge's impartiality would be called into question if an associate of a 1,000 lawyer firm appears before the judge in a contingency fee matter and the judge's cousin is an associate in a west coast office of the firm. Conversely, where the partner of the judge's brother in a two-partner firm in a small town appears before the judge, regardless of how the firm's fee is to be paid, the judge's impartiality is likely to be called into question.

Tennessee Advisory Opinion 04-1. The committee acknowledged that "recusal may well present a more difficult problem for rural judges than for urban judges" who may be able to easily transfer cases or adopt an assignment system

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AJS

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so that a particular judge is not assigned cases involving a particular law firm. The committee stated, however, that "ethical mandates apply to urban and rural judges alike." The committee added that, although disqualification was not required, a "judge may adopt a policy disqualifying himself/herself in all cases where a party is represented by the law firm with which the judge's child is affiliated."

The Alabama advisory committee stated that a judge may preside over a case in which a lawyer representing a party is affiliated with a law firm with which a relative of the judge is affiliated but that the judge should disclose the relationship to give the parties and their attorneys the opportunity to supply additional information and then determine whether any additional factors, in conjunction with the relationship, would cause the judge's impartiality to be reasonably questioned. *Alabama Advisory Opinion 93-500*. The committee did state that the judge need not investigate unless the judge has reason to believe there may be additional factors that would raise a question about his impartiality. In a subsequent opinion, the committee advised that, if a judge does not know the financial arrangements between a relative and a law firm and if the other party files a motion to disqualify after the judge discloses the relationship, the judge should hold a hearing to determine whether the relative has an interest that could be substantially affected by the outcome of the proceeding. *Alabama Advisory Opinion 03-811*. *See also California Advisory Opinion 51* (2001) (if a grandparent or other relative with whom the judge maintains a close familial relationship is affiliated with a law firm, disclosure is required when that firm appears in a case; recusal is not required but may be appropriate, particularly if the family member is an equity partner); *Colorado Advisory Opinion 05-2* (a judge who is one of a small number of judges in a small rural jurisdiction must disqualify from cases in which a partner or associate of the judge's brother-in-law appears when the brother-in-law is the senior member of a law firm with fewer than five attorneys that regularly appears in the judge's court and where the legal community is relatively close-knit with only 55 attorneys that regularly appear before the judge); *Louisiana Advisory Opinion* (July 6, 2011) (a judge whose child is an associate in a 22-member law firm representing a party in a civil matter is not disqualified if the child is not involved in the matter but should disclose the relationship); *South Carolina Advisory Opinion 6-2004* (a judge is not automatically disqualified from a proceeding in which one of the parties is represented by a law firm where his son works as an attorney, but the judge should disclose the relationship, allow the parties to consider the question out of his presence, and then act upon the parties' request); *South Carolina Advisory Opinion 31-2001* (a judge is disqualified from contested or uncontested matters handled by his spouse's partner in a two-attorney law firm); *Washington Advisory Opinion 91-6* (that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-child of the judge is affiliated does not of itself disqualify the judge but, if there are other facts that would lead reasonable persons to question the judge's impartiality, the judge should withdraw; the judge should disclose the relationship). *Cf., Nevada Advisory Opinion JE07-004* (it is the better practice for a judge to disqualify when the firm where his child is a new associate appears, but, if the judge does not, he must look on a case-by-case basis at the total circumstances and is required to disclose his child's employment at the beginning of any proceeding involving the firm).

> Advisory committees have identified factors that a judge should consider in determining whether to disqualify when a law firm with which a relative is affiliated appears in a case.

Bright-line rule

In contrast to the case-by-case approach, some states have adopted a bright-line rule that requires a judge to disqualify, absent waiver, whenever a law firm with which a family member is affiliated appears.

For example, the Utah code of judicial conduct provides that "a judge is disqualified in proceedings involving a law firm that employs the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household as an equity holder in the law firm." That rule encodes in part the Utah Supreme Court's decision in *Regional Sales Agency v. Reichert*, 830 P.2d 252 (Utah 1992). In that case, the Court addressed whether a judge should have disqualified when a law firm appearing before the judge employed the judge's father-in-law and brother-in-law as partners, even though another attorney had exclusive responsibility for the case.

Noting that disqualification would be required if the firm's fee was contingent on the outcome of the case and if the relative's compensation, through profit-sharing or other mechanisms, might be affected by the outcome, the Court stated a rule requiring disqualification only when the outcome of a case actually affects the judge's relative's remuneration would require an evidentiary hearing in every case "into the morass of fee arrangements and

attorney compensation." To avoid creating "such potential for satellite litigation . . . with no apparent offsetting gains," the Court in *Reichert* adopted a "bright-line proscription:" disqualification is required whenever the judge's relative within the third degree of relationship is a partner or otherwise an equity participant in a firm that represents a party to the case. *Cf., Utah Advisory Opinion 97-2* (applying the holding of *Reichert* to associates, including summer associates).

Other jurisdictions have also adopted a bright-line rule although where and how the line is drawn differs from jurisdiction to jurisdiction. In some jurisdictions, the rule extends to relatives within the third degree; in others, it only includes those related within the first or second degree. In some jurisdictions, the rule applies only if the family member is an equity partner; in others, it applies if the family member has any affiliation as an attorney with the firm. In some jurisdictions, the rule is established in the code of judicial conduct; in some, by caselaw; in others, by advisory opinion.

- The Alaska code of judicial conduct states that a judge is disqualified if the judge knows that the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household "is employed by or is a partner in . . . a law firm involved in the proceeding."
- California Code of Civil Procedure § 170.1(a)(2)(B) provides that a judge is disqualified if the judge's "spouse, former spouse, child, sibling, or parent of the judge or the judge's spouse . . . is associated in the private practice of law with a lawyer in the proceeding."
- A Florida advisory opinion states that disqualification is required when a relative (or spouse of a relative) within the third degree is employed as a lawyer with a law firm. *Florida Advisory Opinion 2007-16*.
- A Kansas advisory opinion states that a judge is disqualified from any case in which his spouse's law partner represents a party. *Kansas Advisory Opinion JE-167* (2009) (the law firm was comprised of only the judge's spouse and her partner).
- Judicial ethics opinions in Michigan advise that a judge is disqualified from a case in which the law firm where a relative is a member appears unless the parties waive the disqualification after disclosure of the relationship. *Michigan Advisory Opinion R-3* (1989); *Michigan Advisory Opinion J-4* (1991).
- Montana Code § 3-1-803 provides that a judge "must not sit or act in any action or proceeding . . . when he is related to . . . any attorney or member of a firm of attorneys of record for a party by consanguinity or affinity within the

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third degree, computed according to the rules of law."

• Nebraska Revised Statute 24-739(1)(c) provides that a judge shall be disqualified from any case in which any attorney "is the copartner of an attorney related to the judge in the degree of parent, child, or sibling."

• In *Blaisdell v. City of Rochester*, 609 A.2d 388 (New Hampshire 1992), the New Hampshire Supreme Court held that, when a judge is related within the third degree to a partner in a law firm representing a party, the partner-family member will always be "known by the judge to have an interest that could be substantially affected by the outcome of the proceeding."

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

• A New York advisory opinion directs that a judge should disqualify himself from cases in which his lawyer-brother's partners or associates appear in their capacities as private practitioners or as part-time members of the public defender's staff. *New York Advisory Opinion 87-3*.

• An advisory opinion instructs federal judges to recuse if a relative is an equity partner in a law firm that represents a party, adding that remittal is not available. *U.S. Advisory Opinion 58* (2009).

In 1993, seven justices on the U.S. Supreme Court announced a policy under which they would recuse themselves from all cases in which a firm appears where a relative is a partner unless the justice has received from the firm written assurance that income from Supreme Court litigation is permanently excluded from his or her relatives' partnership shares. The justices noted that "it seems to us that in virtually every case before us with retained counsel there exists a genuine possibility that the outcome will have a substantial effect upon each partner's compensation" but that "it is impractical to assure ourselves of the absence of such consequences in each individual case." ★

Parts I & II—When a Relative is Involved in a Case and *When a Relative is a Prosecutor or Other Government Attorney—appeared in the summer issue of the* Judicial Conduct Reporter.

Recent cases continued from page 1

On August 14, Mr. Sinclair brought to the judge's chambers a pro se petition to establish interim physical custody and visitation and for emergency order. When contacted by phone, the judge told his law clerk to instruct Mr. Sinclair to take the order to another judge but was informed that Mr. Sinclair had already been to other judges' offices, and none were available. Pursuant to the judge's instructions, the law clerk then brought Mr. Sinclair to the entrance of the courthouse, where the judge was waiting in his car. The judge signed an order proposed by Mr. Sinclair that required Cole's immediate return to Louisiana and granted interim physical custody to Mr. Sinclair.

The order was clearly contrary to law: it lacked verification or a supporting affidavit that immediate, irreparable injury would result to the child before the adverse party could be heard; failed to certify efforts were made to give Ms. Sinclair reasonable notice that the order was being presented; failed to provide for temporary visitation by Ms. Sinclair; and set a hearing more than 30 days after it was signed. In his sworn statement to the Commission, the judge admitted that he knew the petition did not comply with the law and stated that what he really thought was warranted was a temporary restraining order but that he signed the deficient order because his pen was not working sufficiently for him to strike out some of the language in the pleading

Ms. Sinclair did not learn of the order until Mr. Sinclair telephoned her on August 19, the day before Cole was scheduled to start school in Destin. Mr. Sinclair called her from a swimming party at the judge's parents' home to which the judge had invited Mr. Sinclair and Cole. Mr. Sinclair told Ms. Sinclair that he intended to keep Cole in Louisiana instead of returning him to Destin to start school. For the next month, Mr. Sinclair used the ex parte order signed by the judge to refuse to permit Ms. Sinclair to see Cole. On September 6, Judge Badeaux signed an order of recusal from the case. On September 14, another judge vacated Judge Badeaux's August 14 order.

During his appearance before the Commission, the judge expressed remorse for not self-recusing immediately upon being assigned the Sinclair case, explaining that he had believed his close, personal relationship with the Sinclairs afforded him "a unique opportunity" to help them resolve any issues they might have. He also viewed the matter as amicable because the Sinclairs were "getting along well" and "sharing custody with no difficulties whatsoever."

The Louisiana Supreme Court stated:

> As a district court judge who had served for almost ten years, Judge Badeaux was unexpectedly naive to think Canon 3C did not require his recusal when two friends who were opposing parties in a domestic dispute were assigned

by random allotment to present their case to him. He should have been fully aware that issues of divorce and child custody create situations where emotions run high and individuals tend to disagree. It was predictable that the Sinclairs might contest any one or more issues as they dissolved their marriage. No judge should preside over any case involving close friends, in particular not a divorce and custody case, on the basis that the judge expects things to remain amicable.

Interfering in prosecution

The Mississippi Supreme Court suspended a judge for 270 days without pay and publicly reprimanded him for interfering with the prosecution of a defendant charged in a crime in which a relative of the judge was the victim and making statements in open court that encouraged others to engage in vigilante justice. *Commission on Judicial Performance v. McGee*, 71 So. 3d 578 (Mississippi 2011).

> "No judge should preside over any case involving close friends, in particular not a divorce and custody case, on the basis that the judge expects things to remain amicable."

After learning that a relative had allegedly been the victim of a crime, the judge actively participated in the investigation. A.B. was indicted by a grand jury and charged with a felony for the crime. The judge, in his official capacity, insisted that A.B. only be allowed to post a cash bond of $50,000 and became upset when he learned that the sheriff had allowed A.B.'s family to post a property bond. The judge burst into a closed meeting of the county board of supervisors to angrily complain of the sheriff's actions. The judge also discouraged local attorneys from representing A.B.

The judge appeared at the public hearing for the sentencing after A.B. pled guilty to a misdemeanor. The presiding judge allowed Judge McGee to address the court, and he stated on the record and in open court:

> I could assure you that if anything like this ever happened to anybody that I know, my advice to them would be do not use the court, handle it themselves. I would like for everyone in this court to know that had I had this to do over again we would never had went to a grand jury, that we would have taken care of this down at Biggersville, Mississippi, down on the farm like things should have been taken care of.

In the discipline case, the Mississippi Supreme Court stated:

> In considering Judge McGee's actions, we must remember that the citizens coming before Judge McGee in civil and criminal cases have every right to expect that they will receive fair and impartial treatment from Judge McGee. Specifically, those citizens charged with criminal offenses coming before Judge McGee have every right to expect that they are appearing before a judge who, through his demeanor, words, and actions, will fairly and impartially consider their cases and make a sound decision grounded on the facts and the law. . . .
>
> We have to ask the rhetorical question: "How could the persons in the courtroom who heard these remarks by Judge McGee, or other persons who later learned of Judge McGee's remarks, if they eventually found themselves appearing before Judge McGee in any court matter, but especially a criminal matter, expect to receive fair and impartial treatment from Judge McGee?" As a judicial officer, Judge McGee has taken the following oath:
>
> > I solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as a justice court judge, according to the best of my ability and understanding, agreeably to the Constitution of the United States and the Constitution and laws of the State of Mississippi. So help me God.
>
> One reasonably could opine that any person in the courtroom of the Alcorn County Circuit Court on that day, or any person who later learned of Judge McGee's outburst, could appropriately question Judge McGee's ability to fairly discharge his duties according to the constitutional oath which he has taken on at least two occasions.

Aggie ring

The Texas State Commission on Judicial Conduct publicly reprimanded a judge for his conduct during the magistration of a college student charged with the alleged theft of a ring. The Commission also ordered the judge to obtain 10 hours of instruction with a mentor. *Public Reprimand and Order of Additional Education of Boyett* (Texas State Commission on Judicial Conduct July 11, 2011) (www.scjc.state.tx.us/pdf/actions/FY2011-PUBSANC.pdf).

On September 11, 2010, several fraternities participated in a recruitment event on the Texas A&M University campus. During a minor altercation between individuals from two fraternities, someone took a class ring belonging to a Texas A&M student and threw it into the grass. Shortly thereafter, Thomas Slauter was arrested for theft from a person, a state jail felony offense, and transported to the county jail.

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On or about September 12, the judge magistrated Slauter by teleconference. The judge asked Slauter if he was a student at Texas A&M. When Slauter responded that he was a student at a different college nearby, the judge observed, "You might want to think about going somewhere else considering the nature of your criminal activity." The judge then asked Slauter if he knew what an "Aggie" ring was, to which Slaughter responded that he did not. The judge then held up his right hand and said, "See this on my hand?", indicating to Slauter that he was wearing an "Aggie" ring. The judge set Slauter's bond at $50,000; according to the county bond schedule, the "threshold" bond amount for a state jail felony is $5,000. On September 15, the theft charge against Slauter was dropped after another individual confessed to throwing the ring into the field.

The Commission noted that the incident was the subject of local media attention critical of the judge's actions. The Commission found that the judge's actions and statements were impatient, undignified, and discourteous and that he abandoned his role as a neutral, detached, and impartial magistrate, indicating a strong bias in favor of the victim and suggesting that he believed the defendant had engaged in criminal activity.

> "[C]itizens coming before Judge McGee in civil and criminal cases have every right to expect that they will receive fair and impartial treatment from Judge McGee."

Ethnic stereotypes

The California Commission on Judicial Performance publicly admonished a judge for remarks that articulated stereotypes about ethnic groups and their propensity to engage in certain types of domestic violence and comments that gave the appearance that she had already accepted the petitioner's version of events before hearing the defense case, in addition to other misconduct. *Public Admonishment of Pollard* (California Commission on Judicial Performance July 13, 2011) (http://cjp.ca.gov/res/docs/public_admon/Pollard_07-13-11.pdf).

On April 30, 2009, the judge presided over a hearing on a petition for a restraining order filed by Kathy Forline against her former boyfriend, Blake Chenier. Forline alleged in her petition that Chenier had engaged in acts of violence during their relationship such as throwing rocks at her, spitting on her, choking her, and throwing protein powder, and that he had destroyed some of her property. The defense position was that Forline had fabricated the allegations and filed the petition because she was angry with Chenier for breaking up with her and being intimate with her roommate in her house after their relationship had ended.

During the hearing, the judge, with Chenier's counsel's consent, asked Chenier where he was born. After Chenier answered "Newport Beach, California," the judge stated:

> I'm concerned about the throwing of the rocks and the spitting. I've been doing domestic violence now for 14 years. Usually that is the kind of behavior I see in Middle Eastern clients, but almost -- if I read a declaration where they say, "He spit on me, he threw rocks at me," almost always it's a Middle Eastern client. If the declaration says, "He drags me around the house by the hair," it's almost always a Hispanic client.

A little later, when Forline was being cross-examined by Chenier's attorney but before Chenier testified or presented any testimony on his own behalf, the judge asked the attorney to explain the relevance of a question about how long Forline and Chenier had been broken up on the night of the altercation involving Chenier, Forline, and Forline's roommate that gave rise to the petition. This exchange followed:

> Attorney: I think she is angry my client broke up with her is what I think.
>
> The Court: She very (sic) may be. That is not the issue. The issue is he spit on her, he choked her, he pushed her, he threw protein powder all over the room, and he destroyed a lot of expensive property.
>
> Attorney: It goes to bias, Your Honor, for filing this order. It goes to credibility, absolutely.
>
> The Court: Well, for whatever reason she has -- and she certainly may feel betrayed in her love life, but that doesn't mean that that gives him the right to destroy the property, to choke her, to throw powder all over her room.
>
> Attorney: Of course not. It goes to her bias for filing this petition.

After Forline's attorney interjected that it was "harassment" for Chenier to come into Forline's house and be intimate with another woman there, the following occurred:

> The Court: Well, I don't even consider that. He can sleep with anybody he wants. He can sleep with anybody in her family. The point is he does not get to choke her. He does not get to spit on her. He doesn't get to threaten her.
>
> Attorney: Of course not.
>
> The Court: He doesn't need to destroy property.

Following these remarks, the attorney commented, "By the way, that didn't happen. I'll be clear when I question my client."

At the end of the hearing, the judge issued a five-year restraining order and ordered Chenier to pay restitution of more than $4,500.

Chenier appealed. In an unpublished opinion, the Court of Appeal affirmed the judge's orders, finding that her "inappropriate statement concerning Middle Eastern and Hispanic males did not evidence a bias against Chenier," because he is neither Middle Eastern nor Hispanic, and that there was no evidence that the judge was generally biased against males. However, it took the opportunity, in a separate section of its opinion entitled "Warning," to "caution the trial judge to be more thoughtful in her comments concerning her previous cases and statements concerning her perceptions of race, ethnicity, or gender." The court continued:

> Such comments suggest ethnic stereotyping that is inconsistent with the fair, impartial, and dispassionate administration of justice. As we explain above, the trial judge's statements did not evidence a bias against Chenier. But in the future, the trial judge's statements about ethnic propensities of past litigants could compel the conclusion that the judge prejudged a case based on ethnicity. A trial judge should refrain from comments that suggest he or she has decided a credibility contest based on some matter outside the record. Such statements do not inspire public trust and confidence in our courts.

In the discipline case, California Commission found that the judge's remarks articulated stereotypes about two ethnic groups and their propensity to engage in certain types of domestic violence. The judge admitted that her remarks were inappropriate. The Commission also found that the comments during the cross examination of Forline gave the appearance that she had already accepted Forline's version of events before hearing any testimony offered by Chenier.

Holding domestic violence complainant in contempt

Pursuant to a stipulation and agreement, the Washington State Commission on Judicial Conduct publicly reprimanded a judge for summarily holding a domestic violence complainant in contempt after she recanted a statement she had given to the police. *In re Shelton*, Stipulation, Agreement, and Order of Reprimand (Washington State Commission on Judicial Conduct July 8, 2011) (www.cjc.state.wa.us/Case%20Material/2011/6284%20Shelton%20Stip.pdf).

According to a police report, at 1:21 a.m. on September 11, 2009, the defendant in a domestic violence proceeding called the police and reported that, following an argument in which he had locked himself in a bedroom, his fiancé, "C.A.," unlocked the bedroom door with a butter knife, entered the bedroom, and threw the knife and a drinking glass at him. The police interviewed both C.A. and the defendant shortly after the call. C.A. acknowledged throwing the knife and glass at the defendant and that the glass broke against a wall and cut the defendant's head. C.A. stated, however, that she threw the knife and glass in self-defense after the defendant threatened to hit her with a belt. The police determined the defendant was the primary aggressor and arrested him. The police report also indicated C.A.'s involvement, noting the report would be forwarded to the domestic violence advocate and prosecutor for review of possible charges against her.

At approximately 11:00 a.m. on the same day as the

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defendant's arrest but prior to his arraignment, C.A. went to the police department and, in a new statement in a supplemental police report, indicated that she had lied to the police at the scene about the defendant threatening her because she was afraid of being arrested.

At approximately 1:00 p.m., the judge presided over the defendant's arraignment. The judge, the prosecuting attorney, and C.A. were in the courtroom; the defendant and a public defender appeared by video feed from the jail. After preliminary advisements, the defendant indicated his intention to plead guilty. As the prosecutor submitted the signed agreement and police reports to the judge, the prosecutor directed the judge's attention to the supplemental police report. The judge determined that neither the defendant nor the public defender were aware of the supplemental police report. After considering the situation and reviewing the records, the judge found there was probable cause to support the charge against the defendant but declined to accept his stipulated plea and waiver of trial and counsel. Instead, the judge announced he would set the matter over to a pretrial conference so the parties would have the opportunity to consider the supplemental police report.

> The Commission found that the judge's remarks articulated stereotypes about two ethnic groups and their propensity to engage in certain types of domestic violence.

After hearing this announcement, C.A. asked the judge if she could make a comment. The judge denied this request, stating, "No ma'am, you can have a moment in a minute, trust me." After another brief pause, the judge directed C.A. to stand and summoned the court bailiff to handcuff her. The judge explained:

> Okay, I'm going to go ahead and give [the defendant] an opportunity to maintain all of his rights, that's why I've not accepted his plea. I'm going to, at this point in time, find you [C.A.] in contempt of court because you have written a second statement stated, ah, stating you "called the police, they came and I lied and said [the defendant] had threatened me, which is untrue. I want to recant my statement, I was frightened and afraid I would be arrested." I'm gonna find you in contempt of court. I'm gonna impose a day in jail. So you'll be released in the morning. This gives the City an opportunity to further review the case and if [the defendant] is still in custody on Monday, then I'll certainly be reviewing his case at pre-trial. If he's able to post bail, then he will still be scheduled to come to court on Monday afternoon.

C.A. was taken from the courthouse and booked into the jail; she spent the night in jail and was released from custody the following morning.

The judge claimed, and the Commission did not dispute, that he did not intend to unfairly punish C.A. but was motivated by a sincere but mistaken desire to maintain decorum and prevent an injustice. The agreement noted that the judge's demeanor was calm and his language was not insulting or offensive. However, the agreement stated, although C.A. may have been implicated in domestic violence assault and providing a false statement to a public servant, "those potential criminal charges were not properly before the court, nor is it within the court's authority to file criminal charges," noting that, as a purported victim of domestic violence, C.A. was owed a heightened degree of respect and protection as codified in the Washington Crime Victim's Bill or Rights.

Supplemental payments

Accepting an agreement for discipline by consent, the South Carolina Supreme Court suspended a judge for 30 days without pay for receiving supplemental payments from the police department who prosecuted cases before her. *In the Matter of McKinney*, 714 S.E.2d 284 (South Carolina 2011). The judge had consented to a public reprimand or a suspension not to exceed 30 days.

From 2002 until 2006, the judge received a total of $4,890, in 43 checks ranging from $50 to $200, drawn from the police department victim's assistance fund and approved by the chief of police, who wanted to supplement the judge's salary for extra work she performed after hours. She was given the checks by her sister, the town clerk; she then endorsed the checks, and her sister gave her cash from the clerk's office. The judge was aware the funds were from the police department, but she believed the police department was providing the funds to the town so that it was the town supplementing her salary. (The judge is a part-time judge who initially was paid $100 a month and is now paid $250 a month.) The judge submits that she was unaware it would be improper for her to receive supplemental payments from the police department and that the checks never affected her decisions, but she now realizes the payments could give the impression she was not impartial. There was no allegation or evidence that the judge ever ruled in a particular way due to the payments or made any decision not fully supported by the evidence.

The checks were discovered by the South Carolina Law Enforcement Division during an investigation of the judge's sister, the town clerk, who was charged with converting to her personal use money from checks she issued in the judge's name and to which she forged the judge's name.

There was no allegation or evidence that the judge was involved in or aware of her sister's conduct.

False document

Pursuant to the judge's agreement and based on a stipulation of facts and a waiver of hearing, the Maryland Commission on Judicial Disabilities has made public its private reprimand of a judge for misleading attorneys that a case would go to trial in less than 24 hours and directing the assignment clerk to create and post a false document setting the case for a jury trial. *In the Matter of McDowell*, Private Reprimand (Maryland Commission on Judicial Disabilities October 24, 2011) (www.mdcourts.gov/cjd/publicactions.html).

In early February 2011, *Zickafosse v. Maxaam Homes* was removed from the trial calendar because counsel for the parties notified the court that the case had settled. On the afternoon of February 15, after learning that the parties had not dismissed the case based upon their earlier agreement, the judge, acting as administrative judge, separately informed the attorneys that the case was being scheduled back in for a jury trial the next day, February 16. Each of the attorneys advised the judge that they were unprepared to try the case in less than 24 hours. The judge rejected the attorneys' efforts to explain that the appropriate action would be for the defendant's attorney to file a motion to enforce the oral settlement agreement.

The judge also directed the assignment clerk to produce an official court docket showing that the case was set for a jury trial the next day and to post a list of the numbers of the jurors, who would be called in for the trial. However, the judge also directed the clerk to advise the jury clerk that no jurors were to be called in but not to tell the attorneys that the posted docket was false. ★

Guns and judges

Recently, the Wisconsin Supreme Court Judicial Conduct Advisory Committee issued an opinion stating that a circuit court judge "is not prohibited by the Code of Judicial Conduct from carrying a concealed weapon in the courthouse and the courtroom" as long as the judge is a proper licensee and in full compliance with all laws. *Wisconsin Advisory Opinion 11-1* (www.wicourts.gov/supreme/sc_judcond.jsp). A judge requested the opinion after the Wisconsin legislature gave judges permission to bring firearms into courtrooms as part of a bill allowing adults to carry concealed weapons under certain conditions.

Previously, the New York Advisory Committee on Judicial Ethics stated that a judge may carry a firearm while performing duties but should keep the firearm concealed and safeguarded on the judge's person while on the bench. *New York Advisory Opinion 06-51* (www.nycourts.gov/ip/judicialethics/opinions/06-51.htm). The committee did note that a judge's possession of a firearm while performing duties may raise legal and administrative issues that were beyond its authority to determine.

The Wisconsin committee explained its opinion did not address "the effect of displaying the weapon or discussing its presence in the courtroom," noting that the Wisconsin Supreme Court had disciplined a judge for, in addition to other misconduct, carrying a concealed revolver into the courtroom and twice forgetting that he had placed it in a wastebasket near the bench where it was discovered by maintenance staff. *In the Matter of Breitenbach*, 482 N.W.2d 52 (1992).

Other judges have also been disciplined for innappropriately handling a gun during their duties. *In re O'Bier*, 833 A.2d 950 (Delaware Court on the Judiciary 2003) (judge sanctioned for displaying a firearm at the courthouse in a way that made two court clerks feel their personal safety was threatened and persistently carrying it at work in a way that it was clearly visible to the public and employees; the judge was also permanently banned from carrying a weapon at work); *Inquiry Concerning Fleet*, 610 So. 2d 1282 (Florida 1992) (judge sanctioned for, during a hearing in open court and while sitting on the bench, displaying a handgun, loading it, questioning an unruly and threatening defendant, and then keeping the loaded handgun in a zippered pouch on the bench); *Inquiry Concerning Peters*, 715 S.E.2d 56 (Georgia 2011) (judge removed for, in addition to other misconduct, pointing a gun at himself in the courthouse and stating to another judge, "I am not scared. Are you all scared?"); *In re Woods* (Kentucky Judicial Conduct Commission June 27, 2000) (judge sanctioned for, in addition to other misconduct, openly displaying a handgun on the bench on two days); *Public Reprimand of Harper* (Texas State Commission on Judicial Conduct June 28, 2000) (www.scjc.state.tx.us/pdf/actions/FY2000-2003PUBSANC-SUMM.pdf) (judge sanctioned for, in addition to other misconduct, disassembling and reassembling two revolvers on the bench while presiding over voir dire in a capital murder case that involved a firearm); *In re Sampson*, Order (Utah Supreme Court December 19, 2009) (http://jcc.utah.gov/discipline/documents/sampson-2009Reprimand.pdf) (judge sanctioned for jokingly drawing a gun in the courtroom, causing a bailiff and victim advocate to be concerned that the weapon might accidentally discharge). ★

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