



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

# JUDICIAL CONDUCT REPORTER

A publication of the American Judicature Society Center for Judicial Ethics  
Volume 33, No. 2 Summer 2011

## A Lawyer in the Family: Disqualification When a Judge is Related to a Lawyer – Parts I & II by Cynthia Gray When a Relative is Involved in a Case

Canon 3E(1)(d)(ii) of the 1990 *American Bar Association Model Code of Judicial Conduct* provided that a judge is disqualified “if the judge, 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 . . . acting as a lawyer in the proceeding.” That provision was amended slightly in the 2007 revisions of the model code; Rule 2.11(A)(2)(b) now provides that a judge is disqualified if the judge “*knows* that the judge, the judge’s spouse *or domestic partner*, or a person within the third degree of relationship to either of them, or the spouse *or domestic partner* of such a person is . . . acting as a lawyer in the proceeding” (emphasis added).

The 2007 model code defines “domestic partner” as “a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married.” The reporters’ notes explain

that the “now commonplace ‘non-traditional’ relationships that exist outside marriage are deserving of treatment equal to that afforded marital relationships in evaluating their potential conflict-of-interest implications under the Rules.” That the disqualification applied to domestic partners as well as spouses was implied even before the amendment. See *Michigan Advisory Opinion R-3* (1989) (a judge cohabiting with a lawyer should follow the disqualification rules for a judge married to a lawyer).

“Third degree of relationship” includes parents, grandparents, great-grandparents, uncles, aunts, siblings, children, grandchildren, great-grandchildren, nephews, and nieces. Further, because the rule also applies to persons within the third degree of relationship to the judge’s spouse or domestic partner and to the spouse or domestic partner of

(continued on page 4)

## When a Relative is a Prosecutor or Other Government Attorney

Absent a waiver, a judge is disqualified if a relative appears in a criminal case as a prosecutor or in a civil case on behalf of a government agency. A judge is also disqualified from a criminal case that is related to a case being prosecuted by a relative. *D.C. Advisory Opinion 6* (1995). Further, a judge may not preside over a case in which a relative participated as a prosecutor in any manner or at any point even if the relative is not currently involved in the case.

• A judge is disqualified from criminal cases in which her son-in-law, an assistant state’s attorney, signed the charging


instrument or represented the state at the first appearance even if he had no subsequent involvement. *Illinois Advisory Opinion 05-2*.


• An appellate judge is disqualified from an appeal in a case that originated with a grand jury indictment that followed a presentation by his daughter, an assistant district attorney, even if she did not participate in the trial. *Louisiana Advisory Opinion 149* (1998).


• A judge cannot hear the retrial of a case originally tried by his father, a senior attorney in the district attorney’s


(continued on page 6)


# Recent Advisory Opinions


 A judge may publicly explain the consequences for the judicial branch of proposed legislation or constitutional amendments. *Florida Opinion 2011-7.*


 During allocution of a guilty plea, a judge may ask a defendant any questions that she determines are legally permissible or required, including questions about immigration status, but should not permit the prosecutor to direct the manner in which she conducts plea allocutions or agree to distribute a “notice of immigration consequences” prepared by the prosecutor. *New York Opinion 10-196.*


 Judge A should report to the State Commission on Judicial Conduct that, after arraigning a defendant, Judge B appeared at the jail, posted bail using a check drawn on his spouse’s bank account, signed his spouse’s name on documents to secure the defendant’s release, and drove the defendant home. *New York Opinion 10-181.*


 A judge is not required to recuse or disclose when an attorney in a case sits with her on a non-profit organization board of directors. *New York Opinion 09-234.*


 A judge is not disqualified from a case when her ruling on a discovery dispute was reversed on appeal unless she has a bias that would prevent an impartial hearing. *South Carolina Opinion 10-2010.*


 A judge is disqualified from a collection case brought by a bank in which he owns approximately \$25,000 worth of stock or bonds. *Connecticut Opinion 2011-7.*

 An investment that is \$5,000 or less or 1% or less in a party is a de minimis economic interest; an interest over that amount or percentage is a disqualifying economic interest. *Connecticut Opinion 2011-8.*


 A judge who disqualifies herself from cases involving a particular attorney must do so at the outset of a case and may not first conduct an arraignment. *New York Opinion 09-223.*


 A judge who is in a committed relationship with a magistrate may not be the chief judge in the circuit in which the magistrate serves even if he had no role in hiring the magistrate and transfers supervisory authority over magistrates to another judge. *Florida Opinion 2010-8.*


 A new judge may execute a final accounting affidavit and seek a commission for work he performed as a receiver prior to taking office. *New York Opinion 11-7.*


 A new judge may complete responsibilities as a referee in a foreclosure pursuant to an appointment made before she assumed the bench. *New York Opinion 10-183.*


 A judge must resign before running for fire district commissioner. *New York Opinion 10-207.*


 While the perpetrator is awaiting sentencing in federal court, a judge who was the victim of a crime in her judicial capacity may respond to media inquiries about how the crime has affected her personally and officially but may not comment about how she might have conducted the case or what sentence she would impose. *New York Opinion 11-10.*


 A judge may, as a guest of a bar association, attend the bar association’s annual meeting and dinner, which is not a fund-raiser, even if part of the cost of the event is paid by sponsors that regularly appear before the judge. *Connecticut Opinion 2011-13.*

 A judge may not be a delegate at a meeting of an organization that excludes certain categories of individuals from full membership on the basis of sex and religion, that is involved in political advocacy, and that has a significant number of pending cases in Connecticut courts. *Connecticut Opinion 2011-9.*

 A judge may accept an offer from a national legal honorary society to waive annual dues. *Connecticut Opinion 2011-10.*

 A judge may not be a candidate for election or re-election to the Board of Governors of the State Bar of Nevada, but a new judge may complete a term on the board. *Nevada Opinion JE11-5.*

 A judge may, as a law professor, discuss cases as long as he does not make unnecessarily controversial statements about pending cases or discuss a case in which he is presiding or that is pending in his jurisdiction. *New York Opinion 10-189.*

 A judge may permit her name and curriculum vitae to be included in an application for a grant to fund a research project about jurors’ memories and the implications for jury instructions and may serve as an unpaid consultant to the professor conducting the research if the professor includes in any published materials a statement that all opinions are solely the professor’s. *New York Opinion 10-115.*

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

## Comment about KKK

The California Commission on Judicial Performance publicly admonished a judge for an insensitive comment about the Ku Klux Klan. *Public Admonishment of Giss* (California Commission on Judicial Performance March 16, 2011) ([http://cjp.ca.gov/userfiles/file/Public\\_Admon/Giss\\_03-16-11.pdf](http://cjp.ca.gov/userfiles/file/Public_Admon/Giss_03-16-11.pdf)).

A prosecutor and counsel for two co-defendants were discussing, off the record, the prospects for a plea agreement. The defendants were in a holding cell, but a family member of one of the defendants was in the courtroom. According to the judge, he perceived that counsel wished him to intercede and explain the potential benefits of the plea offer to the defendants, which the judge did not believe he could do. The judge made a remark to the effect that he guessed that the only thing that would make the defendants plead was if he came out in a white sheet and pointy white hat, a reference to the Ku Klux Klan and the fact that both defendants were African-American.

When defense counsel later requested that the judge recuse himself, the judge, while conceding it was a “bad statement,” also remarked, “People don’t have a sense of humor anymore.” The judge’s comment eventually resulted in his recusal from the case.

## Incarcerating attorney

Based on an agreed statement of facts and recommendation, the Mississippi Supreme Court publicly reprimanded a judge for ordering that an attorney be incarcerated for criminal contempt after the attorney refused to recite the pledge of allegiance in open court. The attorney had stood quietly and did not say or do anything to disrupt court proceedings, subvert justice, or embarrass the court. He was incarcerated for five hours. *Commission on Judicial Performance v. Littlejohn*, 62 So. 3d 968 (Mississippi).

## Escalating a personal disagreement

With the judge’s agreement, the North Carolina Judicial Standards Commission publicly reprimanded a judge for escalating a personal disagreement with the public defender into an unauthorized, closed proceeding that did not comply with due process and embroiled court personnel and the sheriff’s department. *Public Reprimand of Scarlett* (North Carolina Judicial Standards Commission June 15, 2011) ([www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc10-209.pdf](http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc10-209.pdf)).

The judge directed James Williams, the public defender, to meet with her in her office on April 1, 2010. When Williams arrived, the judge greeted him and informed him that she would meet him in the courtroom in a few minutes. Williams inquired whether the meeting would be some type

of proceeding for which he was entitled to notice and representation by an attorney. The judge responded, “That is where we are going to meet and it won’t take five minutes.” Williams then inquired, “Suppose I choose not to go?” The judge responded, “I’m directing you to go to the courtroom. I can tell by your reaction that we should not hold this meeting in chambers but in court.” Williams then stated he would be present in the courtroom in 5 to 10 minutes after he made some calls. The judge instructed the court coordinator to request that the sheriff, a major in the sheriff’s department, and the court clerk attend but that no one else was to be present. The judge directed the court clerk to arrange for the session to be recorded. Shortly thereafter, Williams entered the courtroom, joining the judge, the clerk, the sheriff, the major, the court coordinator, and an assistant clerk, who was present to record the proceeding. The courtroom was closed to the public.

The judge began by advising Williams that the proceeding was intended to put him on notice of his unprofessional behavior and the responses she expected from him. Williams objected to the proceeding. The judge noted the objection and further explained that the primary purpose of the proceeding was to ensure that Williams would treat her with respect and give her “the deference of every other district court judge within the state of North Carolina, whether we are in court or outside of it.” The judge added, “This is so you will hear me.” After directing that the matter was to remain under seal, the judge read from a document entitled “DIRECTIVES FOR MINIMUM STANDARDS OF PRACTICE FOR JAMES E. WILLIAMS WITHIN THE DISTRICT COURTS OF JUDICIAL DISTRICT 15B.”

After reading the directives, the judge reiterated several points regarding the purpose of the meeting and asked Williams if he desired to read a copy of the directives. Williams responded in the negative, renewed his objection, and stated he would show the court respect and listen. The judge stated:

And that’s all that’s required. That’s the only reason for this. Hence the reason everybody in this room is under an order not to disclose or reveal. If I had any, number one, measure of trust in you, number 2, any reason to believe that you would hear me, we would have met. But as displayed in the hall, no sooner than a word is out of my mouth, you cut me off. Your body language is such that you are upset. I’ve witnessed it in every case where I’ve entered a ruling that you did not agree with. Starting today, this is going to change, or else I am gonna follow through with all my duties

(continued on page 11)

## Recent Cases

The judge began by advising Williams that the proceeding was intended to put him on notice of his unprofessional behavior and the responses she expected from him. Williams objected to the proceeding. The

judge noted the objection and further explained that the primary purpose of the proceeding was to ensure that Williams would treat her with respect and give her “the deference of every other district court judge within the state of North Carolina, whether we are in court or outside of it.” The judge added, “This is so you will hear me.” After directing that the matter was to remain under seal, the judge read from a document entitled “DIRECTIVES FOR MINIMUM STANDARDS OF PRACTICE FOR JAMES E. WILLIAMS WITHIN THE DISTRICT COURTS OF JUDICIAL DISTRICT 15B.”

After reading the directives, the judge reiterated several points regarding the purpose of the meeting and asked Williams if he desired to read a copy of the directives. Williams responded in the negative, renewed his objection, and stated he would show the court respect and listen. The judge stated:

And that’s all that’s required. That’s the only reason for this. Hence the reason everybody in this room is under an order not to disclose or reveal. If I had any, number one, measure of trust in you, number 2, any reason to believe that you would hear me, we would have met. But as displayed in the hall, no sooner than a word is out of my mouth, you cut me off. Your body language is such that you are upset. I’ve witnessed it in every case where I’ve entered a ruling that you did not agree with. Starting today, this is going to change, or else I am gonna follow through with all my duties

(continued on page 11)

## When a Relative is Involved in a Case *(continued from page 1)*

a person related within the third degree, it applies to attorneys who are a judge's in-laws and step-relatives as well as blood relatives, in other words, related to the judge by affinity as well as consanguinity. Moreover, the disqualifying relationship is triggered by an engagement. See *Massachusetts Advisory Opinion 02-17* (a judge whose fiancé is an assistant district attorney is disqualified from any case on which the judge's fiancé worked or had any supervisory responsibility and from all cases from the unit in which the fiancé works); *New York Advisory Opinion 97-39* (a judge is disqualified from criminal matters in which his fiancée, an assistant district attorney, was involved or appears); *West Virginia Advisory Opinion* (January 20, 1995) (a judge must recuse herself from cases in which her son's fiancée is an attorney). Cf., *South Carolina Advisory Opinion 19-2008* (whether a judge may preside over matters in which her former spouse appears as an attorney depends on factors such as the length of time since the marriage ended, the nature of their relationship, and any continuing obligations under a court order).

If an attorney is related within the third degree, the judge is disqualified when the attorney appears in a case regard-

less whether the judge in fact is very close to the attorney. The New York judicial ethics committee advised a judge that she was disqualified from any case in which her husband's son appeared as the public defender even though she had no substantial contact with him on a personal basis and she had been married to his father for only five years. *New York Advisory Opinion 05-41*.

Absent additional factors, a judge is not disqualified when an attorney is related to the judge outside the third degree of relationship, for example, a cousin. (Note, however, that in several states, such as Alabama and New York, disqualification extends to relatives within the fourth degree, which includes cousins.) However, if a judge has a near-sibling relationship or a close familial tie with a cousin or other relative outside the third degree, the judge's impartiality might reasonably be questioned, and disqualification would be required. See *Florida Advisory Opinion 97-13*; *Kentucky Advisory Opinion JE-48* (1984); *South Carolina Advisory Opinion 10-2004*.

Disqualification caused by the appearance of a relative as an attorney in a case may be waived by the parties following disclosure. However, the Alabama judicial ethics com-

### Another judge in the family

If a judge sits on a court that reviews the decisions of another court and a relative of the judge sits on the other court, the judge is disqualified from any appeal in which the relative rendered the decision; the reviewing judge, however, may review decisions by the relative's colleagues on the bench, and the reviewing judge's colleagues may review decisions by the relative.

- A judge is disqualified from appeals of cases in which the judge's father, a municipal court judge, sat as trier of fact. *Alabama Advisory Opinion 91-421*.
- A circuit judge whose spouse is a municipal judge may hear any appeal from the municipal court as long as the judge's spouse did not participate in any aspect of the proceeding below. *Alabama Advisory Opinion 97-632*.
- A circuit court judge whose spouse is a district court judge or friend of court referee should not review decisions of her spouse, but that disqualification is not imputed to other judges on the circuit court. *Michigan Advisory Opinion JI-31* (1990).

See also *Kansas Advisory Opinion JE-116* (2004) (the spouse of a chief district judge, who has general control over the assignment of cases within the district, may not

serve as a district magistrate judge); *Michigan Advisory Opinion JI-31* (1990) (when two spouses both serve as judicial officers, one should not supervise the performance of the other); *West Virginia Advisory Opinion* (December 27, 2001) (a magistrate who is married to a family court judge should not preside in any case that could eventually be heard by the spouse).

Noting "it is not uncommon for a judge's spouse or a person within the third degree of relationship to a judge to also serve as a judge in either the trial or appellate courts," the Florida Supreme Court amended the state's code of judicial conduct to expressly provide that a judge shall disqualify when "the judge's spouse or a person within the third degree of relationship to the judge participated as a lower court judge in a decision to be reviewed by the judge." This disqualification may be waived. Similarly, the Ohio code adds a disqualification requirement when "the judge knows that the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person . . . [h]as acted as a judge in the proceeding. . . ."



mittee “strongly discouraged” a judge from obtaining a waiver when her son represents a party *Alabama Advisory Opinion 94-513*. See also *South Carolina Advisory Opinion 1-1995* (a judge should be cautious about obtaining waivers in non-adversarial matters in which her child appears).

Further, emergency circumstances may create at least a temporary exception to the disqualification rule for cases involving attorney-relatives. The Alabama judicial ethics committee advised that a judge may preside in a case in which a party is represented by the brother of the adoptive father of the judge’s spouse if immediate action is necessary to protect life or property or to preserve the status quo but no other judge is available. *Alabama Advisory Opinion 95-542*. However, the committee cautioned the judge to turn the case over to another judge as soon as immediate action is no longer necessary.

There may also be an exception to the requirement of disqualification if, after a judge has made decisions in a case, a dissatisfied party retains the judge’s relative in an apparent strategy to force the judge off the case. Under those circumstances, disqualification is not required (*Alabama Advisory Opinion 95-586*), the party who engaged the attorney-relative may be deemed to have waived the disqualification (*Alabama Advisory Opinion 05-849*), or the judge may refuse to allow the attorney-relative to appear in the case (*Louisiana Advisory Opinion 110* (1993)).

### Relatives appearing before other judges

Advisory committees are unanimous that, absent additional circumstances, a judge’s spouse, child, or other close relative may appear as a lawyer in a case before another judge of the same court as the judge-relative, but are split on whether the non-related judge presiding in the case should disclose the attorney’s relationship with the judge’s colleague.

- A judge’s family member who serves as a deputy district attorney may appear before other judges in his court, and the relationship need not be disclosed unless the relationship goes beyond professional contacts. *California Advisory Opinion 51* (2001).

- A judge who was best man at a judicial colleague’s wedding may preside when the colleague’s wife appears in a case. *Delaware Advisory Opinion 1992-2*

- That an attorney in a proceeding is the spouse or close relative of a judge’s commissioner, magistrate, or referee does not in itself require the judge’s disqualification, as long as the judge discloses on the record to all parties the lawyer’s relationship to the judicial officer. *Indiana Advisory Opinion 4-93*.

- A judge in a multi-judge, unified court is not disquali-

fied if a colleague on the same court would be disqualified by the appearance of the colleague’s spouse in a case. *Indiana Advisory Opinion 1-89*.

- A lawyer who is the daughter of a district judge in a two-judge district may appear before the other judge. *Kansas Advisory Opinion JE-9* (1984).

- A village justice is not disqualified when the son of the acting village justice is an attorney in a case. *New York Advisory Opinion 89-105*.

- A judge may preside over cases in which a parent or sibling of another judge of the same court appears as an attorney and is not required to disclose the relationship. *New York Advisory Opinion 99-170*.

- A judge is not disqualified when the spouse of another judge in that court appears before him, but, if the parties are not aware of the relationship, the judge should disclose it and disqualify himself if any party objects. *New York Advisory Opinion 88-68*.

- A judge is not disqualified when a son and daughter-in-law of another judge in that court appears as counsel, but a town justice of a two-justice court should disclose the relationship. *New York Advisory Opinion 89-100*.

- A county court judge is not disqualified from cases in which the spouse of the other county court judge appears as an attorney provided the judge discloses the relationship. *New York Advisory Opinion 95-15*.

- A judge of the court where a judicial hearing officer serves or is designated to serve is not disqualified when the hearing officer’s child appears as an attorney when only two judges serve in the court. *New York Advisory Opinion 06-97*.

- A judge is not required to disqualify herself when the attorney-brother of her co-judge appears for a party but should disclose the relationship on the record to both parties and counsel. *New York Advisory Opinion 05-124*.

- A part-time judge, in a court with two part-time judges, may preside over a case in which one of the attorneys is the brother of the other judge, but must disclose this fact and disqualify herself if any of the parties object. *New York Advisory Opinion 92-23*.

- A judge is not required to disclose, withdraw, or offer to withdraw when an attorney-spouse or attorney-child of another member of the court appears in a case. *Washington Advisory Opinion 91-18*. 

Part III, “When a Relative’s Law Firm Appears,” will appear in the fall issue of the *Judicial Conduct Reporter*.

## When a Relative is a Prosecutor or Other Government Attorney *(continued from page 1)*

office, even if another district attorney is re-trying the case. *Massachusetts Advisory Opinion 92-1*.

- A judge whose daughter is an attorney in the office of the district attorney or the county attorney is obligated to recuse in every case in which she had any involvement whatsoever. *New York Advisory Opinion 97-130*.

- A judge is disqualified from all cases in which his spouse had any involvement as an assistant district attorney, for example, by taking statements from witnesses, screening the file to decide whether to send the case to a different court, presenting the matter to the grand jury, or appearing at the preliminary hearing. *New York Advisory Opinion 93-116*.

- A judge whose relative is an assistant U.S. attorney is disqualified if the relative acted as an attorney in or relating to the proceeding regardless whether the work was done before or after the action was filed. *U.S. Advisory Opinion 38* (2009).

*But see Kentucky Advisory Opinion JE-34* (1983) (a judge may issue an arrest warrant prepared by his daughter as county attorney if the warrant must be issued without delay and no other judge is available).

Therefore, several judicial ethics opinions advise a judge to determine if a prosecutor-relative had any involvement in any case brought by the prosecutorial agency that employs the relative. For example, the West Virginia committee directed a judge whose relative is an assistant prosecutor to hold a hearing in all criminal cases to determine if the relative had any involvement and what efforts were made to insulate the relative from the case. *West Virginia Advisory Opinion* (February 16, 2002).

The Michigan advisory committee approved screening protocols adopted in one jurisdiction to avoid conflicts of interest for a judge married to an assistant prosecutor. *Michigan Advisory Opinion JI-133* (2006). The judge's clerk reviewed the files in new cases assigned to the judge to determine whether the spouse had had any involvement, the spouse's supervisor in the prosecutor's office double-checked the clerk, and defense attorneys had access to all of the prosecutor's files (except for work product), giving them the opportunity to discover involvement the first two steps may have missed.

Other advisory committees also require disclosure or at least suggest that disclosure is the best practice when a family member is an attorney in the prosecutor's office. For example, the North Carolina committee advised that a judge whose daughter is an assistant district attorney should disclose the relationship on the record and inquire whether his

daughter had any involvement in a matter. *North Carolina Advisory Opinion 10-5*. Similarly, the Arkansas committee stated that it may be a "wise course" for a judge to announce on the record that his sister is an attorney employed in the litigation division of the state attorney general whenever the attorney general appears in a case and invite the parties and attorneys to offer any additional facts that could require disqualification. *Arkansas Advisory Opinion 92-6*. See also *California Advisory Opinion 51* (2001); *Georgia Advisory Opinion 182* (1993); *South Carolina Advisory Opinion 11-1999*; *Utah Informal Advisory Opinion 94-6*. Compare *New York Advisory Opinion 96-42* (a judge whose children are assistant district attorneys in the large, urban county where he sits is not obligated to disclose their employment in each case), with *New York Advisory Opinion 97-130* (if a judge's child is an attorney in a small public law office, the judge must disclose the relationship and obtain a waiver in all matters in which other attorneys from the office appear).

### Relative has no involvement in the case

In cases in which a prosecutor-relative has had no involvement, a judge may preside when other attorneys in the same prosecutorial agency appear (unless the relative has supervisory responsibilities, see discussion below.). *Alabama Advisory Opinion 87-305* (spouse is assistant city attorney); *Arkansas Advisory Opinion 92-6* (sister is an attorney in the litigation division of the state attorney general); *California Advisory Opinion 51* (2001) (family member is assigned to the felony trial division of the district attorney); *Indiana Advisory Opinion 1-89* (spouse is a deputy city attorney or deputy prosecutor); *Kentucky Advisory Opinion JE-8* (1980) (son is an assistant commonwealth's attorney); *Massachusetts Advisory Opinion 01-16* (child is assistant district attorney); *New York Advisory Opinion 97-39* (fiancée is an assistant district attorney); *North Carolina Advisory Opinion 10-5* (daughter is an assistant district attorney); *South Carolina Advisory Opinion 11-1999* (daughter-in-law is an assistant solicitor); *Utah Informal Advisory Opinion 94-6* (spouse is an assistant attorney general); *Washington Advisory Opinion 94-5* (spouse is a civil division assistant city attorney); *U.S. Advisory Opinion 38* (2009) (relative is an assistant United States attorney). See also *Arizona Advisory Opinion 00-1* (a judge in a large metropolitan area whose son is a trial attorney in the prosecutor's office may be the presiding criminal court judge); *U.S. Advisory Opinion 60* (2009) (a district court may appoint the spouse of an assistant United States attorney as a magistrate judge).

In response to a request from a judge whose spouse is an assistant United States attorney in an office that prosecuted

cases in the judge's court, the D.C. advisory committee explained why the judge may sit on cases involving one of the other approximately 151 attorneys from the same office. *D.C. Advisory Committee 6* (1995). The committee pointed out that "the spouse, as a salaried governmental official, has no financial interest that would be substantially affected by the outcome of such proceedings." Further, although noting that the spouse's "pride and sense of group accomplishment" may be enhanced when particular cases have been won, the committee concluded, "this interest is surely de minimus and, moreover, should not be substantially affected by the verdicts in trials (individual or collective) conducted before this single Superior Court judge." Finally, relying on their good judgment, the committee stated that the possibility that the judge and his spouse might share confidences about a case "is too frail a consideration on which to compel recusal."

Thus, the committee concluded that, "although the circumstances of individual cases may dictate otherwise," in general, there was no reason to impute "to the judge, even as a matter of appearance, the status of advocate or partisan which his spouse occupies by virtue of her position as Assistant United States Attorney." The committee added that the judge was not required to disclose his spouse's employment.

### Relative has supervisory responsibilities or is chief attorney

A judge is disqualified from cases involving attorneys supervised by a relative in the prosecutor's office even if the relative does not appear in or have personal knowledge of the cases. Most opinions allow that disqualification to be waived. *But see Massachusetts Advisory Opinion 96-3*

(waiver of disqualification when a judge's spouse is first assistant district attorney is inappropriate).

- A judge may not hear dependency matters handled by the district attorney's office if a family member is the chief deputy whose name is on all pleadings even if the family member is assigned to the felony division. *California Advisory Opinion 51* (2001).

- A judge is disqualified from any case in which the state is represented by the district attorney's office in which her spouse is the first assistant district attorney even if the assistant district attorneys appearing in her court operate independently from her spouse. *Massachusetts Advisory Opinion 96-3*.

- A judge is disqualified from a case in which her spouse had a supervisory role as an assistant prosecuting attorney. *Michigan Advisory Opinion JI-133* (2006).

- A judge whose spouse is chief trial attorney for the county prosecutor is disqualified whenever that office appears. *Michigan Advisory Opinion JI-101* (1995).

- An appellate judge should recuse from appeals in tort cases brought against a municipality where his spouse serves as deputy chief of the corporation counsel's tort division. *New York Advisory Opinion 98-29*.

- A judge may not preside over cases in which the deputy prosecutor is supervised by the judge's spouse as the lead attorney in a unit of the prosecutor's office. *Washington Advisory Opinion 05-8*.

- A judge whose spouse, child, or other relative serves as an assistant U.S. attorney with supervisory responsibility over an attorney handling a case is disqualified even if the relative is not personally involved and has no knowledge of the case. *U.S. Advisory Opinion 38-1* (2009).

*See also Kentucky Advisory Opinion JE-80* (1991) (a judge should disqualify from cases involving a state program department for which her spouse is legal advisor). *But see Nevada Advisory Opinion JE03-3* (a judge may hear cases prosecuted by deputy district attorneys supervised by his spouse if she is not directly involved in the cases and does not directly supervise the prosecution).

The Arizona advisory committee addressed an inquiry from a judge whose husband is a deputy county attorney who supervises other attorneys in a trial section. *Arizona Advisory Opinion 95-19*. The committee advised that the judge is required to disqualify from criminal cases in which attorneys from the spouse's section appear:

- if the spouse is required to evaluate the attorneys' per-

(continued on page 8)

## Judicial Conduct Reporter

Summer 2011

**Seth S. Andersen**  
Executive Director

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

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

© 2011  
American Judicature Society  
ISSN: 0193-7367

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

To subscribe or if you have a change of address, contact 515-271-2285 or [llieurance@ajs.org](mailto:llieurance@ajs.org)

*An index is available on the AJS web-site at [www.ajs.org/ethics/](http://www.ajs.org/ethics/).*



## When a Relative is a Prosecutor or Other Government Attorney *(continued from page 7)*

formance before the judge,

- if the spouse's position or compensation depends on the performance of the attorneys who appear before the judge,
- if the spouse reviews the judge's minute entry orders for errors, and
- if the spouse advises and consults with those he supervises regarding trial technique and strategy, evidentiary questions, sentencing, and similar non-administrative matters.

The committee stated the judge should either direct the attorneys supervised by her spouse to inform her in every case in which her spouse has been consulted or should disclose the relationship in each case and make a specific inquiry. However, the committee advised that, if the spouse's supervisory role is limited to scheduling attorneys, disqualification is not required because the judge and her spouse can reasonably be expected to avoid discussing cases assigned to the judge. *See also Florida Advisory Opinion 77-12* (a judge is not disqualified from cases handled by assistant state attorneys who were administratively assigned to cases by the judge's brother even if the brother signs all criminal informations).

Finally, absent waiver, a judge is required to disqualify from all cases involving a government office if the judge's family member is not just any lawyer in the office, but the head of the office. For example, the D.C. advisory committee stated that a judge whose spouse is corporation counsel for the District of Columbia is disqualified from all criminal cases and civil matters in which the District is represented by the office of the corporation counsel. *D.C. Advisory Opinion 9* (2001). The committee noted that, although a large staff of assistant corporation counsels carries out day-to-day activities, those attorneys operate under the direction and control of the judge's spouse as corporation counsel and perform the duties to which she assigns them. Further, the committee noted, even though there are a number of layers of responsibility between his spouse and the attorney actually appearing before the judge, the regular practice "is for the name of Corporation Counsel to appear on all court filings."

Other judicial ethics committees have given similar advice.

- A judge whose spouse is the appointed county attorney must disqualify herself from any cases in which an assistant county attorney appears. *New York Advisory Opinion 10-5*.

### A law enforcement officer in the family

A judge whose brother is the local chief of police is disqualified from any case in which his brother or one of the officers under his supervision is the complaining witness, unless the disqualification is waived. *Kansas Advisory Opinion JE-113* (2003). Similarly, a judge whose spouse is the sheriff may not preside over cases in which the spouse is a material witness or in which deputies employed by her spouse are involved, but another judge of the same court may do so. *Georgia Advisory Opinion 235* (2007). *See also Arizona Advisory Opinion 10-3* (brother is sheriff in the county where the judge serves); *South Carolina Advisory Opinion 1-2009* (uncle is chief of police); *West Virginia Advisory Opinion* (December 5, 1989) (spouse is chief of police). *But see New York Advisory Opinion 90-75* (a judge whose brother is the police chief should disclose the fraternal relationship in each case in which officers under her brother's command appear and inquire whether he participated in the matter at any stage); *West Virginia Advisory Opinion* (July 19, 2010) (a judge whose son is chief of police must disqualify from any case in which the

judge's son had any involvement and, if necessary, hold a hearing to determine if his son had any involvement in a case).

Further, a judge whose spouse is the commander of one district in the city police department should not preside in cases in which officers assigned to that district will testify, although the judge is not disqualified from cases involving officers from other districts. *D.C. Advisory Opinion 2* (1992). Similarly, a judge whose spouse is a deputy sheriff may not hear cases involving deputies her spouse supervises. *Washington Advisory Opinion 94-1*. *See also Colorado Advisory Opinion 05-1* (spouse is a fire protection district officer with supervisory responsibilities); *New Mexico Advisory Opinion 10-7* (son-in-law is a sergeant who directly supervises four deputy sheriffs); *New York Advisory Opinion 09-242* (relative is in charge of the sheriff's road patrol division in the county where the judge presides); *New York Advisory Opinion 98-27* (spouse is a city deputy chief of police); *New York Advisory Opinion 94-52* (spouse is a police lieutenant); *South Carolina Advisory Opinion 4-2011*



- A judge whose wife is the elected prosecuting attorney is disqualified from all criminal cases, even those handled solely by one of the assistant prosecuting attorneys, including requests for search warrants, petitions for domestic violence orders, initial appearances, and plea proceedings. *West Virginia Advisory Opinion* (February 25, 1994).

- A judge whose child is the elected prosecuting attorney is disqualified from all proceedings involving any assistant prosecuting attorney. *West Virginia Advisory Opinion* (December 28, 2000).

- If a relative serves as the U.S. Attorney, the judge should recuse in all cases in which the office appears. *U.S. Advisory Opinion 38* (2009).

### Public defender and legal aid

The rules and exceptions for judges who are related to prosecutors also apply to judges related to public defenders.

- A judge whose spouse is a member of the public defender's office may hear criminal cases in which a different public defender represents the defendant. *Arizona Advisory Opinion 85-1*.

- An appellate judge whose son is employed by the public defender is not disqualified from a case as long as the

record does not reflect participation by his son in any aspect of the proceeding below. *Florida Advisory Opinion 76-12*.

- A judge who is married to an assistant public defender may preside over a criminal case in which the defendant is represented by a different assistant public defender unless other circumstances place her impartiality in question, for example, her husband assisted in the preparation of the case. *Florida Advisory Opinion 91-17*. The judge should advise the parties that her spouse is an assistant public defender and offer to step down.

- A judge whose spouse is the elected public defender may not preside over any cases in which assistant public defenders appear even if his spouse has attempted to remove herself from direct and indirect supervision of assistant public defenders assigned to his court. *Florida Advisory Opinion 01-5*.

- A judge who is married to the elected public defender may not preside over juvenile and mental health cases to which the public defender is assigned even if private attorneys over whom his spouse exercises no supervisory authority handle those cases under contracts. *Florida*

(continued on page 10)

(spouse is primary investigator for the solicitor's office); *South Carolina Advisory Opinion 5-2009* (spouse is chief deputy sheriff); *South Carolina Advisory Opinion 12-2005* (spouse is captain of detective unit). Cf., *Delaware Advisory Opinion 1994-2* (a judge whose child is the only staff sergeant in a local police department that has 21 officers, two lieutenants, and one police chief may not hear any cases involving the department's other officers, but a judge whose child is one of five staff sergeants in a state police troop that has 33 officers, two lieutenants, and one commander may preside in cases in which other officers from the troop are witnesses).

Finally, the Utah Supreme Court recently approved the stipulated public reprimand of a judge who failed to disqualify himself from 37 traffic citations issued by his son-in-law. *In re Adams*, Order (Utah Supreme Court December 20, 2010) (<http://jcc.utah.gov/discipline/documents/AdamsKenneth2010Reprimand.pdf>). Advisory opinions also state that a judge whose relative is, for example, a detective or deputy with the sheriff's department is disqualified if the relative was directly or indirectly involved in the investigation or litigation of a matter but not from other cases involving that agency.

*Florida Advisory Opinion 07-11*. See also *Alabama Advisory Opinion 99-735* (son is police officer); *Alabama Advisory Opinion 86-286* (wife is sergeant with county sheriff's department); *California Advisory Opinion 51* (2001) (family member is police officer); *Delaware Advisory Opinion 2009-2* (brother-in-law is police officer); *Florida Advisory Opinion 96-15* (son is sheriff's legal advisor and a deputy sheriff); *Florida Advisory Opinion 93-18* (spouse is member of sheriff's mounted unit); *New York Advisory Opinion 10-184* (niece is married to a deputy sheriff); *New York Advisory Opinion 97-59* (son is police officer); *New York Advisory Opinion 93-104* (son is officer in sheriff's department); *New York Advisory Opinion 92-72* (spouse and brother-in-law are deputy sheriffs); *New York Advisory Opinion 92-71* (nephew is police officer); *South Carolina Advisory Opinion 9-1994* (husband is county sheriff's deputy); *Utah Informal Advisory Opinion 10-3* (son-in-law is issuing police officer); *Wisconsin Advisory Opinion 06-2* (son is police officer). Cf., *South Carolina Advisory Opinion 17-2002* (a judge is disqualified from matters brought by the police officer the judge is dating).

## When a Relative is a Prosecutor or Other Government Attorney *(continued from page 9)*

### *Advisory Opinion 10-9.*

• A judge whose brother is the chief assistant public defender responsible for assigning the public defenders who will appear in the juvenile division is not disqualified from all juvenile matters that involve the public defender. *Florida Advisory Opinion 77-4*

• A judge whose husband is an attorney in the felony division of the public defender's office is required to recuse herself from a case in which her husband has participated or has entered an appearance; in cases in which other public defenders appear, the judge should inform prosecutors of the relationship to allow them to submit a challenge for cause. *New Mexico Advisory Opinion 91-1.*

• A judge whose child is an attorney in the public defender's office is obligated to recuse in every case in which his child had any involvement whatsoever. *New York Advisory Opinion 97-130.*

• A judge whose son is an attorney in the public defender's office in the circuit in which she sits may hear cases involving that office provided her son was not involved in any way in the case. *South Carolina Advisory Opinion 2-1991.*

• A judge whose child is a public defender representing a defendant before another judge is disqualified from the companion case of another defendant charged with the same crime. *South Carolina Advisory Opinion 2-1991.*

*But see Utah Informal Opinion 88-3* (a judge is required to disqualify herself from cases when the Legal Defenders' Association, her spouse's employer, is the attorney where the agency functions like a private law office in that attorneys share case information and strategies).

Finally, the same rules and exceptions apply when a judge is related to an attorney in a legal aid agency.

• A judge whose wife is an attorney employed by legal aid may hear cases in which a party is represented by other attorneys employed by legal aid but should disclose the relationship. *Florida Advisory Opinion 97-25.*

• A judge whose wife is an attorney with the legal aid society may preside over a case in which a party is represented by another attorney from the legal aid society. *Georgia Advisory Opinion 72 (1985).*

• A family court judge in a large metropolitan county whose spouse is employed as an attorney for the legal aid society in the same county need not disclose the relationship, but should recuse himself if the spouse has had any involvement with the case. *New York Advisory Opinion 97-82.*



## Outstanding Quality and Value, plus Next Business Day Shipping!

Murphy's Qwick-Ship® Judicial Robes offer the best of all worlds, with guaranteed satisfaction. Order on-line or call for your free brochure today!

### **Internet Special**

Use Discount Code **JCR911** to receive 10% off your online Qwick-Ship® Judicial robe orders now through December 31, 2011. Discount valid only for orders placed on [www.MurphyRobes.com](http://www.MurphyRobes.com), using the above discount code. May not be used in conjunction with any other discount code.



  
**MURPHY  
ROBES**  
Qwick-Ship  
A Division of Herff Jones

[www.MurphyRobes.com](http://www.MurphyRobes.com)  
800-876-8774

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

as a district court judge. I think it is paramount that you know where I'm coming from. I'm doing that out of respect for you. I respect your position, have totally respected you as person, but I will no longer be undermined or disrespected.

After Williams filed a petition with the court of appeals, the judge called him, apologized, and stated she would rescind the directives, which she did on June 17.

### Comment about parking in handicapped space

In lieu of filing formal disciplinary proceedings and with the judge's consent, the Indiana Commission on Judicial Qualifications admonished a judge for making inappropriate comments to a reporter about his son's parking in a handicapped space in the court's public parking lot without an appropriate placard. *Public Admonition of Hunter* (Indiana Commission on Judicial Qualifications May 5, 2011) ([www.in.gov/judiciary/judqual/docs/admonitions/hunter-05-05-11.pdf](http://www.in.gov/judiciary/judqual/docs/admonitions/hunter-05-05-11.pdf)).

A parking ticket was issued to Robert Bryan for parking in a handicapped space without displaying the appropriate placard, in violation of a city ordinance. Mr. Bryan appeared before the judge and denied liability for the ticket. After hearing testimony from Mr. Bryan and the officer who issued the ticket, the judge found that Mr. Bryan had violated the ordinance and imposed a fine of \$10.50 and mandatory court costs of \$114.50.


Mr. Bryan's wife, Charity Bryan, who is confined to a wheelchair, called a TV station to complain about the adjudication. In an on-camera interview, Mrs. Bryan told a reporter that the handicapped placard they usually displayed had accidentally fallen in the car's interior the day the ticket was issued, stating that the ruling was unfair and she was not going to pay the fine.


Several days later, the reporter attended court proceedings when Mr. Bryan's case was again discussed. After the court session, the reporter approached the judge in the court parking lot while the judge, who was using a transport chair, was waiting for help getting into his car.

The reporter, who had a microphone and was with a cameraman, asked, "Are you aware that you don't have a disabled placard and you're parked in a handicapped space?"

Chuckling, the judge answered, "Yes." While the reporter continued to press the judge, the judge's son retrieved the placard from the visor and placed it on the rearview mirror. When the reporter suggested that the Bryans had been in a similar situation, the judge stated, "I didn't get a ticket, did I?" The reporter then asked, "So, it's just their bad luck for having gotten a ticket?" The judge responded, "I guess so, yeah."

### Soliciting for display

Based on the judge's agreement, the Tennessee Court of the Judiciary publicly reprimanded a part-time judge for appearing before the county commission and speaking at their request in connection with their deliberation to grant approval to have a "Citizens Heritage Display" in the courtroom lobby of the Justice Center and for making it publicly known that he would be collecting funds for the display at his private law office. *In re Taylor*, Agreed Order, Public Reprimand (Tennessee Court of the Judiciary June 6, 2011) ([www.tsc.state.tn.us/boards-commissions/court-judiciary/disciplinary-actions/pleadings-public-cases/james-taylor](http://www.tsc.state.tn.us/boards-commissions/court-judiciary/disciplinary-actions/pleadings-public-cases/james-taylor)). 



**JUDICIAL ROBES**  
By Collegiate Apparel®  
Another quality product of Herff Jones, Inc.  
*An employee owned company*

You have attained a position of distinction and honor. Reward yourself with the finest Judicial Robe available. Choose from our custom-tailored Judicial Robes or our ReadyApparel™ Judicial Robes that ship in 3 business days or less!

*Shown is our best selling model The Judicial Robe*

Order online @  
[www.judicialrobesonline.com](http://www.judicialrobesonline.com)  
or call 1-800-552-3228





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

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

## JUDICIAL CONDUCT REPORTER



### The 22nd National College on Judicial Conduct and Ethics

Chicago, Illinois  
October 26–28, 2011

**For more information  
and to register, visit  
[www.ajs.org](http://www.ajs.org)**

West LegalEdcenter

**LOG ON.  
LOOK UP.  
LEARN.**

Gain online access to quality  
legal training and CLE from the  
American Judicature Society

Members get a special discount.

Log on today!

<http://westlegaledcenter.com/link/AJS>

1.800.241.0214



THOMSON REUTERS

**WEST.**