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Disqualification and Friendships with Attorneys *by Cynthia Gray*

Although a social acquaintance with an attorney does not raise reasonable questions about a judge's impartiality, a personal relationship may be so close that the judge is required to disclose the connection when that attorney appears in a case and, at some point, may be so significant that the judge is required to disqualify. However, defining the degree of friendship that triggers disqualification is difficult given the spectrum of social associations.

The U.S. Court of Appeals for the 7th Circuit described the nature of judge/lawyer relationships, noting that friendships among judges and lawyers are common and desirable.

A judge need not cut himself off from the rest of the legal community. Social as well as official communications

among judges and lawyers may improve the quality of legal decisions. Social interactions also make service on the bench, quite isolated as a rule, more tolerable to judges. Many well-qualified people would hesitate to become judges if they knew that wearing the robe meant either discharging one's friends or risking disqualification in substantial numbers of cases.

United States v. Murphy, 768 F.2d 1518 (7th Circuit 1985).

That social relationships between judges and attorneys are normal, ordinary, and frequent suggests that a judge need not disqualify himself just because an acquaintance appears as a lawyer. However, the court stated, when the

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Recommendation Letters in Adjudicative Proceedings *by Cynthia Gray*

More than in other contexts, a letter of recommendation or other communication from a judge on behalf of a person in an adjudicative proceeding may be viewed as an implied request by the judge for favorable treatment of the subject of the reference, an abuse of the prestige of office. Further, in formal adjudicative proceedings, letters of recommendations from judges raise questions of propriety under the last sentence of Canon 2B of the 1990 American Bar Association *Model Code of Judicial Conduct*: "A judge shall not testify voluntarily as a character witness." Advisory opinions have interpreted that prohibition to apply, not only to court proceedings, but to any investigatory or adjudicative proceeding, regardless whether administrative, civil, or criminal, where a person's legal rights are determined. In 2007, the provision was clarified, and Rule 3.3 of the revised model code now provides:

"A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned."

Sentencing

Judicial ethics advisory opinions addressing the question have, without exception, declared that a judge may not voluntarily write a letter to another judge in connection with the sentencing of a defendant in a criminal matter at the request of a defendant or counsel on the defendant's behalf even if the sentencing judge is not in the same jurisdiction as the judge writing the letter. *Alabama Advisory Opinion 00-744* (on behalf of acquaintance); *Arkansas Advisory*

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Statutes of Limitations

Several states have statutes of limitations in judicial discipline proceedings. The limits range from one year (Connecticut, Massachusetts) to two (New Hampshire, West Virginia), three (Nevada, Vermont), four (Pennsylvania), or six years (Alaska). In addition, the commissions in California, Indiana, and Wyoming are prohibited from bringing charges against a judge based on conduct that occurred more than six years prior to the beginning of the judge's current term.

The time limit for filing a complaint begins running from the time the misconduct occurred in Alaska, Massachusetts, and Pennsylvania. For example, the Alaska Commission on Judicial Conduct may only inquire into allegations of misconduct committed by a judge "within a period of not more than six years before the filing of the complaint or before the beginning of the commission's inquiry based on its own motion." In contrast, in New Hampshire, Vermont, and West Virginia, the relevant date is when the misconduct was discovered or could have been discovered. For example, the West Virginia Judicial Investigation Commission is required to dismiss "any complaint filed more than two years after the complainant knew, or in the exercise of reasonable diligence should have known," of the violation.

In Connecticut and Nevada, the statutes of limitations combine the two marks. The Connecticut provision states:

No complaint against a judge, compensation commissioner or family support magistrate . . . shall be brought . . . but within one year from the date the alleged conduct occurred or was discovered or in the exercise of reasonable care should have been discovered, except that no such complaint may be brought more than three years from the date the alleged conduct occurred.

Several of the statutes of limitations have exceptions. The commissions in Massachusetts, Pennsylvania, and Vermont, for example, may investigate complaints outside the time limit "for good cause." Moreover, when misconduct is part of a pattern of recurring or continuing conduct, several commissions are expressly allowed to consider all prior related acts including those outside the statute of limitations. For example, although the Pennsylvania Board on Judicial Conduct is prohibited from considering "complaints arising from acts or omissions occurring more than four years prior to the date of the complaint," if "the last episode of an alleged pattern of recurring judicial misconduct arises within the four-year period, the Board may consider all prior acts or omissions related to such an alleged pattern of conduct."

Examples

Massachusetts

Except where the commission [on judicial conduct] determines otherwise for good cause, the commission shall not deal with complaints arising out of acts or omissions occurring more than one year prior to the date commission proceedings are initiated . . . ; provided, however, that, when the last episode of an alleged pattern of recurring judicial conduct arises within the one year period, the commission may consider all prior acts or omissions related to such alleged pattern of conduct.

Nevada

The Commission [on Judicial Discipline] shall not consider complaints arising from acts or omissions that occurred more than 3 years prior to the date of the complaint or more than 1 year after the complainant knew or in the exercise of reasonable diligence should have known of the conduct, whichever is earlier, except that: (a) Where there is a continuing course of conduct, the conduct will be deemed to have been committed at the termination of the course of conduct; (b) Where there is a pattern of recurring judicial misconduct and at least one act occurs within the 3-year or 1-year period, the Commission may consider all prior acts or omissions related to that pattern; and (c) Any period in which the judge has concealed or conspired to conceal evidence of misconduct is not included in the computation of the time limit for the filing of a complaint pursuant to this section.

New Hampshire

No formal disciplinary proceedings shall be commenced unless a grievance is filed with the committee [on judicial conduct] or a committee-generated complaint is docketed by the committee. . . within two (2) years after the commission of the alleged misconduct . . . except when the acts or omissions that are the basis of the grievance were not discovered and could not reasonably have been discovered at the time of the acts or omissions, in which case, the grievance must be filed within two years of the time the grievant discovers, or in the exercise of reasonable diligence should have discovered, the acts or omissions complained of.

Misconduct will be deemed to have been committed when every element of the alleged misconduct has occurred, except, however, that where there is a continuing course of conduct, misconduct will be deemed to have been committed beginning at the termination of that course of conduct. 

Operation of rental business

Based on stipulated facts, the Pennsylvania Court of Judicial Discipline suspended a judge for four months without pay for using his secretary and other judicial resources in the day-to-day operations of 16 rental properties. *In re Berry*, Opinion (June 25, 2009), Order (Pennsylvania Court of Judicial Discipline July 16, 2009) (www.cjdpa.org/decisions/jd09-01.html). The judge's secretary performed these tasks primarily between 8:30 a.m. and 4:30 p.m. at her work station in the judge's chambers where she maintained files on each of the judge's tenants.

At the judge's request, his secretary contacted prospective or current tenants and met with them in the judge's chambers or other parts of the courthouse; prepared lease agreements, prepared and mailed correspondence regarding delinquent rental payments; filed complaints and appeared in landlord/tenant proceedings in eviction actions; placed advertisements with newspapers; contacted utility companies; deposited rental payments; organized receipts relating to the properties for preparation of the judge's tax returns; paid property taxes; and prepared and mailed checks for payment of bills to utility companies, contractors, government agencies, and vendors. The City of Philadelphia had issued over 70 citations to the judge for violations of safety, building, and licensing codes, and his secretary communicated with city agencies concerning the violations.

The judge used his judicial office address and telephone number in advertisements of vacancies, on written correspondence to tenants or prospective tenants, and on rental signs. The secretary and the judge used court resources, including computers, telephones, fax machines, paper, envelopes, and postage in connection with the properties.

The Court found that the judge's misappropriation of his secretary's services "was neither inadvertent nor inconsequential," but "broad, bold and impossible to overlook." It concluded that the judge's "active operation of a real estate business out of his judicial office, at the very least, trivializes the fundamental concept of judicial office," demonstrating "a flagrant, open, disregard for the dignity of judicial office" and "a total disregard for the citizens of the Commonwealth including those who elected him." The Court also found that the judge's diversion of the services of his secretary to his own benefit violated a criminal statute prohibiting theft of services.

Babysitting and typing

Accepting an agreed statement of facts and joint recommendation, the New York State Commission on Judicial

Conduct determined that censure was the appropriate sanction for a judge who repeatedly used her secretary for personal purposes, in addition to other misconduct. *In the Matter of Ruhlmann*, Determination (New York State Commission on Judicial Conduct February 9, 2009) (www.scjc.state.ny.us). The Commission found that, when the judge signed her secretary's weekly attendance/leave accrual sheets, she in effect confirmed that her secretary was entitled to her court salary for periods in which she was performing personal services for the judge.

After assuming office, the judge appointed her friend Kimberly Keskin as her confidential secretary. On at least nine occasions, the judge had Keskin babysit her eight-year-old daughter or three-year-old son at the courthouse during court hours in circumstances that were not exigent or compelling. For example, one day, the judge had her babysit her son in the court office for more than an hour and then had Keskin transport the boy to his regular day care provider, which took about 30 minutes.

On another occasion, the judge had Keskin watch her daughter in the court office beginning at 9:00 a.m. because the girl was sick and unable to attend school. At about 12:00 p.m., the judge had Keskin take the girl to the doctor, wait for her to be examined, drive her to a pharmacy to obtain medicine, and drive her to the judge's parents' home. Keskin spent about four hours, including the lunch hour, assisting the judge with her daughter.

The judge also had her secretary perform personal typing for the judge's husband, the repeated nature of which, the Commission found, was "not de minimis." For example, the secretary typed minor up-dates to his resume and cover letters and a short paragraph describing his teaching philosophy for his application for employment at a community college. Twice when her secretary objected that the typing was interfering with her court work, the judge told her that she should finish the typing for the judge's husband first.

The Commission found:

Routinely using court staff for extra-judicial purposes is improper regardless of whether the employee consents or performs such tasks without protest. It is disruptive to court administration and sets a poor example for court personnel. It is a breach of the public trust and damages public confidence in the integrity of the judiciary. Repeatedly requiring a court employee to perform personal tasks also changes the nature of the employment relationship, complicates any evaluation of the employee's job performance and has adverse consequences when, ... the judge decides to discharge the employee. 

Recent Decisions Personal Use of Court Staff

Disqualification and Friendships with Attorneys *(continued from page 1)*

relationship “exceeds ‘what might reasonably be expected’ in light of the associational activities of an ordinary judge . . . , the unusual aspects of a social relation may give rise to a reasonable question about the judge’s impartiality.” Stating the “inquiry is entirely objective and is divorced from questions about actual impropriety,” the court held that the test was:

Whether an astute observer in either [the legal or the lay] culture would conclude that the relation between judge and lawyer (a) is very much out of the ordinary course, and (b) presents a potential for actual impropriety if the worst implications are realized.

In *Murphy*, the court decided that the relationship between the trial judge and the principal trial lawyer for the United States was unusual enough to require disqualification, noting they were “the best of friends.” They had met when both were Assistant U.S. Attorneys between 1971 and 1975, and their professional relationship developed into a social friendship. Before the trial, they planned a trip with their families to Georgia, and the judge advanced the date of sentencing so that he could wrap up the case before the vacation. Immediately after the judge sentenced Murphy, the judge, the prosecuting attorney, and both of their families went to a “vacation hideaway” where they resided in adjoining cottages.

The court concluded:

Most people would be greatly surprised to learn that the judge and the prosecutor in a trial of political corruption had secret plans to take a joint vacation immediately after trial. An objective observer “might wonder whether the judge could decide the case with the requisite aloofness and disinterest” The test for an appearance of partiality in this circuit is “whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case” That hypothetical observer would be troubled by what happened in this case.

This is not an occasion on which to lay down rules for the permissible extent of social ties between judge and counsel. Social relations take so many forms that it would be imprudent to gauge all by a single test. We decide only the case before us. But with appreciation for both the diffi-

culty of deciding how much is too much, and deference to the contrary judgment of a careful and upright judge, we conclude that an objective observer reasonably would doubt the ability of a judge to act with utter disinterest and aloofness when he was such a close friend of the prosecutor that the families of both were just about to take a joint vacation. A social relation of this sort implies extensive personal contacts between judge and prosecutor, perhaps a special willingness of the judge to accept and rely on the prosecutor’s representations. . . . A judge could be concerned about handing his friend a galling defeat on the eve of a joint vacation. A defendant especially might perceive partiality on learning of such close ties between prosecutor and judge.

(That conclusion did not lead to reversal of the verdict against Murphy, however, because, the court concluded, “although perhaps 999 of 1000 observers would have been stunned to discover that judge and prosecutor were about to go on a joint vacation, the

remaining one of the thousand was on Murphy’s defense team.” The principal trial lawyer for the defendant had been in the U.S. Attorney’s office at the same time as the prosecutor and the judge, and all three remained friends. They and their families had vacationed together in 1982 and, although he did not know of the plans for the 1984 vacation, defense counsel admitted that he knew of the close relationship. Even the defendant conceded that he knew that the three men were close friends.)

The committee warned the judge to “be constantly vigilant” about whether, subjectively, the relationship influences his judicial conduct or judgment.

Disclosure

The California advisory committee explained why a judge’s disclosure of a relationship with an attorney is “desirable,” even if disqualification may not be warranted. *California Advisory Opinion 45* (1997). The committee emphasized that:

Disclosure in an abundance of caution will assuage any doubt in most cases. A party or attorney learning of this affiliation directly from the judge is far less likely to question the judge’s impartiality than one who learns about it later from another source. By clearing the air, the judge dispels any potential doubt about impartiality.

Moreover, the committee stated:

If the judge fails to disclose, and was incorrect in his or her reasonable person analysis, the judge may have concealed

facts that would constitute a basis for a successful challenge to the judge's improper failure to recuse him/herself, thereby effectively depriving the litigant of his/her . . . right to challenge the judge.

In *In the Matter of Huttner*, Determination (July 5, 2005) (www.scjc.state.ny.us), the New York State Commission on Judicial Conduct censured a judge who had presided over a civil case without disclosing that he had a close social relationship with the defendants' attorney. Since the mid-1990s, the judge and attorney Ravi Batra had socialized together with their spouses and had drinks, lunch, and dinner together on numerous occasions. They had been to each other's homes, and the judge had attended various Batra family events, including a wedding anniversary celebration and a memorial service. When Batra appeared before the judge as counsel for several defendants in a civil case in June 2000, the judge did not disqualify himself or disclose the relationship and continued to socialize with Batra while the case was pending. The judge also failed to disclose that, between 1996 and 1999, he had appointed Batra as a fiduciary in 11 matters.

The Commission found that, at the very least, the judge should have disclosed the relationship so that the parties and their attorneys could consider whether to seek his disqualification. The Commission stated that, even if the judge and the attorney did not discuss the merits of the case during their out-of-court meetings, "an appearance of impropriety would be inevitable."

The *Huttner* decision prompted a judge to ask the New York judicial ethics advisory committee whether she was required to disclose and offer to disqualify when an attorney in a case attended the annual holiday celebration at her home, which is attended by about 70 people, including some attorneys and their spouses. The committee advised that an attorney's attendance at the judge's "get together" did not, by itself, require disclosure, stating the issue was whether there was a "close social relationship" between the judge and the attorney. *New York Joint Opinion 05-89 and 05-90*. The committee reiterated that judges are not prohibited from engaging in ordinary social activity with attorneys who practice before them as long as there is no discussion relating to any of the attorneys' matters then pending before the judge.

However, the committee added that "clearly, during the course of a trial, a judge should avoid private social activity with the attorneys who are engaged in litigation before the judge." Moreover, the committee emphasized that "if the personal relationship between a judge and attorney can be characterized as a close social relationship and thus one in which the judge's impartiality might reasonably be ques-

tioned, the judge should, at the very least, disclose the relationship."

A subsequent inquiry to the New York committee came from a judge who walked his dogs with an attorney once or twice a month, had dined at a restaurant with the attorney a few times each year during the past two to four years, had gone to the beach with the attorney, had been driven by the attorney to campaign events, and had held social functions at his residence that the attorney attended. The committee concluded that the "continuing relationship appears to be sufficiently close so as to give rise to a perception that the judge's judicial conduct or judgment may be influenced by their social relationship and thus may call into question the judge's impartiality," requiring the judge's disqualification from cases involving the attorney. *New York Advisory Opinion 06-149*. The committee noted that the disqualification could be waived unless one of the other parties is self-represented.

The Delaware advisory committee stated that "a merely 'close' friendship" with a deputy attorney general did not require disqualification even though the judge and the attorney socialize frequently and the attorney sometimes babysits for the judge's children. *Delaware Advisory Opinion 2002-2*. However, the committee acknowledged, "the circumstances of a particular friendship could become so close and continuing that the parties to the friendship are commonly identified as closely associated by reasonable people who know them . . . especially if the relationship develops other aspects, including but not limited to financial or amorous relations." The committee further warned the judge to "be constantly vigilant" about whether, subjectively, the relationship influences his judicial conduct or judgment.

No litmus test

The advisory committee for federal judges stated that the question whether a judge should disqualify himself in cases where one of the attorneys is a friend of long standing and is also a godfather of one of the judge's children" was "not capable of answer by crisp formulation" and "ultimately, . . . is one that only the judge may answer." *U.S. Advisory Opinion 11* (2009). The committee stated that no reasonable question of impartiality "would be raised if the relationship were simply one of historical significance, the godfather being merely within the wide circle of the judge's friends, and the obligation having been perfunctorily assumed." But, the committee advised, "if the godfather is a close friend whose relationship is like that of a close relative, then the judge's impartiality might reasonably be questioned."

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Disqualification and Friendships with Attorneys *(continued from page 5)*

The Massachusetts advisory committee addressed an inquiry from a judge who had recently moved to a secluded, four-home cul de sac in which the neighbors frequently socialized with each other. One of the houses was owned by an attorney who appears regularly in the court in which the judge sits and has appeared before the judge. *Massachusetts Advisory Opinion 04-9*. Stating “there is no easy litmus test to apply,” the committee advised the judge that, in deciding whether to disqualify from cases involving his neighbor, the judge should consider the frequency with which the attorney appears before him, the nature and degree of the social interaction, and the culture of the legal community.

For example, how many attorneys practice in your court and how likely is it that trips to public venues, such as restaurants, or boating excursions and vacation trips will become known to local practitioners?

Attending dinners and functions at homes on the cul de sac may appear to disinterested third parties and lawyers to connote more of an intimate social relationship than public outings. You are also more likely in those circumstances to learn directly, or indirectly, about information that concerns a matter that is before you or might come before you. If that were to happen, you would be required to recuse yourself . . .

Given the parameters discussed herein, limited social contact with [the] attorney . . . may not require recusal. You would be wise to avoid recurring contact with the attorney in circumstances that would create the reasonable perception that you and he have a close personal relationship. Occasional gatherings in small groups may be appropriate as opposed to intimate dinners. You should be circumspect of accepting any gifts or favors from the attorney.

Other examples

- A judge should disclose when an attorney is his social friend, was his partner in private practice for six months in 1987, and was his tenant for two years *Arizona Advisory Opinion 90-8*.
- A judge is disqualified if an attorney in a case attended reciprocal social dinners with the judge, loaned the judge a computer, arranged for the purchase and maintenance of a car for members of the judge’s family, and sought advice from the judge on strategy in cases with other judges. *California Advisory Opinion 45 (1997)*.

- A judge should disclose if she is acquainted with both the husband and the wife in a pending dissolution. *California Advisory Opinion 45 (1997)*.

- A judge need not disqualify from cases involving attorneys with whom the judge is friendly in such activities as golfing, jogging, and dining, but must disclose the relationship. *California Advisory Opinion 47 (1997)*.

- A judge should not preside in cases involving an attorney with whom the judge had gone on group cruises and attended several small group dinners. *Inquiry Concerning Shook, Decision and Order* (California Commission on Judicial Performance October 29, 1998) (<http://cjp.ca.gov/>).

- A judge is required to recuse herself from a case involving an attorney with whom the judge and her immediate family have a close social relationship, including one-on-one social breakfasts. *Connecticut Emergency Staff Opinion 2009-30*.

- A judge is not disqualified when he is the godfather of the child of the assistant state attorney in the case, but in some cases, a judge is required to disclose a close personal relationship with an attorney to the opposing attorneys and parties. *Florida Advisory Opinion 93-21*.

- A judge should disqualify himself in cases involving an attorney with whom the judge has had a close social relationship for 28 years, who has served and will serve as the judge’s campaign treasurer, and who represented the judge in a personal injury lawsuit 11 years previously. *Florida Advisory Opinion 04-1*.

- A judge is not disqualified from cases involving an attorney from whom the judge accepted a weekend trip to Maine eight to nine years ago but should disclose on the record that, since the trip, he has voluntarily recused from cases involving the attorney and his social relationship with the attorney has consisted of friendly conversations at the courthouse and the regular exchange of e-mails. *Florida Advisory Opinion 2009-1*.

- A judge is not required to disqualify but is required to disclose when an attorney appearing before the judge worked for seven years with the judge at a firm; they have maintained a personal friendship; the judge’s children were members of the attorney’s wedding party; the judge, the attorney, and their spouses have dinner once a year; and the judge’s children have cared for the attorney’s children. *New York Advisory Opinion 08-166*.

- A judge must recuse when the judge has a close, continuing social relationship with the spouse of an attorney appearing before the judge. *New York Advisory Opinion 07-26*.

- A judge is not disqualified from a case in which a personal friend is counsel absent additional circumstances (*Washington Advisory Opinion 04-2*).

Compare *West Virginia Advisory Opinion* (June 12, 2008) (judge should disclose a social relationship with an attorney when the judge and her husband intend to vacation with the attorney and the attorney’s wife and the attorney was the judge’s campaign manager; the judge must disqualify if one of the parties files a motion to recuse) with *West Virginia Advisory Opinion* (March 29, 2004) (judge may preside in cases in which an attorney is a close personal friend without disclosing that the attorney and her spouse have vacationed with the judge’s family and the attorney and the judge belong to the same social clubs and shop together).

Several advisory opinions address a judge’s duty to disclose or disqualify when an attorney in a case is a member of the same law firm as a friend of the judge. *Connecticut Emergency Staff Opinion 2009-30* (judge is not required to recuse herself from a case involving an attorney from the same firm as an attorney with whom the judge has a close social relationship); *Florida Advisory Opinion 04-35* (judge must disclose a close personal friendship with an attorney in cases involving that attorney’s associate if the judge would disclose the relationship if the friend were appearing personally); *New York Advisory Opinion 92-41* (judge need not recuse when a person with whom the judge was socially involved several years previously is a member of the law firm representing a party in a matter before the judge); *U.S. Advisory Opinion 11* (2009) (judge is not required to recuse from

all cases handled by a law firm simply because the judge is friends with some members of the firm absent special circumstances).

Analysis

Faced with a friend appearing as an attorney in a case, a judge should apply a two-part test, with subjective and objective components. First, the judge consults his or her own “emotions and conscience.” *Massachusetts Advisory Opinion 04-9*. If the judge subjectively believes he or she can be fair, the judge then asks whether objective observers, fully informed of the nature of the relationship, would entertain significant doubts that the judge could act impartially in cases involving the attorney.

To apply that test, a judge should consider the following factors based on the caselaw and advisory opinions:

- Whether the judge’s family and the attorney’s family are included in their socializing.
- Whether the judge and the attorney vacation together.
- Whether the judge and the attorney visit each other’s homes.
- Whether the judge and the attorney socialize in public or private settings and as part of a large group or one-to-one.
- The frequency of the social contacts between the judge and the attorney.
- The length of the social relationship.
- Whether the relationship is continuing.
- Whether there are additional circumstances such as a current or past financial, political, partnership, or amorous relationship.
- Whether the judge has received a gift or hospitality from the attorney.
- Whether the judge and the attorney have plans for future get-togethers.
- The frequency with which the attorney appears before the judge.
- The culture of the legal community.
- The number of attorneys who practice in the judge’s court.
- Whether other local practitioners know the judge and the attorney socialize.
- Whether the frequency and nature of the judge’s socializing with the attorney differs significantly from the judge’s relationship with other attorneys. 

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

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Recommendation Letters in Adjudicative Proceedings *(continued from page 1)*

Opinion 2005-1 (lifelong friend); *Florida Advisory Opinion 75-18* (letter to federal judge); *Illinois Advisory Opinion 95-12* (letter to federal judge); *Indiana Advisory Opinion 5-91* (on behalf of lawyer in judge's county); *Massachusetts Advisory Opinion 97-2*; *New York Advisory Opinion 88-63* (court employee); *New York Advisory Opinion 89-73* (lawyer); *New York Advisory Opinion 91-46* (close friend); *Pennsylvania Informal Advisory Opinion 10/24/07* (neighbor's son); *Pennsylvania Informal Advisory Opinion 9/13/05* (son's former coach); *Washington Advisory Opinion 92-17* (adult child of family friend); *West Virginia Advisory Opinion* (March 19, 2007) (family member of good friend). Moreover, a judge is prohibited from writing a character reference for use in sentencing even if the letter is written on plain paper without using the judicial title, is addressed "To Whom It May Concern," is based on the judge's personal observations, and is given to the defendant's attorney. *Washington Advisory Opinion 92-17*.

The prohibition also applies to a request for a character reference to be used at a bond hearing (*South Carolina Advisory Opinion 21-2005*) or in support of a bail application for a former client (*New York Advisory Opinion 98-88*). Further, a judge may not submit a recommendation to a district attorney in connection with a former law clerk's plea bargain (*New York Advisory Opinion 89-4*) or regarding a close friend's arrest for driving while intoxicated (*Pennsylvania Informal Advisory Opinion 3/12a/08*).

Several judges have been disciplined for writing character reference letters on official court stationery to sentencing judges. For example, in *Inquiry Concerning Fogan*, 646 So. 2d 191 (Florida 1994), the Florida Supreme Court acknowledged that the judge's letter, "standing alone, constitutes no major act of judicial misconduct. Judge Fogan said some nice things about a friend. These things are, no doubt, also things that a sentencing judge may like to know, especially when they are from another judge." The court concluded, "therein lies the danger that the Canons seek to curb."

Judges must not act on their own initiative, especially in judicial proceedings, to lend the prestige of their office for the private benefit of another. This practice and its appearance undermines the very prestige and respect that is being traded upon and, inevitably, erodes public confidence in the judiciary.

The argument that a judge is not "testifying" because a letter is not under oath was rejected in *Fogan*. The court held that the prohibition on testifying as a character witness was sufficiently broad to encompass a written statement voluntarily submitted with the knowledge and understanding that it may be used directly or indirectly in some adjudicatory proceeding.

If a judge is properly summoned to testify as a character witness, however, a judge is obligated to comply. *See e.g., Inquiry Concerning Fogan*, 646 So. 2d 191 (Florida 1994). Moreover, a judge may answer an official request for information from the sentencing judge (*Illinois Advisory Opinion 95-12*), the prosecutor (*Arkansas Advisory Opinion 2005-1*), a parole and probation officer on behalf of the sen-

tencing judge (*Florida Advisory Opinion 75-22*), or the probation department (*New York Advisory Opinion 91-46*). A defense attorney's representation that a probation officer has requested a letter, however, is not an official, formal request to which a judge may respond. *Inquiry*

Concerning Ward, 654 So. 2d 549 (Florida 1995). Moreover, a letter extolling a defendant's virtues and recommending a particular sentence is not "information" within the meaning of the exception, but a prohibited character reference. *Id.*

Both the general rule and the exception were expressly incorporated in commentary to Canon 2B of the 1990 model code: "A judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons information for the record in response to a formal request." That provision was omitted from the 2007 model code.

Pardon and parole

Similarly, a judge is not permitted to make a recommendation regarding parole, pardon, or clemency. *See Alabama Advisory Opinion 78-44* (pardon or parole); *Florida Advisory Opinion 77-17* (parole); *Florida Advisory Opinion 82-15* (pardon); *Florida Advisory Opinion 97-7* (clemency for former client); *New York Advisory Opinion 97-92* (probation for former client); *New York Advisory Opinion 08-143* (clemency for former litigant); *Pennsylvania Informal Advisory Opinion 3/22/04* (presidential pardon); *South Carolina Advisory Opinion 6-1994* (pardon for college classmate); *Texas Advisory Opinion 146* (1992) (parole);

Several judges have been disciplined for writing character reference letters on official court stationery to sentencing judges.

Texas Advisory Opinion 207 (1997) (presidential pardon); *U.S. Advisory Opinion 65* (2009) (commutation of sentence; pardon, parole).

Even the judge who sentenced an inmate may not provide a recommendation about parole or clemency although the judge may provide objective information in response to an official request. *See, e.g., Kansas Advisory Opinion JE-79* (1998); *U.S. Advisory Opinion 65* (2009). *But see Alabama Advisory Opinion 83-177* (judge who presided over trial may respond, either positively or negatively, to proposed parole for inmate where a statute requires that the trial judge be given notice of the impending parole). The Illinois advisory committee emphasized that a judge may respond only to a formal request directly from the prisoner review board and that neither the petitioner's notification to the sentencing judge of a clemency hearing nor a general invitation for comments directed to interested parties and published in a newspaper constitutes an official request. *Illinois Advisory Opinion 05-6*.

Further, the Alaska advisory committee cautioned that a sentencing judge who responds to an official request by the pardon or parole board should refrain from giving personal opinions and should narrowly address the criteria used by the pardon or parole board. *Alaska Advisory Opinion 2003-1*. The opinion noted that, "because the only permissible communications are 'official' communications, official court stationery should be used for the letters to the pardon or parole board."

A few advisory committees have allowed a judge to write a letter of recommendation on behalf of a former client to a pardon or parole board in response to an official request. The New York judicial ethics committee cautioned that the statement must be based upon the judge's knowledge of the inmate and be designated "personal and unofficial." *New York Advisory Opinion 97-92*. The Tennessee judicial ethics committee concluded that a judge may write a letter to a parole or pardon board on behalf of a former client because a judge "should not be required to forego his or her First Amendment right to free speech in all instances." *Tennessee Advisory Opinion 94-5*. Noting that the judge believed his former client had a meritorious cause, the committee emphasized that its advice should not be broadly interpreted, but was limited to the facts of the particular request.

In contrast, the Florida advisory committee stated that a judge should not provide a *recommendation* regarding a former client who was seeking commutation of his sentence even in response to a request from the parole and probation commission but could furnish *information*. *Florida*

Advisory Opinion 84-14. The committee was concerned that a letter of recommendation would inject the prestige of the judicial office into the proceeding and be misunderstood as an official testimonial. The committee also noted a potential for conflict between the judge's "duty as an attorney not to reveal matters unfavorable" to a client, and her "duty as a judge to be completely candid and truthful."

There may also be an exception for judges who are former prosecutors. The Washington advisory committee stated that a judge may, based on information the judge learned while acting as the prosecuting attorney, write a letter to the indeterminate sentence review board that focuses on the nature of the defendant's criminal activity and its impact on the victims. *Washington Advisory Opinion 97-14*. The committee cautioned that the letter should not be on official letterhead or refer to the judge's current position and should use the judge's personal address.

The Alabama advisory committee also stated that a judge may write a letter opposing the parole of a prisoner from a sentence imposed as the result of a conviction prosecuted by the judge as an assistant district attorney where a statute envisions that officers of the court who participated in the trial can provide input into the parole decision. *Alabama Advisory Opinion 06-866*. However, the committee cautioned that the judge should not provide the information on the judge's official letterhead, should not identify herself as a judge, and should provide only facts consistent with her capacity as the trial attorney. Similarly, the Kentucky judicial ethics committee advised that a judge who had formerly served as commonwealth's attorney could comply with a parole board rule requiring a prosecutor to write a letter saying he has no objection to a felon receiving early parole board review. *Kentucky Advisory Opinion JE-81* (1991).

Disciplinary proceedings

In most states, the rule against voluntary character testimony has been construed to prohibit a judge, unless requested by bar officials, from writing a character letter to be used in attorney disciplinary proceedings. The prohibition applies even if the attorney is being investigated for conduct that occurred in a trial over which the judge presided. *See Florida Advisory Opinion 92-1; New York Advisory Opinion 90-156*. Thus, a judge may not:

- provide a letter on behalf of a disbarred attorney seeking re-admission to the bar (*Florida Advisory Opinion 88-19; Missouri Advisory Opinion 137* (1988); *New York Advisory Opinion 95-75*);

(continued on page 10)

Recommendation Letters in Adjudicative Proceedings *(continued from page 9)*

- submit a character letter to the state supreme court in bar proceedings to suspend an attorney pending an appeal from a conviction for tax evasion (*Florida Advisory Opinion 75-6*);

- send a letter or affidavit attesting to an attorney's character, competence, and service to the bar and his clients for use at a hearing to determine the sanction in a discipline proceedings (*Nebraska Advisory Opinion 02-2*);

- provide a character reference on behalf of a lawyer seeking reconsideration of disbarment (*New York Advisory Opinion 89-73*);

- provide a letter of support for a lawyer in a discipline or reinstatement proceeding (*North Dakota Advisory Opinion 91-1*);

- write a letter in support of a lawyer who is being investigated by a discipline committee (*Pennsylvania Informal Advisory Opinion 7/29/02*); or

- sign an affidavit attesting to the competency of an attorney to be used in a grievance proceeding (*Texas Advisory Opinion 277* (2001)).

Similar advice has been given regarding judicial discipline proceedings.

- An administrative judge should not write a letter to the State Commission on Judicial Conduct expressing her views of the professional performance of a judge who is the subject of a matter before the Commission. *New York Advisory Opinion 99-101*.

- A judge may not write a letter at the request of another judge's lawyer about his impressions of the other judge to be submitted to the supreme court with the response to judicial discipline charges. *West Virginia Advisory Opinion* (September 4, 1997).

See also New York Advisory Opinion 97-97 (in review of determination of the State Commission on Judicial Conduct, individual judges and a judges' association should not communicate with the Court of Appeals that a judge, who is a member of the association, should not be removed); *In the Matter of Waddick*, 605 N.W.2d 861 (Wisconsin 2000) (it is "at least, inadvisable" for a judge to write a letter speaking to the character of a respondent in judicial disciplinary proceeding).

However, at least three states allow a judge to write a reference letter in discipline proceedings even absent an official request. Canon 2B(2)(b) of the California code of judicial conduct permits judges, even without a subpoena, to "provide the Commission on Judicial Performance with a written communication containing . . . information related to the character of a judge who has a matter pending before the commission, provided that any such factual or character

information is based on personal knowledge."

The Washington advisory committee reasoned that a character letter from a judge to the Washington Bar Association concerning the reinstatement of a disbarred attorney was appropriate because the bar association operates as an arm of the supreme court. *Washington Amended Advisory Opinion 88-5*. *See also Washington Advisory Opinion 03-8* (judge may provide factual testimony to the bar association about an attorney's professional skills in a letter that will be part of the attorney's disciplinary file, not as a mitigating factor but as an acknowledgment that the lawyer is considered an excellent trial attorney).

The Alabama advisory committee has also issued several opinions allowing a judge to submit a letter of support or an assessment of an attorney's performance for use in discipline proceedings. *Alabama Advisory Opinion 78-48* (judge may respond to general notice of a petition for reinstatement to the state bar that requests members of the public to furnish information relevant to the qualifications of the petitioner); *Alabama Advisory Opinion 80-84* (judge may submit a letter in support of an attorney's application for reinstatement at the attorney's request); *Alabama Advisory Opinion 86-269* (judge may submit a letter to the Board of Bar Commissioners in support of an attorney against whom disciplinary action has been taken or is being contemplated); *Alabama Advisory Opinion 89-390* (judge may submit an assessment of an attorney's performance at a trial over which the judge presided to the state bar grievance committee even if the case is pending on appeal).

A judge is permitted to furnish the judge's opinion as to a lawyer's character in response to an official request from the referee in attorney discipline proceedings (*Nebraska Advisory Opinion 02-2*); from the presiding hearing officer, disciplinary committee, or its counsel (*New York Advisory Opinion 89-73*); or from a discipline committee that is investigating a lawyer (*Pennsylvania Informal Advisory Opinion 7/29/02*). In addition, a judge may authorize a lawyer to tell the disciplinary committee that it may contact the judge (*New York Advisory Opinion 90-156*). *See also Commentary to Canon 2B, California Code of Judicial Ethics* (judge "shall provide information to disciplinary bodies when officially requested to do so)."

Judges are also prohibited from providing a letter of recommendation in disciplinary proceedings involving court employees or individuals in other professions.

- A judge may not write a letter attesting to the character of a court employee and opposing termination of the employee for disciplinary reasons for use in an appeal from

a termination decision. *Massachusetts Advisory Opinions 04-4 and 04-5*.

- A judge should not write a letter at the request of a court employee facing disciplinary charges attesting to the employee's good character, work ethic, and job performance. *New York Advisory Opinion 05-34*.

- A judge may not write a letter of support on behalf of the judge's personal physician for use in a hearing by state medical licensing authorities considering whether the doctor may continue to practice. *Nevada Advisory Opinion JE04-004*.

Other adjudicative proceedings

Other situations in which judges have been warned against providing a letter of recommendation or similar reference, at least without an official request, include family court, permit and licensure, and immigration proceedings and in support of terminated employees or insurance applications.

- A judge should not, without a subpoena or official summons but under threat of subpoena, sign an affidavit providing opinion evidence concerning the parenting skills of the parties in a pending matter, identifying himself as a judge, and stating that his opinion was shared by other judges in the county. *In re Poyfair*, Stipulation, Agreement, and Order (Washington State Commission on Judicial Conduct December 1, 1995) (www.cjc.state.wa.us).

- A judge may not write a recommendation for use in a pending marital dissolution in which custody of a child is at issue to the effect that the judge's stepson is a person of good character. *California Advisory Opinion 40* (1988).

- A judge should not send a letter to an employer recommending that a former employee be reinstated. *Nebraska Advisory Opinion 07-4*; *Virginia Advisory Opinion 06-1*.

- A family court judge should not provide a reference for the foster parent application of a friend because such applications are heard in family court. *New York Advisory Opinion 05-60*.

- A judge should not initiate letters supporting an individual's efforts to have his civil rights restored. *Nebraska Advisory Opinion 07-4*; *Virginia Advisory Opinion 06-1*.

- A judge should not write a letter to a modeling agency asking for the reinstatement of an employee who had been fired after an arrest. *In the Matter of Wright*, Determination (New York State Commission on Judicial Conduct 1988) (www.scjc.state.ny.us).

- A judge may not voluntarily provide a reference in support of an attorney's application to adopt a child that will become part of the file to be considered by the court, which is located in the same county where the judge presides. *New*

York Advisory Opinion 08-211.

- A judge should not initiate letters supporting an individual's efforts to renew permits such as those allowing the possession of concealed weapons. *Nebraska Advisory Opinion 07-4*; *Virginia Advisory Opinion 06-1*.

- A judge should not provide a letter of good character on behalf of a friend applying for a license to practice acupuncture to the state department of education. *New York Advisory Opinion 93-12*.

- A part-time judge may not write a letter of reference to the sheriff in the county in which the judge presides in connection with the application of a long-time client for a pistol permit even if the letter would not mention the judicial office and would be written "as an attorney on the attorney's letterhead." *New York Advisory Opinion 95-33*.

- A judge should not write a letter, on official court stationery and signed in the judge's name, to the New Jersey Racing Commission extolling a client and good friend who had unsuccessfully sought a license. *In the Matter of Anastasi*, 388 A.2d 620 (New Jersey 1978).

- A judge should not write a letter of reference for his dog walker to be submitted to the United States embassy in a foreign country to aid the individual's fiancé to obtain a visa. *New York Advisory Opinion 02-123*.

- A judge should not write a letter to the state department of labor supporting an application for alien labor certification at the request of a waiter known to the judge and the judge's family at a neighborhood restaurant. *New York Advisory Opinion 03-47*.

- A judge should not voluntarily write a letter to the Immigration and Naturalization Services attesting to the good character of a member of the judge's church and requesting an expedited exclusion hearing, but may respond to a request from the INS for a letter of good character. *New York Advisory Opinion 03-51*.

- A judge may not write a "to whom it may concern" letter on behalf of an attorney who has had her insurance policy canceled as a result of a malpractice claim. *Washington Advisory Opinion 87-1*.

- A judge should not write a recommendation for a life insurance policy on behalf of an attorney who had been addicted to a controlled substance, but has since been rehabilitated. *New York Advisory Opinion 05-107*. 

This article is an excerpt from the paper Recommendations by Judges, which was recently up-dated. See page 12.



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Recommendations by Judges

The American Judicature Society has published an up-dated version of its paper *Recommendations by Judges*, part of its Key Issues in Judicial Ethics series. Written by Cynthia Gray, director of the Center for Judicial Ethics, this 25-page publication discusses the guidance judicial ethics advisory committees have provided judges deciding whether to provide a letter of recommendation or act as a reference in contexts such as employment, admission to an educational institution or the bar, appointment to the bench, and adjudicative proceedings. Originally published in 1996 and up-dated in 2000, the 2009 up-date incorporates recent advisory opinions and citations to the 2007 ABA *Model Code of Judicial Conduct*.



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