CANON 2—THE HIRING OF COURT EMPLOYEES

Issue

Shall the Representative Assembly support and endorse a Resolution to Amend the Michigan Code of Judicial Conduct to *add* Section (F) to Canon 2, as follows:

CANON 2 (F)
A Judge Should Avoid
Impropriety and the Appearance
of Impropriety in
All Activities

F. A trial court judge should neither contract as an independent contractor nor employ as a court staff member in any capacity a spouse, sibling, parent or child of an attorney having an office located within the same jurisdiction as that trial court or of an attorney who engages in the practice of law in that trial court.

Synopsis

This rule would help avoid impropriety or the appearance of impropriety when family members of judges are working in the same court system.

Background

Relative of judges, prosecutors, defense lawyers and civil attorneys who work in positions of authority within the court system, with access to information in court files and case scheduling opportunities which may be used to assist one party to the disadvantage of another.

Opposition

None known.

Prior Action by Representative Assembly

None known.

Fiscal and Staffing Impact on State Bar of Michigan

None known.

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on September 18, 2008

Should the Representative Assembly support and endorse a Resolution to amend the Michigan Code of Judicial Conduct to *add* Section (F) to Canon 2 as proposed?

(a) Yes

or

(b) No

stand. You can all be seated.

Any abstentions stand. I don't see any abstentions.

With that, the motion is approved 62 votes to 37 votes.

(Applause.)

CHAIRPERSON GARDELLA: Next on the agenda is item number 12, consideration of Canon 2(F) of the Michigan Code of Judicial Conduct. Mr. Abel, if you would like to approach the microphone or the podium, whichever you prefer.

MR. ABEL: Thank you, Mr. Gardella. I have been upfront, and it wasn't all that much fun. Thank you all very much, by the way, for your support on that last proposal. I think that was the right thing to do, obviously.

In regard to the proposals regarding pre-sentence investigation reports, I have no particular ownership on this.

CHAIRPERSON GARDELLA: Mr. Abel, this is on the second page. This would be item 12, which was going to be 11:25.

MR. ABEL: I am sorry. Thank you. In regard to that matter, the only comments that were received that I am aware of were those from the Attorney

General, and it may be that this matter needs more discussion. I am not sure it does. It seems that the Attorney General missed the point, which is that the defendant who is doing the appeal is the one who should have the copy of the report.

CHAIRPERSON GARDELLA: Mr. Abel, this is item 12.

MR. ABEL: Code of conduct, okay. This has to do with -- maybe I should have gone upfront -- judges allowing relatives to be employed in the courts in which they work, and I know that that happens in various places, and, for example, in Livingston County the prosecutor's wife is in charge of juries -- she is the court clerk -- and that to me is certainly an appearance of impropriety. Now, I am not saying the judge did anything wrong in this. They are like why should that reflect on the court? How is the judge doing anything wrong?

Well, it's the court's hiring practices that are at issue here, and there is an appearance of impropriety when someone who is related to someone in a position of authority has more than just a straight ministerial role, where they have the opportunity to impact the docket and the jury.

If the body felt that this needs more work,

because there really were no comments on this aside from -- well, there were no comments -- that if we were to refer it, I would suggest that we refer it to the Assembly Review, I am sorry, Special Issues or Drafting Committee with specific instructions to seek comments from particular sections that are involved, basically any section that is involved in litigation where people are in court would be impacted, and I see those as criminal law, family law, general practice, judicial conference, legal administrator, litigation, negligence, prisons and corrections, public

corporation law, Civil Procedure in the Courts Committee, the Criminal Jurisprudence and Practice Committee.

CHAIRPERSON GARDELLA: Mr. Abel, are you making that as a motion to refer it to the Special Issues Committee?

MR. ABEL: Yes, with instructions, because -- unless you all want to vote for it right now.

CHAIRPERSON GARDELLA: Is there support for his motion?

VOICE: Support.

CHAIRPERSON GARDELLA: With the motion to refer it to the Special Issues Committee with instructions to refer the proposal to all of the

sections of the Bar so that they can comment or make proposals to modify the proposal, whatever they choose, the support does go along with that. I see a yes on that. So any discussion on that proposal, or on the motion?

Hearing none, all in favor say aye.

Those opposed nay.

And any abstentions say yes.

The motion carries that that motion and the proposal will be referred to the Special Issues Committee for further development and consideration.

At this point we will move along to item number 16, which is consideration of MCR 6.425, (B) and (C), which is providing copies of presentence reports to defendant and defendant's counsel. The proponent is Matt Abel.

MR. ABEL: Thank you. I appreciate it. I

From: "Kakish, Katherine" <KakishK@michigan.gov>
To: "Breitmeyer, Kimberly (DELEG)" <breitmeyerk@michigan.gov>, "Anne Smith" ...
CC: "Mark Burzych" <MBurzych@fsblawyers.com>, "Gobbo, Stephen (DELEG)" <gobb...
Date: 5/11/2009 10:54 AM
Subject: RE: Ad. Law Section's Position on Judicial Canon #2.

Thank you, Kim.

Anne, please add this along with the other responses.

Katherine Kakish
Assistant Attorney General
Licensing and Regulation Division
Cadillac Place
3030 W. Grand Blvd., Ste 10-200
Detroit, MI 48202
(313) 456-0040
Fax: (313) 456-0041

-----Original Message-----
From: Breitmeyer, Kimberly (DELEG)
Sent: Friday, May 08, 2009 1:27 PM
To: Kakish, Katherine
Cc: 'Mark Burzych'; Gobbo, Stephen (DELEG)
Subject: Ad. Law Section's Position on Judicial Canon #2.

Dear Kathy:

On behalf of the Bar's Administrative Law Section, please include the following regarding the discussion at Representative Assembly:

Admin. Law Section's Position on SBM Judicial Canon #2.

We object to the proposed Canon as written but remain concerned about the conflict of interest issues raised by proponents of the Canon, especially given the serious lack of public confidence in the judiciary and the need to maintain the impartiality and the appearance of impartiality of the judiciary. Our opposition concerns the methods and language used by the proposed Canon to correct the problem, and not to the principle of preventing the conflicts of interest that the Canon is designed to address. However, we urge the Representative Assembly to urgently and carefully address the issue of restoring public confidence in the judiciary.

I hope all is well with you!

Thanks,

Kim Breitmeyer

Administrative Law Specialist

Legal Affairs Division

Bureau of Commercial Services

Department of Energy, Labor & Economic Growth

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LABOR & EMPLOYMENT LAW SECTION

April 20, 2009

Anne Smith
306 Townsend Street
Lansing, Michigan 48933

Re: Request for Comment - The Hiring of Court Employees

Dear Ms. Smith:

The Council of the Labor and Employment Law Section has reviewed the request for comment as to whether the Representative Assembly should support and endorse Resolution to Amend the Michigan Code of Judicial Conduct to add a new provision to Canon 2. The proposed new Section (F) to Canon 2 is as follows:

> F. A trial court judge should neither contract as an independent contractor nor employ as a court staff member in any capacity a spouse, sibling, parent or child of an attorney having an office located within the same jurisdiction as that trial court or of an attorney who engages in the practice of law in that trial court.

The LELS Council finds that the proposed amendment is overbroad and will lead to unnecessarily harsh results. The prohibition against trial court judges hiring covered relatives of "an attorney having an office located within the same jurisdiction as the trial court" is over-inclusive. Consider, for example, an attorney whose primary office is based in Detroit. The law firm for which the attorney works also has offices in Grand Rapids, Lansing, Ann Arbor and Detroit. If that attorney has a child who graduated from law school, this amendment would bar employment of that individual as a judicial assistant or clerk for a Grand Rapids circuit court judge, regardless whether the individual is the best qualified for the position, or the frequency with which that attorney practices in that court.

In addition, since all attorneys in Michigan are licensed to practice law in all state trial courts, the amendment would theoretically bar all judicial employment by a covered relative. Even if this is not the intent,

if a Detroit-based attorney who does not currently have a case in Traverse City is retained to represent a client in that court, would this require a covered relative employed by that court to resign? Is the mere potential of that attorney being retained to represent a client in Traverse County enough to disqualify the covered relative as an applicant?

The LELS Council believes that the proposed amendment paints with too broad a brush. It attempts to cure a perceived problem with vague and imprecise language. It also assumes that trial judges are unable to act without bias or partiality where a lawyer has familial connections to any court staff employee. Our Council believes that instances of bias are more properly addressed on a case by case basis, without employing overbroad assumptions such as those contained in the proposed amendment. The LELS Council recommends that the Representative Assembly of the State Bar of Michigan oppose the proposed amendment to Canon 2.

If you have questions regarding the foregoing, please contact me.

Very truly yours,

Daniel J. Bretz
Section Chair
Labor and Employment Law Section

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JUDICIAL QUALIFICATIONS COMMITTEE

March 27, 2009

Katherine Kakish
Representative Assembly Chair
Assistant Attorney General
Licensing & Regulation Division
3030 W. Grand Blvd Ste 10-200
Cadillac Place
Detroit, MI 48202-6030

Dear Ms. Kakish:

The Judicial Qualifications Committee was invited to comment on the proposed amendment to Canon 2(C) of the Michigan Code of Judicial Conduct which reads as follows:

> A judge should neither contract as an independent contractor nor employ as a court staff member in any capacity (a) a spouse, sibling, parent or child of an attorney having an office located within the same jurisdiction as that trial court, (b) a spouse, sibling, parent or child of a prosecuting attorney for the same jurisdiction as the trial court, (c) a spouse, sibling, parent or child of a public defender for the same jurisdiction as the trial court, or (d) a spouse, sibling, parent or child of an attorney who engages in the practice of law at that trial court.

In our capacity as co-chairs of this Committee, we forwarded the proposal to the members and discussed the merits during our March 10, 2009 meeting. Although a formal vote was not taken, the Judicial Qualifications Committee does not support the proposed amendment and all agreed this letter should be sent expressing our collective viewpoints.

The proposal is viewed by this Committee as overly broad and, therefore, punitive to practitioners. Moreover, specific rules that govern the hiring of court staff would be misplaced in the Michigan Code of Judicial Conduct. If, however, this type of restriction is deemed necessary, careful consideration should be given to developing an administrative rule that would allow individual courts to address the issue on a case-by-case basis.

We hope these comments will be of assistance to the Representative Assembly as it considers the proposed amendment to Canon 2(C) of the Michigan Code of Judicial Conduct. If you have any questions or concerns, please feel free to contact us.

Sincerely,

Robert B. Webster (pmp)
Co-Chair

Kathleen L. Bogas (pmp)
Co-Chair

Daniel T. Stepek (pmp)
Co-Chair

/pmp

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PROBATE & ESTATE PLANNING SECTION

March 16, 2009

Anne Smith
State Bar of Michigan
306 Townsend
Lansing, MI 48933

Dear Ms. Smith:

The Council of the Probate and Estate Planning Section of the State Bar of Michigan discussed the proposed changes to Canon 2 - The Hiring of Court Employees at its regular March 14, 2009 meeting.

After consideration, the Council voted unanimously in opposition to the proposed changes to Canon 2. The Council feels this proposal is unduly broad and limits the ability of courts to hire the most qualified person for a position. Further, if enacted, the amendments to Canon 2 would force the resignation of several current court employees, some of whom are exceptionally well-qualified.

Very truly yours,

Nancy L. Little

Nancy L. Little, Chair
Probate and Estate Planning Section

cc: Probate and Estate Planning Council

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FAMILY LAW SECTION

March 10, 2009

Ms. Katherine Kakich
Chair - Representative Assembly
3030 W. Grand Blvd., Ste 10-200
Detroit, MI 48202

Re: Proposed Amendment to Canon 2
Hiring of Court Employees
Family Law Council Position

Dear Ms. Kakich:

Please be advised that the Family Law Council considered the proposed Amendment to Canon 2, regarding the Hiring of Court Employees at a full Council Meeting on March 7, 2009 in Grand Rapids, Michigan.

By unanimous vote, 18-0, the Council opposed the proposed Amendment. The Council considered the following reasons in opposition to the proposal: (1) the broad sweep of the Amendment would preclude the hiring of employees related to attorneys in multiple counties and preclude employment even where there is no evidence of bias or impropriety; (2) it is unclear what the precise nature of the problem is that the proposed Amendment is intended to address; (3) this Court Rule would not only create problems in large jurisdictions where law students are regularly employed, but could cause severe problems in small County jurisdictions; (4) the "synopsis" of the proposed resolution is in conflict with the proposal, and the proposal has a far broader reach than simply addressing problems with Judges hiring relatives; the proposal as written would preclude the hiring of relatives of attorneys in any County where the attorney practices or has an office; (5) a Motion to Disqualify is a clearly available remedy in the limited number of cases in which the issue arises.

Thank you for your assistance in this regard.

Sincerely,

James J. Harrington, III
Co-chair Court Rules/Ethics Committee
Family Law Council-Family Law Section

cc: Carlo Martina, Chair
Barbara Kelly, Chair-elect

From: Carrie Sharlow
To: Elizabeth Lyon
Date: 2/23/2009 7:22 AM
Subject: Fwd: Re: Request for Comment - The Hiring of Court Employees

>>> "Terry Adler" <lemonade1@sbcglobal.net> 2/20/2009 2:59 PM >>>

Carrie,
When I received your e-blast, I copied it and sent it out on the Consumer Law Section list, with a request for comment and a promise to convey the comments to you. Below are the three comments that I received from the members.

As for my own comment, I guess that I would have to align myself with Christy Pudyk. The rule seems overbroad and onerous. It presumes that a judge will be unfair instead of presuming that the judge will be fair. To me, that's backwards.

Terry J. Adler
Terry J. Adler, PLLC
10751 S. Saginaw St., Ste. F
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"My comment is more of a concern- what happens when an attorney starts to date to a clerk or something? Is dating allowed, and then what happens when they get married?

What about clerks that are friends? There is just as much "risk" that they will leak information, or help out the attorney. It is for that very reason that most attorneys befriend the clerks J

While I do not like the appearance of impropriety, I think this rule goes to far.

Christy M. Pudyk
Attorney at Law
Pudyk Law Office, PLLC
46825 Garfield
Macomb, MI 48044
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(586) 416-4340"

"I think this is long overdue. The nepotism inherent in some courts is discouraging to those of us who don't share the requisite last names. It is amazing this was not done before.

Lynn H. Shecter
Roy, Shecter & Vocht, P.C.
36700 Woodward Ave., Ste. 205
Bloomfield HIlls, MI 48304
248-540-7660
shecter@rsmv.com"

"I would vote yes." -- clarence r constantakis [claretakis@comcast.net]

Michigan Judges Association
Founded 1927

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Treasurer:
HON. LITA M. POPKE
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Immediate Past President:
HON. MICHAEL F. SAPALA
Detroit, MI.

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HON. GEORGE S. BUTH
HON. ALTON T. DAVIS
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HON. HENRY W. SAAD
HON. KENNETH W. SCHMIDT
HON. VIRGIL C. SMITH, JR.
HON. THOMAS L. SOLKA
HON. PAUL STUTESMAN

Executive Director:
TIM WARD

January 28, 2009

Ms. Katherine Kakish
Representative Assembly Chair
Assistant Attorney General
Licensing and Regulation Division
3030 West Grand Blvd.
Ste. 10-200, Cadillac Place
Detroit, MI 48202

Dear Ms. Kakish:

I am writing to you on behalf of the Michigan Judges Association in response as to whether or not the Representative Assembly of the State Bar should support and endorse a resolution to amend the Michigan Code of Professional Conduct to *add* Section (F) to Canon 2. We reviewed the proposed amendment, as well as discussed it at our board meeting in January. It was the consensus of our committee and board that the amendment is not necessary. I know our county, and I believe a number of other counties, already have a nepotism policy as to employment of family members. I know I could not hire my daughter as a law clerk to work for me.

When I was admitted to the bar approximately 37 years ago, my father was on the bench and I took the job as an Assistant, and subsequently, Chief Assistant Prosecutor in Saginaw County. We had a standing order/rule that I would not appear in his court nor have contact with any case appearing in his court. I have a similar situation with my brother, who is now in the Prosecutor's Office. Similarly, he has nothing to do with any files that I have coming in front of me, nor does he ever appear in my court.

Neither our committee nor board has taken a vote on the proposal, but none of the comments from the members support the proposal. The proposed rule presumed that a judge that hired a relative of an attorney would be incapable of acting without bias or prejudice in dealing with a lawyer. With the make-up of our local bar, a vast majority of attorneys never appear in court. As an example, should the attorney of a spouse employed within the court system appear before a judge, a proposed recusal form could be filed or the matter could be taken up with counsel on the record. The rule, itself, would appear to be not needed. With all due respect to the proposal, we would ask that the amendment be defeated.

Thank you for allowing us the opportunity to review and have input in this matter.

Sincerely,
MICHIGAN JUDGES ASSOCIATION

Hon. Fred L. Borchard
President

prw
cc: Hon. W. Wallace Kent, Jr.

STATE OF MICHIGAN

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PROBATE AND FAMILY COURT
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FAMILY DIVISION
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MARY LOU BURNS
FRIEND OF THE COURT
(989) 673-4848

December 29, 2008

Katherine Kakish
Assistant Attorney General
3030 W. Grand Boulevard, Suite 10-200
Detroit, MI 48202

RE: Canon 2, Code of Judicial Conduct

Dear Kathy:

Enclosed is a copy of the material which I received from Judge Elwood Brown of Port Huron concerning the proposed amendment to Canon 2 of the Code of Judicial Conduct. As stated, his letter represents the position of the Michigan Probate Judges Association. Please pass these materials on to the appropriate parties for consideration by the Assembly at its next meeting.

Very truly,

W. Wallace Kent, Jr.
Judge of Probate/Family Court

WWK/ps

STATE OF MICHIGAN

ST. CLAIR COUNTY PROBATE COURT
31ST JUDICIAL CIRCUIT COURT
FAMILY DIVISION

201 McMORRAN BLVD.
PORT HURON, MICHIGAN 48060

ELWOOD L. BROWN
CHIEF JUDGE OF PROBATE

JOHN D. TOMLINSON
JUDGE OF PROBATE

December 11, 2008

Hon. Wallace Kent
Tuscola County Probate Court
440 N. State Street Dept. 4
Caro, Michigan 48723

Re: Cannon 2, Code of Judicial Conduct

Dear Judge Kent,

At the meeting of the MPJA on December 5, 2008 the board addressed the proposed amendment to Cannon 2 of the Code of Judicial Conduct as has been proposed by the Representative Assembly of the State Bar of Michigan. In as much as I am the MPJA representative to the State Bar Ethics Committee, President John Hohman requested that I write to you about this issue.

It was the feeling of the Board that the proposed amendment is wholly unnecessary and in many situations would be unworkable. The proposal would seek to place a blanket prohibition upon the court having as an employee in any capacity, a spouse, sibling, parent or child of an attorney having an office located within the same jurisdiction as the trial court or of an attorney who engages in the practice of law in that trial court. Although, such a situation as described could arguably be an issue involving an appearance of impropriety it is more probably an issue to be covered under Cannon 3 involving impartiality.

Cannon 2 essentially covers conduct of the judge and the necessity of avoiding the appearance of impropriety in that conduct. The proposed amendment is not consistent with the remainder of Cannon 2 as it addresses something other than judicial conduct.

Although not on the exact point, the State Bar Ethics Committee has issue several opinions in areas that would be analogous and the reasoning in these opinions would be applicable to the situation attempted to be addressed by the proposed amendment. Opinions J-5 and J-6 (copies of which I have enclosed) are two that have been adopted by the State Bar as formal opinions and are examples.

J-5 addresses a situation wherein the judge or the court employs a lawyer to represent the judge or the court, and that lawyer appears before the judge in another case, while so employed. In the opinion it is important to note that there is no absolute rule that would prohibit the lawyer in the employ of the court or of that specific judge from appearing before the court. There is however a duty on the part of the judge to disclose the relationship to the other side thereby allowing any party to raise the issue of disqualification under MCR 2.003 or to allow remittal of disqualification under that same rule. (Formal opinion R-20 addresses the corresponding duty of the lawyer.)

As noted in J-5 if the judge is asked to disqualify himself and he denies that request the court rule provides a method to have the issue addressed by a different judge. J-6 addresses the fact that the general court rules were specifically amended to allow for remittal of disqualification of a judge except in cases wherein the judge is personally biased or prejudiced concerning a party.

By placing a blanket prohibition, the proposed amendment would defeat the specific purpose of the amendments to MCR 2.003 under the guise of appearance of impropriety. If a lawyer hired directly by the judge or the court can appear before the court so long as disclosure is made and the other party given an opportunity to file a motion to disqualify as is indicated by J-5 and that does not involve an appearance of impropriety then the fact that a child of a lawyer appearing before the judge may work as a clerk in the Friend of Court office surely does not present an appearance of impropriety.

The position of the Board of MPJA is that individual situations can be addressed under existing rules, through appropriate disclosure by the court of any relationship that might exist between a lawyer appearing before the court and an employee of the court and allowing the provisions of MCR 2.003 to be used, including the provision relating to remittal of disqualification. (As noted in R-20, if a judge fails to disclose a relationship the lawyer must act in order to avoid assisting the judge in a violation.)

The Board also took the position that the proposed rule would be unworkable. Although the judge may know lawyers who practice before them it is not a guarantee that they always do. In many jurisdictions the large number of lawyers means that a judge may not know all the lawyers who have an office in their jurisdiction.

If a court hires a person as an employee and a lawyer opens an office in the courts jurisdiction or begins to appear regularly before the judge, under this proposed rule the court would have to discharge the employee which of course would not only be unfair to the employee but could lead to issues involving a union contract.

Additionally judges cannot be expected to know the relatives of people who appear before them. In any given situation the judge may know or may not know that a particular person is related to a lawyer. By placing a blanket prohibition as the proposed rule attempts to do, a judge is held accountable to the extent of removal from the bench if a person works for the court that is related to a lawyer with a law office in his or her jurisdiction or a lawyer who practices in the court even if the judge would have no actual

knowledge of the relationship. (What constitutes practices, appearing once or five times or on a regular basis?)

The Board asks that you do what you can to prevent this proposal from being adopted. If there is anything that you feel I or other members of the Board can do to assist or if you have any questions please feel free to contact us.

Best regards,

Elwood L. Brown

J-5

July 24, 1992

SYLLABUS

While litigation against the judges of a court for actions taken in an official judicial capacity is pending, and counsel for the judges appears before any of the judges in an unrelated matter, the judge must disclose the relationship to the parties and their counsel.

References: MCJC 3; MCR 2.003(B); JI-39, JI-43; R-14; CI-306; *Kolowich v Ferguson*, 264 Mich 668 (1939); *People v Lowenstein*, 118 Mich App 475 (1982); *Pitoniak v Borman's Inc*, 104 Mich App 718 (1981).

TEXT

A circuit judge of a metropolitan county has inquired on behalf of a multi-judge bench whether recusal by the judges of that bench is required in all cases where a private law firm (which happens to be one in which the inquiring judge was formerly a member) retained to represent the county circuit judges in

superintending control or federal civil rights actions brought against them by disgruntled litigants appears before the court.

A similar question was addressed in ABA i1477, which required recusal where litigation against the presiding judge was ongoing, absent a remittal of disqualification and subject to the rule of necessity. ABA i1477 is predicated on Canon 3C of the 1972 ABA Model Code of Judicial Conduct, which is essentially the same as 1990 Model Code of Judicial Conduct Canon 3E. ABA i1477 states:

> "The Model Code declares that a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. Canon 3.
>
> "Canon 3C(1) of the Model Code sets forth instances in which a judge should disqualify himself. These are but examples, and the general standard is not limited to them. Any circumstances that objectively lead to the conclusion that the judge's impartiality might reasonably be questioned calls for disqualification. This objective standard extends beyond the judge's personal belief that his impartiality is not impaired. [Citation omitted.] Only in unusual circumstances would a judge's impartiality not be subject to reasonable question when a lawyer appearing before the judge in behalf of a client is at the same time representing the judge in

litigation pending before another court, whether the lawyer is representing the judge in a personal matter or in a matter pertaining to the judge's official position or conduct. [Footnote omitted.]"

In Michigan the state court administrator may assign a visiting judge who is not a member of the same circuit bench to preside, therefore the exception of the rule of necessity is not operative. See, MCR 2.003(4). Further, MCJC 3 contains different language than that of the ABA Model Code. MCJC 3C reads:

"A judge should raise the issue of his disqualification whenever he has cause to believe that he may be disqualified under GCR 1963, 405."

GCR 1963, 405, is now MCR 2.003, which provides in pertinent part at MCR 2.003(B):

"Grounds. A judge is disqualified when the judge cannot impartially hear a case, including a proceeding in which the judge

"(1) is interested as a party;

"(2) is personally biased or prejudiced for or against a party or attorney;

". . .

"(7) is disqualified by law for any other reason."

In *Kolowich v Ferguson*, 264 Mich 668, 670 (1933), the Michigan Supreme Court stated:

"We accept the statement of the circuit judge that he has no bias or prejudice and can accord defendant a fair trial. Unless the fact of prejudice or bias is established or the necessities of justice to the defendant require it, a change of judge is an unjustifiable wrong to the public for it works delay, entails expense, and endangers the prosecution."

In *People v Lowenstein*, 118 Mich App 475 (1982), the court stated:

"No human being (even a judge) is completely prejudice free. But our judicial system requires judges.

> Therefore, we make allowances. Under normal circumstances, we will assume (absent evidence to the contrary) that the judge is free enough from bias to make a tolerably nonpartisan decision. For example, a judge will occasionally preside over a case involving a defendant who had earlier pled guilty to the offense. Because this situation often enough arises and because the appearance of impropriety is not that high, we allow the trial judge to remain in charge of the case absent a showing of actual bias. [Citation omitted.] However, we realize that some situations are just too dangerous. Judges normally are not subjected to such special pressures and 'under a realistic appraisal of psychological tendencies in human weakness' we find that the appearance of justice requires the judge to disqualify himself. The test is not whether or not actual bias exists but also whether there was 'such a likelihood of bias or an appearance that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused'. *Ungar v Sarafite*, 376 US 575, 588; 84 S Ct 841; 11 L Ed 2d 921 (1964). In fact, 'even though a judge personally believes himself to be unprejudiced, unbiased and impartial, he should nevertheless certify his disqualification where there are circumstances of such a nature to cause doubt as to his partiality, bias or prejudice'. *Merritt v Hunter*, 575 P2d 623, 624 (Okla, 1978). The right to a fair tribunal is a right grounded in due process. *United States v Sciuto*, 531 F2d 842 (CA 7, 1976)." *People v Lowenstein*, 118 Mich App 475, 481-483 (1982).

The *Lowenstein* court goes on to favorably quote the following passage by the Arizona Supreme Court.

> " '[N]ormally a judge should not sit on litigation involving a party who is a party to other litigation in which the judge himself is a litigant.' *Smith v Smith*, 115 Ariz 299, 303; 564 P2d 1266, 1270 (1977)." 118 Mich App 475, 485.

The test of Lowenstein has been stated another way in *Pitoniak v Borman's Inc*, 104 Mich App 718, 724 (1981):

> "A party who challenges the impartiality of a judge or tribunal need not show actual prejudice; it is sufficient grounds for disqualification if the situation is one in which 'experience teaches that the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable'. *Withrow v Larkin*, 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712 (1975), Crampton, supra, 351."

JI-39 states that when a judge is codefendant with the former law firm in a malpractice action, the judge is automatically recused when the malpractice defense counsel appear before the judge in unrelated matters. In the malpractice case the judge has a direct financial interest in the outcome.

JI-43 states that when a judge's former real estate partnership is sued for actions taken while the judge was a partner, and the judge's lawyer appears before the judge as advocate for another client in unrelated litigation, the judge should disclose the relationship to the parties.

> " . . . [W]hen suit of a substantial nature, not spurious nor used as a tactic to induce disqualification, is filed against a judge, the judge, even absent actual prejudice against a lawyer or party, should seriously consider recusal [in unrelated cases where the judge's lawyer appears as advocate], even when not mandatory. This may extend to cases other than the one in which the judge is actually a party, and should last as long as the judge's personal cause is at risk in the hands of the lawyer for any party." JI-43.

In this inquiry, although there may be no question of actual bias or prejudice for or against the members of the law firm representing the judge in another wholly unrelated matter, the question of appearance must be considered. To a member of the public who is before the court as a party in a lawsuit on the opposite side of the judge's lawyer, that party may well believe that the judge's lawyer carries esteem and approval by the Court beyond that of his/her own lawyer and that such esteem or approval will inure to the adversary's advantage.

Beyond a subjective feeling of disadvantage that the party might have lie other possible, albeit unlikely, concerns. Are the lawyers paid from the Court's budget? If so, might there be a temptation to hold down billings to the Court, in hope of an exchange wherein the lawyer receives a favored treatment on matters before the Court? What about the lawyer/client relationship itself? We know it is privileged and can involve the most sacrosanct secrets. Is it not possible that in defending a judge, the judge might tell the lawyer some secrets that might give the lawyer great leverage in litigating before that judge. Some of these concerns may seem far-fetched to a judge dedicated to fairness and impartiality. Nonetheless, they may well cause an adversary of the judge's lawyer to feel considerably disadvantaged.

CI-306 stated that when an assistant city attorney in an official capacity represents a judge who has been sued as a result of the judge's official acts, the judge is not disqualified from unrelated cases in which the assistant city attorney appears absent actual bias. In reaching that result it was reasoned that the representation was by a "public lawyer" i.e. one without private clients and who would not personally financially benefit from any appearance of judicial bias, and that the representation was "pro forma" because the judge has immunity for actions taken in an official capacity.

Here, although the judges of the court are being sued for acts in an official capacity, they are represented by private counsel, not a "public lawyer." When a lawsuit is filed against a judge for acts or omissions in an official capacity, the judge might not have personal choice of counsel, might never discuss the lawsuit directly with the counsel selected, does not personally pay the counsel, and might not even be apprised of the details of the matter as it progresses. Instead, counsel may be selected and coordinated by an insurer or at public expense. Representation of judges in their official capacity rarely involves the sharing of confidences and secrets of the judicial clients that would give the judges' advocate an advantage when appearing before the judges in unrelated matters.

Thus, although recusal is question of law for the presiding judge's initial decision, a judge has the obligation to disclose any ongoing lawyer/client relationship to all parties in any matter in which a member of the law firm representing the judge appears.

Pursuant to MCR 2.003(A), a party may raise the issue of a judge's disqualification by motion, or the judge may raise it. With respect to motions for disqualification, MCR 2.003(C)(3) states:

> "Ruling. The challenged judge shall decide the motion. If the challenged judge denies the motion,
>
> "(a) in a court having two or more judges, on the request of a party, the challenged judge shall refer the motion to the chief judge, who shall decide the motion *de novo*;

> "(b) in a single-judge court, or if the challenged judge is the chief judge, on the request of a party, the challenged judge shall refer the motion to the state court administrator for assignment to another judge, who shall decide the motion *de novo*,"

The factors discussed above should be weighed by the judge in deciding any motion to recuse.

The ethical duties of a lawyer when considering representation of judges is discussed in R-14.

J-6

September 20, 1996

SYLLABUS

The validity of ethics opinions issued prior to September 1, 1995, must be reevaluated in light of amendments to the rules governing judicial disqualification.

A judge's disqualification under Michigan Rules of Court may be remitted by the parties in any circumstance except personal bias or prejudice concerning a party.

References: MCJC 3C, 3D; MCR 2.003(B) and (D). The following opinions are affirmed: J-5; R-14, R-15; JI-6, JI-24, JI-28, JI-29, JI-31, JI-34, JI-35, JI-37, JI-43, JI-44, JI-50, JI-51, JI-57, JI-61, JI-62, JI-79, JI-86, JI-96, JI-97, JI-100; RI-1, RI-119, RI-121, RI-131, RI-166. The following opinions are distinguished: C-216, J-3, R-3; JI-39. The following opinions are affirmed in part and superseded in part: JI-23, JI-102. The following opinion is affirmed in part, distinguished in part, and superseded in part: J-4.

TEXT

The Committee has been asked to address the impact recent amendments to MCR 2.003, relating to judicial disqualification, may have on previous ethics opinions. The amendments were effective September 1, 1995.

THE COURT RULE

Prior to September 1, 1995, MCR 2.003(B) provided that there were certain enumerated grounds when a judge could not impartially hear a case, and thereby, warranted a disqualification:

"(B) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including a proceeding in which the judge

"(1) is interested as a party;

"(2) is personally biased or prejudiced for or against a party or attorney;

"(3) has been consulted or employed as an attorney in the matter in controversy;

"(4) was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years;

"(5) is within the third degree (civil law) of consanguinity or affinity to a person acting as an attorney or within the sixth degree (civil law) to a party;

"(6) or the judge's spouse or minor child owns a stock, bond, security, or other legal or equitable interest in a corporation which is a party, but this does not apply to

"(a) investments in securities traded on a national securities exchange registered under the Securities Exchange Act of 1934, 15 USC 78a et seq.;

"(b) shares in an investment company registered under the Investment Company Act of 1940, 15 USC 80a-1 et seq.;

"(c) securities of a public utility holding company registered under the Public Utility Holding Company Act of 1935, 15 USC 79 et seq.;

"(7) is disqualified merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge.

"A judge is not disqualified merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge."

The Michigan Supreme Court amended MCR 2.003 in significant ways, effective September 1, 1995. The current rule states:

"(B) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:

"(1) The judge is personally biased or prejudiced for or against a party or attorney.

"(2) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

"(3) The judge has been consulted or employed as an attorney in the matter in controversy.

"(4) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

"(5) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.

"(6) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

"(a) is a party to the proceeding, or an officer, director or trustee of a party;

"(b) is acting as a lawyer in the proceeding;

"(c) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

"(d) is to the judge's knowledge likely to be a material witness in the proceeding.

"A judge is not disqualified merely because the judge's former law clerk is an attorney of record for a party in

> an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge."

The 1995 amendments made four significant changes.

First, MCR 2.003(B)(2) is completely new, and is modeled after the ABA Model Code of Judicial Conduct, Sec 3E(1)(a). It appears consistent with *Cramptom v Department of State*, 395 Mich 326; 235 NW2d 343 (l975), which is frequently cited by parties seeking disqualification even though it did not involve the disqualification of a judge. The case involved the disqualification of administration board members, usually police officers, from hearing driver's license appeals. Lebow, Michael J., "Judicial Disqualifications for Bias or Prejudice", Vol 72 No 7, MBJ 684, 685 (Jul 1993). In recommending the provision to the Michigan Supreme Court, the State Bar commentary provided:

> "[The rules] describe instances in which a judge has "participated personally and substantially" in a matter outside of the judicial role. Such prior participation is considered sufficient to raise the question of a judge's personal bias in a matter, and should not be left for a party or party counsel to prove the judge's actual bias. This is the same standard applied when public officials and employees handle matters in private practice, MRPC 1.11 and 1.12; when lawyers change firms, MRPC 1.9 and 1.10; when former prosecutors become judges; and when judges negotiate private employment in anticipation of leaving the bench. . . ."

Second, the provision for disqualification for fiduciary and economic interests has been moved from MCR 2.003(B)(6) to MCR 2.003(B)(5). The provision is only triggered when the judge knows of the financial interest. The scope has been expanded beyond the judge's spouse and minor child, to also include the judge's parents and anyone residing in the judge's household. The scope has also been expanded beyond an economic or equitable interest in the party, to also include any economic interest in the subject matter in controversy. The scope has also been changed to apply to any more than di minimis interest that could be substantially affected by the proceeding.

Third, the provision for disqualification for degrees of kinship has been moved from MCR 2.003(B)(5) to MCR 2.003(B)(6). The former provision required disqualification of the judge if a party was within six degrees of kinship or an advocate was within three degrees of kinship to the judge. The amended provision addresses only three degrees of kinship. It expands the scope, however, beyond parties and advocates to also include officers, directors and trustees of parties, material witnesses, and those whose interests could be substantially affected by the proceedings.

Fourth, the court rule was further amended to add section (D), which provides for remittal of disqualification as follows:

> "(D) Remittal of Disqualification. If it appears that there may be grounds for disqualification, the judge may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If, following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement shall be in writing or placed on the record."

The process speaks for itself, and states that this procedure may be utilized in all cases of possible disqualification except for grounds as found in MCR 2.003(B)(1), to wit: personal bias or prejudice for or against a party or attorney.

MICHIGAN ETHICS OPINIONS

The State Bar of Michigan has published a collection of ethics opinions for judges and lawyers in the book, *Michigan Ethics Opinions*. It includes the following:

"Judicial Tenure Commission Advisory Opinions

> "From 1968 through 1988, the Judicial Tenure Commission, pursuant to MCR Subchapter 9.200, rendered 111 advisory opinions which were compiled and published in the 1987 Annual Report of the Judicial Tenure Commission. At the direction of the Michigan Supreme Court, the Judicial Tenure Commission ceased issuing advisory opinions in October, 1988. The opinions are designated as A/O.

"Formal Judicial and Lawyer Ethics Opinions

> "Formal ethics opinions are prepared by a subcommittee and submitted to the State Bar Board of Commissioners. A formal ethics opinion adopted by the State Bar Board of Commissioners reflects the policy of the State Bar. Formal ethics opinions deal with matters of general and substantial interest to the public, address situations which affect a significant number of members of the Bar, or reverse prior formal opinions. The opinions are designated as J for formal opinions interpreting the Michigan Code of Judicial Conduct (MCJC), and R for formal opinions interpreting the Michigan Rules of Professional Conduct (MRPC).

"Informal Judicial and Lawyer Ethics Opinions

> "An informal ethics opinion is prepared and issued by a subcommittee after it has been circulated to subcommittee members and the Chairperson has resolved any conflicting views. Informal ethics opinions generally deal with situations of limited and individual interest or application. The opinions are designated as "JI" for informal opinions interpreting the Michigan Code of Judicial Conduct (MCJC), and RI for informal opinions interpreting the Michigan Rules of Professional Conduct (MRPC)."

The publication also contains formal opinions released prior to October l, l988, and designated as "C". The amendment to MCR 2.003 necessitates review of these prior ethics opinions as discussed hereafter.

DUTY TO RAISE THE ISSUE OF DISQUALIFICATION

MCR 2.003(A) remains unchanged and, therefore, any party or the judge may raise the issue of a judge' disqualification by motion. See also, MCJC 3C, "a judge should raise the issue of disqualification whenever the judge has cause to believe the grounds for disqualification may exist under MCR 2.003(B)." Formal opinions interpreting the Michigan Rules of Professional Conduct are designated "R" in the publication Michigan Ethics Opinions.

In R-14, July 24, 1992, the Committee concluded that the judge's personal lawyer could in certain cases represent clients before the judge, provided that everyone consented after consultation. MRPC 1.2, 1.4, 1.7. The opinion, in relation to MCR 2.003, also held that "the lawyer must disclose the judicial representation to opposing parties, allowing them an opportunity to seek recusal of the judge [or disqualification of the lawyer]". The former court rule, MCR 2.003(B)(2), is identical to the court rule as amended, MCR 2.003(B)(1). The rationale of R-14 has not changed. Therefore, MCR 2.003(D) would permit the opposing party to reach an agreement with the other party to allow the judge to hear the case despite the possible grounds for disqualification. The judge would have to carefully weigh the provisions of MCR 2.003 before agreeing to participate in the proceedings.

IMPARTIALITY AND BIAS

A number of opinions have been rendered by the committee regarding issues of impartiality and bias. MCR 2.003(B) as amended provides specific enumerated grounds for disqualification. How do the amendments affect the committee's former opinions?

In J-5 the issue was whether all of the county's circuit judges would be disqualified from hearing cases involving a law firm retained to represent them in an action before the federal court. Once again, the question of the appearance of impropriety was raised. The judges certainly have the obligation to disclose the relationship to all other parties. The committee concluded then that a judge should consider the appearance of impropriety as well as other factors in deciding a motion to recuse. The advent of MCR 2.003(D) would permit the judge to retain the case provided the parties consented after the disclosure. The opinion is affirmed.

In JI-29 a judge asked about disqualification in domestic relations matters where an advocate had been appointed by the judge to serve as a part-time circuit court domestic relations referee. Aside from the ethical issues facing the appointee, the committee opined that, pursuant to MCJC 3C, the judge would be required to raise the issue of disqualification pursuant to MCR 2.003(B). JI-29 holds that a policy requiring judicial disqualification because an appointee appears before the judge is not justified, since

> "[s]uch a rule would burden the judicial system, particularly in a one-judge circuit. Further, the statute which creates the judge's appointive authority specifically authorizes appointment of a private practitioner, MCL 552.507."

Such policy considerations are still valid. In light of MCR 2.003(D), absent circumstances which demonstrate bias, a judge may still agree to participate in the proceedings if the parties consent after the disclosure of this information. The opinion is

affirmed.

In JI-34 the committee subsequently addressed disqualification issues of a judge who presided over criminal matters initiated or pending while the judge served as the chief prosecutor. Disqualification was required "where the judge is personally biased or prejudiced for or against a party or lawyer or where the judge has actual knowledge about a criminal case because the judge while a prosecutor had been consulted or employed as counsel". The circumstances of this scenario invokes mandatory disqualification on the basis of MCR 2.003(B)(2), and perhaps MCR 2.003(B)(3). However, absent personal bias or prejudice, the procedure found in MCR 2.003(D) could be utilized. It is not likely that a defendant would waive disqualification, but he/she could. If the defendant did, the judge could consider participating in the proceedings. The opinion is affirmed.

In JI-35, an incumbent judge who lost his bid for re-election sought the guidance of the committee in negotiating for employment upon leaving judicial office. The committee stated that "the judge should automatically recuse to avoid accusations that the judgment or the judge's position has been maneuvered for personal gain of the judge or the prospective employer". To hold otherwise would render a long-serving judge unemployable. Nonetheless, the committee further stated the judge should refrain from employment negotiations with a lawyer or law firm that has pending matters before the judge. It is interesting to note that the committee further stated that:

> "If the judge does not join a particular firm following employment discussions with the firm, the judge should for a reasonable time disclose to all parties the proposed professional relationship, and recuse unless asked to proceed." Emphasis added.

The court rule as amended specifically provides for this process. Thus, in this fashion, MCR 2.003(D) codifies JI-35, and the opinion is affirmed.

Ethics opinion JI-39 concluded that a judge who is a defendant in a legal malpractice action may not preside over any matter in which a member of the judge's former law firm, or a member of the law firm representing the judge appears, until the malpractice action is resolved. The committee further reasoned that the disqualification was "absolute" despite a mutual agreement by all parties to permit the judge to preside over the case. With regard to the former firm, the committee reasoned that there "is an extension of the shared ethics and malpractice responsibility" and that "this continuation automatically disqualifies the judge from hearing and presiding on matters in which the judge's former law firm is involved, until such time as the malpractice action filed against the judge and the law firm is completely resolved." Similarly, the committee reasoned that "only in unusual circumstances would a judge's impartiality not be subject to reasonable question, when a lawyer appearing before the judge in behalf of a client is at the same time representing the judge in litigation pending before another court. This would be true whether the lawyer was representing the judge in a personal matter, or a matter pertaining to the judge's official position or conduct."

Although MCR 2.003(D) does not allow remittal in cases of bias for or against a party, it does allow remittal in cases of bias for or against an advocate. The duty to disclose the relationship remains, however, the disqualification is not absolute absent actual bias or prejudice. Therefore, JI-39 is distinguished.

The committee addressed the disqualification of a Court of Appeals judge in opinion JI-43. The judge was a defendant in civil litigation arising from certain real estate transactions while the judge was a general partner in a real estate development.

The issue was whether the judge should recuse when the judge's lawyer or the opposing lawyer appeared before the judge on unrelated matters. The committee found no extension of shared ethics and malpractice liability in these facts, and thus the reasoning of JI-39 did not apply. The committee concluded that absent actual bias, the judge was not *per se* disqualified, however, since reassignment was readily available, the judge should recuse while the judge's personal case was pending. The same would then hold true if law firm associates of either advocate appeared before the judge. With the proviso that any disqualification may be remitted under MCR 2.003(D), JI-43 is affirmed.

In JI-51 a judge who served on the board of directors for a nonprofit legal aid organization was required to disclose the relationship when a lawyer from the organization appeared before the judge. Once again the committee found no grounds for a *per se* disqualification. This again assumes that the judge is not personally biased or prejudiced for or against the organization's lawyers. If challenged, the parties could avail themselves of MCR 2.003(D), and the judge could proceed accordingly. JI-51 is affirmed.

On a rare occasion, a judge may appear as a witness before a colleague of the same bench. Such was the case in JI-57, in which defense counsel sought the testimony of a judge who conducted the marriage ceremony of the plaintiff, to determine if the judge noted any deficiency in the plaintiff's competency. The judge was a colleague of the judge assigned to the case. Would the presiding judge be swayed by the fact that a particular witness was a judicial colleague? The committee concluded that if the presiding judge was concerned about the appearance of bias, the judge should so advise the parties, and recuse unless asked to proceed. This former opinion is still acceptable in light of MCR 2.003(D), and JI-57 is affirmed.

A variation of the preceding opinion was presented in JI-6l, in which a district judge questioned whether recusal was required if a witness was both a part-time police officer and a full-time probation officer of the district court. The committee reasoned that "if there is no appearance of bias in the judge regularly hearing the sentencing recommendations of the probation officer, there should be no increased likelihood of bias when the police officer testifies."

Furthermore, it was concluded that "defense counsel has an opportunity to impeach" the witness, and therefore, "there is less likelihood of abuse in the criminal case than in the sentencing stage." In the end, the committee once again opined that absent actual bias, the judge need not recuse. This opinion remains intact with or without the application of MCR 2.003(D), and is affirmed.

In JI-62 the question posed addressed the propriety of the employer of a judge's spouse appearing as a witness in mental health proceedings. MCR 2.003(B)(6)(d) provides that the judge is disqualified when the judge's spouse is likely to be a material witness. On such occasions, the judge should disclose the relationship and is recused unless asked to proceed via MCR 2.003(D). The mere appearance of the spouse's employer or colleagues still does not create a basis for disqualification. Therefore, JI-62 is affirmed.

In JI-79 the committee concluded that a judge was not automatically disqualified from presiding in a matter in which a member of the judge's re-election campaign committee appears as an advocate for a party. MCJC 2 requires a judge to avoid even the appearance of impropriety in all activities, and therefore there is an obligation to disclose the relationship. See Shaman, Lubet, and Alfini, *Judicial Conduct and Ethics*, The Michie Company, 1992, pp. 274-275. Understandably, this situation is potentially burdensome on single judge courts. The committee stated that,

> "Lawyers as well as all members of the public should have a sincere and significant interest in the individuals who represent them on the bench. An inflexible rule of automatic recusal would discourage lawyers from participating in the election of qualified individuals to the bench at the expense of disqualifying the judge in unrelated matters."

The committee suggested that the better practice would be to "liberally consider requests for recusal" in such cases. The advent of MCR 2.003(D) would now permit another alternative. If the petitioning party did not wish to consider remittal of the disqualification, it is still the better decision to follow the opinion presented in JI-79, and it is affirmed.

Once upon a time, there was a circuit judge, a district court magistrate, and a deputy sheriff, who co-owned recreational real estate property. In JI-86 the committee noted that MCJC 5C provides that a judge should refrain from certain financial and business dealings that would reflect adversely on the judge's impartiality. If the instances of recusal become too frequent, divestiture of the financial interests is required by MCJC 5C(3). Under the circumstances where the deputy sheriff might appear as a witness in either court, the committee concluded that "a judge's personal friendship and financial ties with a witness is not, in itself, sufficient to require recusal," and furthermore:

> "[A] circuit judge is not *per se* disqualified from reviewing decisions of a district court magistrate solely on the basis of their common ownership of land and building. There is no presumption that the judge's friendship or financial ties with the magistrate has created actual bias or the appearance of bias requiring recusal. The result should be no different in cases where the circuit judge, deputy sheriff and magistrate are all involved in the same proceeding unrelated to their common investment."

The obligation to disclose the relationship exists pursuant to MCJC 3C. MCR 2.003(D) is applicable, and hence, JI-86 is affirmed.

RI-121 addresses the participation of four lawyers in the processing of attorney grievance matters where one of the lawyers is the supervising attorney for the remaining three lawyers in their capacity as corporate attorneys for a large metropolitan county. The supervising attorney is a member of the Attorney Grievance Commission, the prosecutorial arm of the Michigan Supreme Court pursuant to MCR 9.108(A). The other three attorneys are voluntary hearing panelists for the Attorney Discipline Board, the adjudicative branch of the Michigan Supreme Court pursuant to MCR 9.110. The inquiry focused on the appearance of impropriety and/or the problems of inadvertent "influence", or "contamination" arising from the mutual employment as corporate counsel.

PERSONAL BIAS FOR OR AGAINST A PARTY OR ATTORNEY

Personal bias for or against a party or attorney is now found in MCR 2.003 (B)(1). Personal bias for or against a party may not be remitted; personal bias for or against an attorney may be remitted. This particular ground for disqualification was previously cited as MCR 2.003(B)(2). Several opinions have been issued regarding this provision. Opinions C-228, JI-29, JI-34, JI-5l, and RI-121 have already been discussed. The remaining opinions will now be reviewed.

Ethics opinion RI-131 addressed whether a lawyer could continue to serve as a hearing panelist for the Attorney Discipline Board pursuant to MCR 9.115, while the subject of a formal complaint approved by the Attorney Grievance Commission, or while the subject of an investigation by the Grievance Administrator. The committee noted that a member of the hearing panel who was the subject of a formal complaint might be perceived to be biased or partial in one of two ways. The panelist might be lenient to another lawyer respondent who was also charged with misconduct, or the panelist might be seen as favoring the prosecution in an effort to obtain an advantage in the panelist's own case. The committee stopped short of

concluding that recusal was absolute. To clarify the opinion, applying MCR 2.003 as amended, if the panelist is personally biased or prejudiced for one party or the other, the disqualification is mandatory and is not affected by MCR 2.003(D).

If the panelist is the subject of an investigation but not a formal complaint, the panelist must either disclose this fact to the parties, or, if the panelist did not wish to disclose, voluntarily recuse "on the basis that the panelist could not hear the case impartially." If the panelist chooses the first option, disqualification could be remitted pursuant to MCR 2.003(D). The opinion is affirmed.

Opinion J-3 affects the service of retired judges by assignment who may also serve as "director, officer, manager, advisor, or employee of any business." Sitting judges are prohibited from serving in any such capacity pursuant to MCJC 5C(2). This opinion states that,

> "When assigned judicial duties, the visiting or retired judge should take a leave of absence from the business, receive no compensation from the business during the period of time in which the judge is adjudicating matters, and of course, recuse from hearing matters that are related to the interests of the outside business."

MCJC 5C still applies, but MCR 2.003(B)(6)(a) now requires disqualification when the judge is an officer, director or trustee of a party. The disqualification may be remitted. The opinion is distinguished.

Opinion J-4 addressed a number of other grounds for disqualification which will be addressed in subsequent sections of this article, but is affirmed in the following respect. Recusal is still required in situations where the judge formerly served as a city commissioner and subsequently faces matters which came before the commission, or where the judge had previously "participated personally and substantially in the matters" reaching fruition after the judge's resignation.

If a judge serves as a member of the attorney discipline board hearing panel, is the judge automatically disqualified when the respondent-attorney appears before the judge? In JI-24 the Committee concluded that disqualification was not automatic. However, the committee noted the case of *People v Lowenstein*, 118 Mich App 475, 482-483 (1982), which cited an Oklahoma case holding:

> "Even though a judge personally believes himself to be unprejudiced, unbiased and impartial, he should nevertheless certify his disqualification where there are circumstances of such a nature to cause doubt as to his partiality, bias or prejudice."

The committee reasoned that even if the judge did recuse when the respondent appears as advocate in unrelated matters pending before the judge, the recusal is personal to the circumstances of the respondent and does not reach appearances by the respondent's law firm colleagues. The opinion is affirmed.

Opinion JI-28 is closely related to J-3 in that it addressed retired judges. The State Court Administrator sought this opinion in response to a retired Court of Appeals judge who intended to accept judicial assignments while also accepting appointments as a neutral mediator for certain trial courts. MCJC 5E prohibits a full-time judge from acting as an arbitrator or mediator,

except in the performance of judicial duties. The committee reasoned that a retired judge need not refrain from serving as a mediator or arbitrator, provided that this service is not contemporaneous with the period of any judicial assignment, and the service on prior mediation or arbitration panels is:

> ". . . not so identified with one party, organization or interest group as to reflect adversely on the judge's impartiality or to raise questions of bias or the appearance of impropriety."

Whether a judge is automatically disqualified from matters in which the judge had participated as a mediator or arbitrator depends upon the particular forum. See, RI-265, "a lawyer who has served as a mediator under MCR 2.403 may not later serve as an arbitrator in an arbitration proceeding between the same parties concerning the matter which was mediated", and "whether a lawyer who has served as a mediator in a private mediation setting may serve as an arbitrator in a proceedings between the same parties concerning the matter which was mediated depends upon the rules of the private mediation forum and the arbitration forum." The opinion is affirmed.

Many judges, especially those in the less populated counties, are bound to face litigants and lawyers who are personal acquaintances. Likewise, judges are likely to occasionally encounter a litigant or an attorney who have leveled derogatory remarks against the judge. In either situation, according to opinion JI-44, recusal is not, and should not be, automatic. A judge concerned about the appearance of bias should advise the parties and attorneys and recuse unless asked to proceed. This is exactly the procedure now available by MCR 2.003(D).

If the judge under the foregoing scenarios grants a motion to recuse, or refuses to participate even where the parties remit the disqualification, the judge should specifically state the reasons. This will permit the chief judge, or any other judge selected to review the decision to appropriately decide the matter *de novo* pursuant to MCR 2.003(C). The committee affirms JI-44.

A frequent criticism or suspicion of indigent litigants is that court-appointed attorneys are not as capable as privately retained counsel, or that counsel's loyalty is to the appointing judge rather than to the client. There is an array of contractual arrangements between courts and attorneys who accept court appointments. In JI-50 a probate judge questioned the ethical implications of hiring a lawyer as a county employee to represent indigent youth in delinquency cases, and indigent parents or children in child protection proceedings. The committee recognized that the lawyer would be completely dependent on the judge for any earned income. JI-29. MRPC 1.7(b) and 1.8(f) obligates the attorney to not permit the judge to affect the level of advocacy for the indigent client. MCJC 1 and 3 obligate the judge to uphold the integrity and independence of the judiciary and to perform the duties of judicial office impartially. The committee recognized that with due care, the lawyer could be hired as a county employee, but that:

> " . . . no one will envy the delicate task a judge and counsel must undertake in walking this professional tightrope."

MCR 2.003(A) continues to permit a party or the judge to raise the issue of disqualification. A judge's appointment of counsel, without more, is not grounds for disqualification. If a particular case presents aggravating circumstances in addition to the appointment of counsel under the facts set forth in the opinion, the parties should be counseled accordingly.

Opinions RI-52 and JI-23 impose a reciprocal obligation on lawyers and judges a presiding judge's campaign opponent appears as advocate. Opinion JI-96 modifies this stand by concluding that disqualification is not *per se* required in

uncontested matters in which one of the advocates is an announced candidate for the presiding judge's seat. Citing an advisory opinion of the Judicial Tenure Commission, A/O 103, the committee noted that no distinction was made between adversarial proceedings and non-adversarial matters. The committee suggested that the judge disclose the lawyer's candidacy and await a motion to recuse if the parties so choose. The opinion suggests that "in the absence of a reasonable good faith challenge to the judge's impartiality", the judge could preside over uncontested matters or sign stipulated orders. Since the opinions are based upon bias for or against an advocate, not a party, the remittal procedures of MCR 2.003(D) are available. To the extent that JI-23 requires recusal, the opinion is superseded. Opinion JI-96 is affirmed.

We have previously addressed the appearance of a lawyer and the lawyer's law firm colleagues in matters before a judge who is also a client of the law firm. JI-39, J-5, and R-14. We now turn our attention to JI-102 which reviews the ethical implications of a lawyer appearing before an administrative hearing officer whose family member was a former client of the lawyer. The committee recognized that given these facts, a person could deduce that the judge would be personally biased or prejudiced for or against that lawyer. The committee concluded the following:

> 1. The family relationship, in and of itself, is not sufficient to require disclosure or disqualification.
>
> 2. If the representation of the family member is concurrent with the appearance before the judicial officer, disclosure is required.
>
> 3. If the judge's personal ethics or financial interest are directly at stake, disqualification is required.

With regard to situations 1 and 2, the opinion is affirmed. With regard to situation 3, the disqualification may be remitted under MCR 2.003(D).

Judges have varying experiences and relationships with their respective local boards of county commissioners. On at least one occasion, a lawyer was elected as chairperson of a board of commissioners which oversees the budget and related issues of court operations. Aside from the ethical implications for the lawyer, R-15 addressed issues of judicial disqualification. The committee was cognizant of the fact that parties might question the independence of the judiciary as being threatened by "toadyism", and suggested that each matter be handled on a case by case basis since automatic disqualification was not warranted. A second fact complicated this inquiry, to wit: the lawyer commissioner "has been an opposing party in litigation against the circuit court judge", and had been sanctioned for contempt. Therefore, at the very least, the question of the appearance of bias or prejudice must be considered. The committee quoted the *Lowenstein* case:

> "No human being (even a judge) is completely prejudicial free. But our judicial system requires judges. Therefore, we make allowances. Under normal circumstances, we will assume (absent evidence to the contrary) that the judge is free enough from bias to make a tolerably nonpartisan decision." *People v Lowenstein*, 118 Mich App 475, 481-482 (1982).

Hence, if the lawyer commissioner believes the presiding judge is biased, the lawyer may seek disqualification, or reconsider whether or not to remain on the case. The opinion is affirmed.

PREVIOUSLY CONSULTED OR EMPLOYED AS ATTORNEY IN THE MATTER

This ground for disqualification is still cited as MCR 2.003(B)(3). The only change is the addition of the words, "the judge", at the beginning of the provision. A few opinions have been issued on this topic, including JI-34 which has already been discussed.

In JI-97, the committee concluded that a part-time magistrate would be disqualified from any matters being handled by a member of the magistrate's private law firm, and that at no time could the magistrate practice law in that court as it is precluded by statute and the Michigan Code of Judicial Conduct. MCL 600.8525; MSA 27A.8525; MCJC 5F. Furthermore, the magistrate would be disqualified from any matter in which the magistrate participated personally and substantially as a lawyer. MRPC 1.11(c); MCR 2.003(B)(3). In accord, RI-1.

Under the current language of MCR 2.003(B)(4), a part-time magistrate would be disqualified when a member of the magistrate's law firm appears, so JI-97 and RI-1 are affirmed. The disqualification could be remitted pursuant to MCR 2.003 (D).

RELATIONSHIP TO PARTY OR FIRM WITHIN PRECEDING TWO YEARS

This ground for disqualification remains cited as MCR 2.003(B)(4), with the only difference being the addition of the words, "the judge" at the beginning of the provision. Several opinions have been rendered in the past, including RI-1; J-4; JI-34, JI-39, and JI-97, as previously discussed. Since the applicable rule has not changed, the only affect the 1995 amendments have on these opinions is to allow remitter. J-4 bears another look along with a quick review of a few others.

A portion of J-4 involved a lawyer who became a partner in a law firm that divided into two firms shortly before the lawyer was elected to the circuit court bench. Is the judge disqualified from hearing matters involving either law firm for a period of two years? The purpose of the two-year disqualification rule is to avoid requiring a party to prove actual bias or prejudice where the judge had been personally and professionally associated with a law firm. The committee noted that MCJC 3D allowed for the remittal of disqualification as provided by court rule, but that no court rule then existed and prior to September 1, l995, it appeared that all situations arising under MCR 2.003 mandated disqualification.

If a former partner was no longer associated with the judge's former law firm, what is the outcome? The committee concluded that the relationship should be disclosed, MCJC 3C, and the judge should recuse unless the parties remit disqualification. This conclusion in J-4 is perfectly in line with the court rule as amended.

Does a bonus for work performed prior to taking judicial office extend the two year period of disqualification? In JI-37 the Committee concluded that it did not. There is no basis to change this opinion, especially in light of the review of J-4.

In JI-100 the Committee considered the ramifications of a former client of the judge who now appears before the judge but is represented by a totally different law firm. The committee applied MCR 2.003(B)(4), "representing a party", which was not changed by the 1995 amendments. The opinion is affirmed.

DEGREES OF KINSHIP - EQUITABLE INTEREST AFFECTED BY PROCEEDINGS - WITNESS IS KIN

Similar grounds for disqualification were previously cited as MCR 2.003(B)(5), and (B)(6) respectively. They have been combined and modified, and are now found in MCR 2.003(B)(6). The court rule as amended now provides for disqualification if:

> "(6) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> "(a) is a party to the proceeding, or an officer, director or trustee of a party;
>
> "(b) is acting as a lawyer in the proceeding;
>
> "(c) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;
>
> "(d) is to the judge's knowledge likely to be a material witness in the proceeding." Emphasis added.

Opinion J-4 addressed whether a judge is disqualified from presiding over cases of law firms employing the judge's relative. The Committee concluded that the disqualification would not be automatic, citing the provisions of MRPC 1.8(i), and prior opinions. C-216; R-3. However, the judge was obligated to disclose the relationship, and the law firm was obligated to "disclose whether the judge's relative [had] participated personally and substantially in the matter." The opinion went on to state that the judge could proceed if the parties consented after disclosure.

MCR 2.003(B)(6) now requires recusal if someone within the third degree of kinship to the judge is known to have an

interest that could be substantially affected by the proceeding. It could be argued that a relative of the judge who is a partner or shareholder in the law firm, and thus whose income may be affected by the success of the advocacy in the matter, has such an interest triggering disqualification. The result is the same as under C-216, R-3 and J-4, but the underlying authority for the disqualification is more precise, and to that extent the opinions are distinguished.

J-4 also addressed the issue of disqualification where the judge has a financial interest with certain attorneys in a real estate venture. MCJC 5C(2) allows a judge to participate in certain investments, including real estate provided the judge is not a director or manager. The Committee reasoned:

> "We believe that automatic disqualification for every continuing financial interest, although traditional, is not required under the current Code or court rules. MCR 2.003(B)(6) disqualifies a judge when a member of the judge's immediate family has more than a *de minimis* economic interest in a party; clearly, then the judge's economic connection to an advocate must be more than *de minimis* before automatic disqualification is required. Where the agreement for the financial interest is a contract with the amount due the judge established as a set amount, not subject to contingency or discretion of the judge or the payor, and neither the amount nor the terms of payment are in dispute, the fact of the agreement to pay the judge is not presumptively prejudicial. Regular, periodic, or one-time disbursements to the judge from a lawyer or law firm are not prejudicial unless the matter over which the judge presides is the matter which affects the disbursement."

Similarly, JI-6 concluded that a landlord judge must disclose that an advocate is the judge's tenant and recuse unless asked to proceed. The Michigan Supreme Court itself has endorsed this approach in *People v Perkins*, 193 Mich App 209 (1992). The opinions are affirmed.

May a judge review the decisions of the judge's spouse in their capacity as a judge of a lower court? Opinion JI-31 addresses this question and answers it in the negative, but the decision was not based upon MCR 2.003. Recusal allows the circuit judge to avoid the appearance of impropriety and the appearance that a family relationship has influenced judicial conduct. MCJC 2; MCJC 2C. See also, Franck, Michael "A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities", commentary reported in Vol 69 No 3, MBJ 234-235 (Mar 1990). This appears to be a case where the *Lowenstein* rule would apply, in that the "circumstances [are] of such a nature to cause doubt as to . . . partiality, bias or prejudice."

The opinion also addresses a situation where a circuit judge contemplates appointing the judge's spouse as a Friend of the Court referee. The committee relied upon MCJC 3B for the ethical policy that a judge should not create a situation which increases the number of cases in which the judge may be disqualified. This result is not affected by the 1995 amendments, and the opinion is affirmed.

In R-3 it is concluded that a judge should not preside over a case in which the judge's spouse appears as a lawyer for one of the litigants. The committee extended this to lawyers who are dating and/or cohabitating with the judge. A second inquiry addressed the propriety of the judge presiding over a case when the spouse's law firm appears on behalf of a litigant. The judge is directed to disclose the relationship and recuse unless the parties request that the judge proceed. This result is not affected by the 1995 amendments, and on this issue the opinion is affirmed.

RI-119 responded to an inquiry from the Attorney Discipline Board in light of the fact that a hearing panelist was related to

an advocate within the third degree of consanguinity. MCR 9.115(F)(2)(a) explicitly states that a motion to disqualify a hearing panelist shall be decided under the guidelines of MCR 2.003. It is clear that a hearing panelist is disqualified from any proceedings in which the hearing officer's close relative is directly involved. This result is not affected by the 1995 amendments, and the opinion is affirmed.

CONCLUSION

Prior to September 1, 1995, the committee has opined that in certain situations other than actual bias or prejudice, parties could remit disqualification after being informed of a possible ground for disqualification. It is clear that MCR 2.003(D) now specifically provides a procedure for doing so. It is equally clear that the final decision rests with the presiding judge who must thereafter agree to participate in the proceedings.

NOTE: This opinion was reconsidered and has been replaced by R-20.

R-14
July 24, 1992

SYLLABUS

A lawyer whose law firm has cases pending before the various circuit court judges or has clients whose matters have not yet reached litigation but are expected in due course to come before any of the judges in the future, may represent the judges of the court in litigation for actions taken in the judges' official capacity, provided that the judicial clients and the other clients consent after consultation.

A member of a law firm currently representing judges of a circuit court who appears before the judicial clients in unrelated matters must disclose the judicial representation to all other parties.

References: MRPC 1.2, 1.4, 1.7; J-5; RI-108; CI-306; ABA i1331.

TEXT

In J-5 we discussed disqualification issues when judges who are represented by counsel in litigation challenging actions taken in an official judicial capacity are scheduled to preside in an unrelated matter in which the judges' counsel appear for a party. J-5 held that while representation of the judicial clients is pending and counsel for the judicial clients appear before any of the judges in an unrelated matter, the judge should disclose the relationship to the parties and their counsel.

We are now asked to address the ethical duties of a lawyer whose law firm is asked by the judges of a circuit court to defend them in civil actions in state and federal court challenging acts taken in an official judicial capacity, when the law firm has cases pending before various circuit court judges and has clients whose matters may come before the judicial clients in the future.

Michigan practice, rules and decisions recognize a reciprocal duty of adjudicators and advocates regarding disqualification and recusal. For example, MCR 2.003(B) sets forth standards for mandatory recusal of judges in certain circumstances, but also provides that, even for the mandatory recusal situation, a motion be made by the advocate for recusal, MCR 2.003(A) and (C). R-3 addresses personal relationships between an advocate and an adjudicator, such as dating or cohabiting, and places duties on both the advocate and the adjudicator to disclose the relationship to the other parties. JI-23 and RI-52 speak to judicial campaign opponents and place concurrent duties on both the incumbent judicial officer and the announced candidate advocate to avoid facing each other in the courtroom. These mutual duties better ensure the impartiality and integrity of the administration of justice. In those situations where the adjudicator might not be aware of circumstances that would raise recusal concerns, the advocate's duties to raise the issue serve the practical purpose of seeing that the issues are timely resolved.

As stated in JI-43 and J-5, a judge is normally not disqualified absent actual bias or such a likelihood or appearance of bias that the judge is unable to overcome the perception of partiality. One such instance where the likelihood or appearance of bias is strong enough to require automatic judicial recusal is

where a judge and the judge's former law firm are defendants in a malpractice action; the judge may not preside over any matter in which a member of the former law firm, or a member of the law firm which represents the judge and the former law firm in the malpractice action appears until the malpractice action is resolved, JI-39. Even so, the automatic recusal of the judge in those situations where the likelihood of bias of the judge
is strong, does not relieve the judge's lawyer of ethical obligations to other clients.

Cases and opinions discussing the disqualification of a judge when the judge's own counsel appears before the judge in unrelated matters sometimes turn on whether the representation is of the judge personally or in an official capacity, CI-306; Yorita v Okumota, 643 P2d 820 (Haw 1982), or whether the law firm is charging the judge regular rates, Narro Wholesale Inc v Kelly, 530 SW2d 146 (Tex 1975). We find no such criteria in the lawyer ethics rules, and thus such distinctions are not helpful to the lawyer in determining whether to undertake the judicial representation.

Advocates have separate duties which mitigate against relying totally on judicial disqualification when conflicts arise. For instance, a lawyer may not associate as co-counsel with a lawyer in another firm or offer or accept a referral from a lawyer, when one of the reasons for associating with or referring to the particular lawyer is to instigate judicial recusal, JI-44.

For all these reasons, J-5 does not resolve the lawyer's dilemma when asked to represent the judicial clients.

MRPC 1.7(a) prohibits the lawyer from undertaking representation of the judges if the law firm currently represents, even in unrelated matters, the interests of any of the claimants in the judges' case, unless the lawyer reasonably believes the representation would not be adversely affected and both clients consent. Undertaking the judges' case would be "directly adverse" to the interests of those clients, and the propriety of the lawyer undertaking representation of the judges in those circumstances must be evaluated on a case by case basis.

MRPC 1.7(b) prohibits the lawyer from representing the bench if representation of the judges will be materially limited by the lawyer's responsibilities to other clients, third parties, or the lawyer's own interests, unless the lawyer reasonably believes the representation will not be adversely affected and the clients consent after consultation.

RI-108 posed the situation in which a lawyer represented two separate and distinct clients in unrelated domestic relations cases, but when the cases were consolidated on appeal, the lawyer was faced with the duty to advocate and argue truly diametrically opposed and adverse positions, even though the clients and their cases were unrelated. In that case we held that a disinterested lawyer could not reasonably believe that the representations would not be adversely affected, MRPC 1.7(a)(1) and MRPC 1.7(b)(1), and therefore the lawyer was required to withdraw from both representations. Similarly, if in this inquiry the law firm currently was representing another client before the same court in which the judges' litigation would be presented, in a matter which would require advocacy of a position diametrically opposed to that which would be argued on behalf of the judges, the law firm could not undertake representation of the judges.

Other than the circumstance raised by RI-108, representation of clients before other courts will not affect the lawyer's representation of the judges. Likewise, we do not foresee a circumstance under which the representation of other clients in matters presided over by the judicial clients would materially limit the lawyer's ability to render effective representation to the judges.

We now address the reverse situation, i.e., whether the representation of the judicial clients will "materially affect" the law firm's representation of other clients.
The representation of clients whose matters do not involve litigation would not be materially affected by the law firm undertaking representation of the judicial clients, and absent other factors should not prevent the representation of the judicial clients.

However, in a litigation setting if a client's advocate is the judge's lawyer in a separate matter, the judge's partiality may reasonably be questioned by the other party, resulting in challenges and grounds for
appeal. A lawyer whose firm is held in such esteem that its services are desired by the judicial clients, may reasonably be presumed to be credited with more credibility, more competence, and more familiarity than the opposing advocate. In J-5 we observed:

> "To a member of the public who is before the court as a party in a lawsuit on the opposite side of the judge's lawyer, that party may well believe that the judge's lawyer carries esteem and approval by the Court beyond that of his/her own lawyer and that such esteem or approval will inure to the adversary's advantage.
>
> "Beyond a subjective feeling of disadvantage, the party might have other possible, albeit unlikely, concerns. Are the lawyers paid from the Court's budget? If so, might there be a temptation to hold down billings to the Court, in hope of an exchange wherein the lawyer receives a favored treatment on matters before the Court? What about the lawyer-client relationship itself? We know it is privileged and can involve the most sacrosanct secrets. Is it not possible that in defending a judge, the judge might tell the lawyer some secrets that might give the lawyer great leverage in litigating before that judge. Some of these concerns may seem far-fetched to a judge dedicated to fairness and impartiality. Nonetheless, they may well cause an adversary of the judge's lawyer to feel considerably disadvantaged. We think these are things to be taken into the judge's calculus in weighing the decision of whether to recuse."

To avoid such conclusions, the presiding adjudicator might overcompensate in "fairness" to the opposing party, in rulings, adjournments, or otherwise. Parties may conclude they "have it made" or contrarily that nothing will help them prevail. Confidence in the legal system is lost. These realities "materially limit" the lawyer's ability to represent other clients whose cases are pending, or in the future would be brought for adjudication before, the judicial clients.

The lawyer may not agree to represent the judicial clients if the lawyer has cases pending before, or if other current clients whose matters have not yet reached litigation are expected in due course to be presided over by, the judicial clients, unless a disinterested lawyer would reasonably believe the representation of the client would not be adversely affected, and the client consents. The lawyer will make this evaluation when the judicial representation is undertaken, and has a continuing duty to evaluate as the judicial representation and the law firm's representation of other clients proceed.

We can conceive of several situations in which the representation would not be adversely affected. In some cases the law firm may be able to delay a client's case during the pendency of the judicial clients' matter, without material adverse affect to the client or violation of MRPC 3.2 [expediting litigation], 3.4 [fairness to opposing parties] or 4.4 [litigation for purposes of delay]. Some clients' cases may be through trial and awaiting judgment; even if the eventual decision is appealed, the record has been established before the judges became clients. Some matters may be settled or unopposed. When these

circumstances exist, we believe MRPC 1.7(b)(1) is satisfied, and the lawyer may seek consent of the client after full consultation regarding the circumstances, MRPC 1.2, 1.4, 1.7(b)(2).

Another instance in which the representation of other clients would not be affected is where the lawyer would represent the judicial clients in matters involving their judicial capacity, as opposed to matters involving the private conduct or personal matters of the judicial clients. When a lawsuit is filed against a judge for acts or omissions in an official capacity, the judge might not have personal choice of counsel, might never discuss the lawsuit directly with the counsel selected, does not personally pay the counsel, and might not even be apprised of the details of the matter as it progresses. Instead, counsel may be selected and coordinated by an insurer or at public expense. Representation of judges in their official capacity rarely involves the sharing of confidences and secrets of the judicial clients that would give the judges' advocate an advantage when appearing before the judges in unrelated matters. In such cases the judge's connection to the advocate does not reach the level to adversely affect the representation of the advocate's other clients.

ABA i1331 considered whether a law firm may represent various members of the judiciary in actions brought against them for official acts. After noting that there were sufficient judges available to allow rescheduling of the law firm's unrelated cases from the judges which the firm would represent, and noting that there were sufficient other lawyers with expertise to represent the judges, the opinion concluded that because of an "appearance of impropriety" the law firm could not appear before the judicial clients on unrelated matters while the judicial representation was pending. When facing circumstances where other presiding adjudicators were not readily available or other counsel was not readily available to the judicial clients, other jurisdictions have followed a "rule of necessity" to avoid disqualification of the judge, Reilly v Southeastern Pennsylvania Transportation Authority, 479 A2d 973 (Pa Sup 1984), modified 489 A2d 1291 (Pa 1985).

The "rule of necessity" appears to have been applied in CI-1108, which considered whether a law firm representing 37 of 38 workers' compensation administrative hearing officers in challenging the constitutionality of legislation abolishing their positions could represent clients in unrelated matters before the hearing officers during the pendency of the litigation. Referring to ABA i1331, CI-1108 held that the law firm could continue to represent clients before the hearing officers, but that the hearing officers should use "good judgment and conscience" in determining whether to preside. Citing authority from another state, the opinion also required the law firm to disclose the representation of the hearing officer to other parties.

In CI-306 an assistant city attorney in an official capacity represented a judge who has been sued as a result of the judge's official acts. Although the opinion held the judge was not automatically disqualified from unrelated cases in which the assistant city attorney appeared absent actual bias, the opinion provided that the judge "may disqualify . . . if a litigant reasonably and in good faith questions the judge's impartiality." For a litigant to question the partiality of the judge, the litigant must be told about the relationship of opposing counsel and the adjudicator.

Therefore if the lawyer agrees to represent the judicial clients, the lawyer must disclose the judicial representation to opposing parties, allowing them an opportunity to seek recusal of the judge or disqualification of the lawyer. Since any disqualification of the lawyer is imputed to the lawyer's firm, other members of the lawyer's firm appearing before the judicial clients in unrelated matters must similarly disclose the relationship.

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Professional Ethics Committee

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August 4, 2008

Robert C. Gardella
Representative Assembly Chair
134 N. First Street, Suite 201
Brighton, MI 48116-1264

Dear Mr. Gardella:

The Professional Ethics Committee was invited to comment upon a proposed amendment to Canon 2(C) of the Michigan Code of Judicial Conduct that would read as follows:

> A judge should neither contract as an independent contractor nor employ as a court staff member in any capacity (a) a spouse, sibling, parent or child of an attorney having an office located within the same jurisdiction as that trial court, (b) a spouse, sibling, parent or child of a prosecuting attorney for the same jurisdiction as the trial court, (c) a spouse, sibling, parent or child of a public defender for the same jurisdiction as the trial court, or (d) a spouse, sibling, parent or child of an attorney who engages in the practice of law at that trial court.

The proposal was circulated to the membership of the Committee for comment. The Committee has not taken a vote on the proposal, but none of the comments received from members support it.

The purpose of this letter is to convey the comments received in response to the circulation of the proposed amendment.

Several members have a concern that this type of provision would be misplaced in the Code of Judicial Conduct. The Code in its present form consists of black letter statements (the Canons) followed by a series of considerations or adjurations about things that either could be done or should not be done in order to comply with the Canon. It is not written in a way that accommodates specific rules about precise conduct. Such rules are more appropriate for administrative order or court rule. The Committee has commented in previous situations where the first considered cure to a perceived problem is amendment of the ethics rules. We believe this should be a last resort, as it has the most serious of possible consequences.

Even if the suggested provision is to be proposed for placement in the Code, there is a question of whether it is appropriately placed under Canon 2, which speaks to the avoidance of impropriety. Canon 1 requires a judge to uphold the integrity and independence of the judiciary, and Canon 3 requires a judge to perform the duties of the office impartially. Either of these Canons would fit the subject more aptly. In other words, are proscriptions about hiring practices appropriately placed under the category of "avoiding impropriety?"

Setting the matter of appropriateness to the Code aside, the members question the wisdom of a rule that presumes a judge who hires the spouse, sibling, parent, or child of a lawyer in the categories described is incapable of acting without bias or prejudice in dealing with the lawyer. The proposal would equate having a specific person in employment as having an influence on judicial conduct *per se*. That proposition would be hard to justify. Moreover, particularly in urban areas, there are undoubtedly hundreds of lawyers within a given court's jurisdiction who will never before the court. Under those circumstances, such a rule would seem to be overkill and might result in hampering a judge's ability to secure perfectly qualified applicants whose only disqualifier is a familial relationship to someone the judge will never encounter.

We hope that these comments are helpful to the Assembly in its deliberations regarding the advisability of proposing such a rule.

Yours sincerely,

William B. Dunn
Chair
Professional Ethics Committee

WBD:lb

cc: Dawn Evans