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Relationship Advice

Cynthia Gray

It It is a judicial ethics truism that judges are not automatically disqualified from cases involving someone they know. However, several recent judicial discipline cases indicate that at least some judges have misinterpreted that to mean that they never have to disclose anything less than a familial relationship with an attorney, much less disqualify if someone they vacation with, for example, appears in a case.[1]

While blood, marriage, and domestic partnership ties are relatively easy to define, "friendship" is variable and ineffable. Based on caselaw and advisory opinions, a judge should consider the following factors to determine whether a relationship with a particular attorney diverges so significantly from the judge's relationships with other attorneys that disqualification or at least disclosure is required:[2]

- The frequency of the social contacts between the judge and the attorney,
- The length of their social relationship,
- Whether the relationship is continuing,
- Whether their families are included in their socializing,
- Whether they visit each other's homes,
- Whether they vacation together,
- Whether they socialize only in a professional context,
- Whether they socialize in public or private settings,
- Whether they socialize as part of a large group, a small group, or one-on-one,
- Whether there are additional circumstances such as a current or past financial, political, work, or amorous relationship,
- Whether they have exchanged gifts or hospitality,
- Whether they have plans for future get-togethers, and
- Whether they are "friends" on Facebook or otherwise connected on social media:[3]
  - The timing of the "friend" request and acceptance;
  - The frequency of the judge's social media contacts and communications with the individual;
  - The substance of the judge's social media contacts and communications with the individual;
  - The number of "friends" the judge has on the page;
  - The nature of the judge's social networking account (for example, whether it is a personal profile or a professional page);
  - The judge's practice in deciding whom to "friend" (in other words, whether the judge is very exclusive or more inclusive when deciding whom to add); and
  - Whether the judge and the individual have frequent, personal contacts in real life.

Footnotes

1. In *In the Matter of Gorski*, 937 N.W.2d 609 (Wisconsin 2020), for example, a judge presided over a small claims cases within a month of taking a week-long golfing trip to Ireland with an attorney in the case and without disclosing the trip of any other aspect of the relationship to the other party. *See also Public Admonishment of Mason* (California Commission on Judicial Performance December 3, 2019) (https://tinyurl.com/u3ejkma) (failing to disclose "personal and sustained" relationship with an attorney every time the attorney appeared before him); *Inquiry Concerning Bailey*, Decision and Order (California Commission on Judicial Performance February 27, 2019) (https://tinyurl.com/y468x7zm) (ordering defendants in five cases to use an alcohol monitoring service without disclosing that his son worked for the company and that the owner was a friend and ordering a defendant to pay restitution to the company contrary to the law and based on a letter from his son; appointing an attorney as a special master without disclosing that the attorney was a personal friend); *In re Brennan*, 929 N.W.2d 290 (Michigan 2019) (failing to disclose the extent of her relationship with a police detective who was a witness in a trial over which she presided; failing to disclose the extent of her relationship with an attorney when the attorney or her law firm appeared in cases over which the judge presided).
2. Gray, "Disqualification and Friendships with Attorney," *Judicial Conduct Reporter* (Fall 2009) (https://tinyurl.com/uqa6rwb).
3. *See California Judges' Association Advisory Opinion 66* (2010) (https://tinyurl.com/7bozntm) (if a judge has created a very personal profile on a social media site and adopted an exclusive policy regarding whom to include on the site, the judge should disqualify if one of those he has chosen to friend appears as an attorney in a case); *Utah Informal Advisory Opinion 2012-1* (http://tinyurl.com/mywqho5); ("disqualification is not automatically required simply because a judge and a lawyer are "friends" on Facebook;" the "frequency and substance of the contacts will be determinative)*ABA Formal Opinion 462* (2013) (https://tinyurl.com/b3shjkp) (if a social media "connection includes current and frequent communication, the judge must very carefully consider whether that connection must be disclosed"). Finding that "the extreme facts of this case rebut the presumption of judicial impartiality and establish a due process violation," the Wisconsin Supreme Court held that a serious risk of actual bias was created in a custody dispute when, while the decision was pending following a contested hearing, the trial judge accepted a Facebook "friend request" from the mother and she interacted with him, including "liking," "loving," or commenting on at least 20 of his Facebook posts. She also "shared" and "liked" several third-party posts related to domestic violence, which was an issue in the case. *In re Paternity of B.J.M.*, 944 N.W.2d 542 (Wisconsin 2020). The Court affirmed the decision of the court of appeals reversing the trial judge's denial of a motion for reconsideration of his decision in the mother's favor and remanding the case with directions that it proceed before a different judge.

(This analysis would apply to relationships with parties and witnesses as well as attorneys. A brief disqualification refresher: a judge is required to disqualify from a case when "the judge's impartiality might reasonably be questioned"[4] and "should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification."[5] Of course, if a judge subjectively feels a personal bias about an attorney, positive or negative, disqualification is always required.[6])

Although it has been suggested that a less strict standard applies in smaller communities where every attorney knows who a judge's friends are, the California Commission on Judicial Performance has rejected such an exception. It notes that a standard based on what local attorneys know leaves out "attorneys who are not local, and the parties, including self-represented parties,"[7] and has held that a "'judge's ethical duties are the same irrespective of population statistics,'"[8] emphasizing the importance of "uniform statewide standards."[9]

CATEGORIES

To provide more guidance for judges, in a 2011 advisory opinion, the New York Advisory Committee on Judicial Ethics identified three categories of connection—acquaintance, close social relationship, and close personal relationship—and imposed a different ethical obligation for each category.[10] The American Bar Association Standing Committee on Ethics and Professional Responsibility also sorted associations into three groups—acquaintance, friendship, and personal relationship—in a 2019 formal advisory opinion on judges' social relationships with attorneys.[11]

Both opinions treat "acquaintances" the same: a judge is not required to disclose being acquainted with an attorney or to disqualify from cases involving acquaintances. The New York opinion defines "acquaintance" as a relationship in which the parties do not initiate social contact with each other but do "greet each other and interact cordially" when they meet by "happenstance or some coincidental circumstance such as being members of the same profession, religion, civic or professional organization, etc."

> For example, the judge and the attorney both attend bar association meetings . . . , other professional gatherings, sporting or other school events involving their children; they patronize the same retail establishment; they see each other primarily when socializing with mutual friends, but not otherwise; they are members of the same country or golf club; or they attend the same religious services.

Although they use different terms, the two opinions appear to conceive of a "close social relationship" (New York) and "friendship" (the ABA) similarly. The ABA committee defines "friendship" as implying "a degree of affinity greater than being acquainted" and "connot[ing] some degree of mutual affection;" some friendships may be professional, some may be social, and "some friends are closer than others."

"The … cases illustrate that judges may need the extra guidance provided by bright lines to … determin[e] when a relationship shifts from unremarkable, to disclosable, to disqualifying."

The ABA committee defines a "personal relationship," its third category, as one that "goes beyond or is different from common concepts of friendship . . . ." The New York committee explains that a judge and an attorney have a close personal relationship, its third category, when they "share intimate aspects of their personal lives. For example, where the judge, the attorney, and/or members of their immediate families share confidences, socialize regularly, vacation together, celebrate significant events in each other's lives and/or share interests that are important to them personally . . . ."

Despite similar categories, the two committees analyze the ethical obligations arising from relationships other than acquaintance very differently. Under the New York analysis, while it is up to the judge to decide how to characterize a relationship based on various factors, if the judge determines it is a close social relationship, disclosure is mandated, and, if the judge determines it is a close personal relationship, disqualification is mandated, subject to waiver.

In contrast, although it distinguishes between friendships and personal relationships, the ABA committee does not create distinct ethical obligations for the two categories. According to the opinion, neither disclosure nor disqualification are always required for either, but "whether judges must disqualify themselves when a party or lawyer is a friend or shares a close personal relationship with the judge or should instead take the lesser step of disclosing the friendship or close personal relationship to the other lawyers and parties, depends on the circumstances." The only definitive advice the ABA opinion gives is that "a judge must disqualify himself or herself when the judge has a romantic relationship with a lawyer or party in the proceeding, or desires or is pursuing such a relationship." Under the ABA analysis, after deciding whether an attorney is

4. Rule 2.11(A), *Model Code of Judicial Conduct* (ABA 2007) (https://tinyurl.com/wga4u2w).
5. Comment 5, Rule 2.11(A), *Model Code of Judicial Conduct* (ABA 2007) (https://tinyurl.com/shr56ud);
6. Rule 2.11(A)(1), *Model Code of Judicial Conduct* (ABA 2007) (https://tinyurl.com/wga4u2w).
7. *Public Admonishment of Mason* (California Commission on Judicial Performance December 3, 2019) (https://tinyurl.com/u3ejkma), *quoting*
8. *Id.*
9. *Inquiry Concerning Bailey*, Decision and order (California Commission on Judicial Performance February 27, 2019) (https://tinyurl.com/y468x7zm).
10. *New York Advisory Opinion 2011-125* (https://tinyurl.com/sudo8sb).
11. *ABA Formal Opinion 488* (2019) (https://tinyurl.com/y6rrsbmc).

more than an acquaintance (but not a romantic interest), the judge needs to determine whether there are other circumstances that necessitate disclosure or disqualification regardless whether the relationship is characterized as a friendship or personal relationship.

The recent discipline cases illustrate that judges may need the extra guidance provided by bright lines to meet the challenge of determining when a relationship shifts from unremarkable, to disclosable, to disqualifying.

Since October 1990, Cynthia Gray has been director of the Center for Judicial Ethics, a national clearinghouse for information about judicial ethics and discipline that is part of the National Center for State Courts. (The CJE was part of the American Judicature Society before that organization's October 2014 dissolution.) She summarizes recent cases and advisory opinions, answers requests for information about judicial conduct, writes a weekly blog (at www.ncscjudicialethicsblog.org), writes and edits the Judicial Conduct Reporter, *and organizes the biennial National College on Judicial Conduct and Ethics. She has made numerous presentations at judicial-education programs and written numerous articles and publications on judicial-ethics topics. A 1980 graduate of the Northwestern University School of Law, Gray clerked for Judge Hubert L. Will of the United States District Court of the Northern District of Illinois for two years and was a litigation attorney in two private law firms for eight years.*