

Personal Relationships within Ethical Standards

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Senior Level (SL) Commissioner for

Judge Kevin Ohlson, U.S. Court of Appeals for the Armed Forces

And

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at Washington College of Law, American University

April 2020

Disclaimer

- *Disclaimer: The views in this presentation are those of the author and do not necessarily reflect the official policy or position of the United States Court of Appeals for the Armed Forces (USCAAF), the Department of Defense (DOD), or the United States Government (USG).*

Outline/Goals

- Know what rules apply to you
- Ethical Relationships
 - Judges
 - Counsel
 - Witnesses
- Not covering UCMJ fraternization and unprofessional relationships

Additional Goal

- During PME don't become the source of further appellate litigation
 - US v. Bremer, 72 MJ 624 (NMCCA 2013)
 - US v. Sanders, NMCCA 2014
 - US v. Kish, NMCCA 2014
 - US v. Howell, NMCCA 2014
- Rule of Thumb: If you need 6 pages of single space transcript to explain why you aren't conflicted, you probably are...

2017 Year-End Report on the Federal Judiciary

- We have **a new challenge** in the coming year. Events in recent months have illuminated the depth of **the problem of sexual harassment** in the workplace, and events in the past few weeks have made clear that **the judicial branch is not immune**. The judiciary will begin 2018 by undertaking a careful evaluation of whether its standards of conduct and its procedures for investigating and correcting inappropriate behavior are adequate to ensure an exemplary workplace for every judge and every court employee

Headline News

- **Newly Amended Law Clerk Handbook Affirms Harassment Complaints Are Permitted**
- **The federal law clerk handbook was revised Monday to include language that says nothing in the code of conduct prevents a clerk, or another judiciary employee, from revealing alleged misconduct. "Clerks are encouraged to bring such matters to the attention of an appropriate judge or other official," the handbook now says.**
- By [Tony Mauro](#) | December 19, 2017 at 12:03 AM
- National Law Journal

Change to the Federal Clerk's Handbook

- *However, nothing in this handbook, or in the Code of Conduct, prevents a clerk, or any judiciary employee, from revealing misconduct, including sexual or other forms of harassment, by their judge or any person. Clerks are encouraged to bring such matters to the attention of an appropriate judge or other official.**
- * Clarifying language in italics added December 18, 2017.

30 Sep 2019

- 10th Circuit's Public Reprimand of Judge Murguia
 - Unwanted attention to female employees
 - Sexually suggestive comments, inappropriate text messages and excessive non-work related contact
 - Years long extramarital affair with a drug-using felon on probation (now back in jail)
 - Habitually late due to lunchtime basketball games
- Less than candid/apologies tied to his actions being discovered/admitted only w/evidence

Continuing Headlines

- Today United States District Judge Carlos Murguia tendered his resignation from office to President Trump, effective April 1, 2020. Judge Murguia's letter is attached. **Judge Murguia resigned** with "a heavy heart and profound apologies, out of respect for the federal judiciary, my colleagues, my community and — most importantly — my family." Between now and April 1, 2020 Judge Murguia will assist the District of Kansas with an orderly transition of his administrative duties and case-related responsibilities. Judge Murguia's cases will immediately be reassigned to the other district judges of this court. Judge Murguia has been a district judge since 1999 and **resigns his commission without eligibility for pension or any retirement benefits.**

Why this topic again?

U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515-6216
One Hundred Sixteenth Congress

February 6, 2020

James C. Duff
Secretary
Judicial Conference of the United States
One Columbus Circle NE
Washington, D.C. 20544

The Hon. Julie A. Robinson
Chief Judge
U.S. District Court for the District of Kansas
500 State Avenue, Suite 511
Kansas City, Kansas 66101

The Hon. Timothy M. Tymkovich
Chief Judge
U.S. Court of Appeals for the Tenth Circuit
1823 Stout Street
Denver, Colorado 80257

Dear Secretary Duff, Chief Judge Tymkovich, and Chief Judge Robinson,

As the leadership of the House Judiciary Committee, we, along with our colleagues, are responsible for assessing how best to ensure accountability within the courts so that judicial branch employees and judges can be free from workplace misconduct, isolation, and retaliation, and have fair and meaningful recourses to address any concerns. The Committee is committed to protecting the more than 30,000 people employed by the federal Judiciary.

On September 30, 2019, the Tenth Circuit Judicial Council issued an order finding that Carlos Murguía, a federal district judge in Kansas City, Kansas, had committed multiple acts of serious judicial misconduct, including sexually harassing an undisclosed number of Judiciary employees for an undisclosed period of time.¹ In light of these serious allegations, we write to inquire about the adequacy of the rules and statutes governing judicial misconduct, and the effectiveness of the Judiciary's recent reforms to address workplace harassment. Because the

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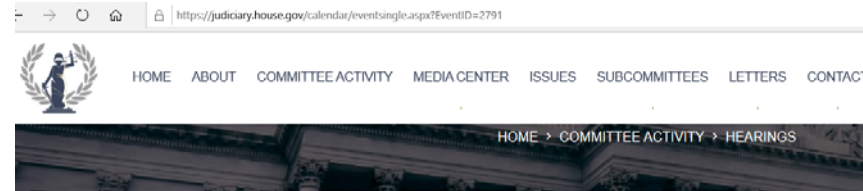
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Hearings

Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct

Subcommittee on Courts, Intellectual Property, and the Internet

Date: Thursday, February 13, 2020 - 08:30am

Location: 2141 RHOB

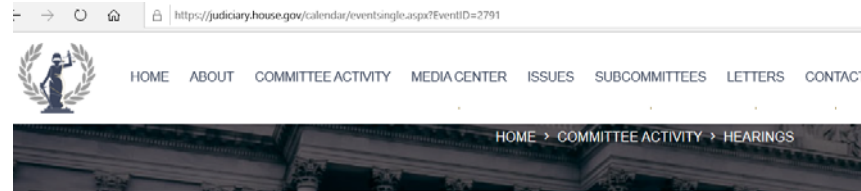
Tags: *Courts, Intellectual Property, and the Internet*

Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct

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Dear Secretary D

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8. Provided nation-wide training by the Federal Judicial Center on preventing harassment, workplace civility, and diversity and inclusion.

These actions, and other initiatives, are discussed more completely in the *Status Report from the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States*, dated September 17, 2019, which has previously been furnished to the Committee. We have more to do, and I appreciate that you also share our commitment to protecting employees of the Judiciary. I look forward to our continuing discussion with you on how the Judiciary is making progress in this area.

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Sexual
place

tion, and Other

Recent CCA Case Law

- Regardless of precisely when [the military judge] LTC Henry's relationship with Mrs. KC [prosecutor's wife] rose to the level of being grounds for disqualification, the relationship had certainly reached that level for the trial on the merits in December. There is ample evidence that over the summer of 2017, LTC Henry had developed a close friendship with Mrs. KC. **The increase in emails, text messages, and Facebook posts raises questions of impropriety and impartiality.** There is no question that having the prosecutor's wife visit with the military judge in private while the panel was deliberating is a serious departure from the conduct expected of a military judge.

United States v. Springer, No. ARMY 20170662, 2020 CCA LEXIS 30, at *11-12 (A. Ct. Crim. App. Jan. 22, 2020)

How do the rules apply to me?

WHO

ARE

YOU

?

Who Are You
by The Who
from the Album:
Who Are You

There's a place where I
know you walked

The love falls from the
trees

My heart is like a broken
cup



What Rules apply to you?

- Who are you?
 - Appellate Judge
 - Judicial Staff
 - Military Servicemember
 - Army, Air Force, Navy, Marines, Coast Guard
 - Judge (Appellate, Trial)
 - Counsel
 - Paralegal
 - Civilian Attorney
 - Federal Employee
 - State Bar

Sources of Law

- Code of Conduct for US Judges
- Service Specific Instructions/Regulations
 - May differ depending on role/assignment
- USCAAF and CCA Case law
- State bar rules

Code of Conduct for US Judges

- Canon 1: A Judge Should Uphold the **Integrity and Independence** of the Judiciary
- Canon 2: A Judge Should **Avoid Impropriety** and the Appearance of Impropriety in All Activities
- Canon 3: A Judge Should Perform the Duties of the Office **Fairly, Impartially and Diligently**
- Canon 4: A Judge May Engage in Extrajudicial **Activities That Are Consistent** with the Obligations of Judicial Office
- Canon 5: A Judge Should Refrain from Political Activity

Code of Conduct for Judicial Staff

- **Ch 3: Code of Conduct for Judicial Employees**
- Canon 1: A Judicial Employee Should **Uphold the Integrity** and Independence of the Judiciary and of the Judicial Employee's Office
- Canon 2: A Judicial Employee Should **Avoid Impropriety and the Appearance of Impropriety** in All Activities
- Canon 3: A Judicial Employee Should **Adhere to Appropriate Standards** in Performing the Duties of the Office
- Canon 4: In Engaging in Outside Activities, a Judicial Employee Should Avoid the Risk of Conflict with Official Duties, Should **Avoid the Appearance of Impropriety**, and Should Comply with Disclosure Requirements
- Canon 5: A Judicial Employee Should **Refrain from Inappropriate Political Activity**

ABA MODEL CODE OF JUDICIAL CONDUCT (2011 EDITION)

- CANON 1
A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY
- CANON 2
A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY
- CANON 3
A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE.
- CANON 4
A JUDGE OR CANDIDATE FOR JUDICIAL OFFICE SHALL NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR IMPARTIALITY OF THE JUDICIARY

Navy & Marine Corps

Judicial Conduct. To the extent that it does not conflict with statutes, regulations, or these Rules, the American Bar Association Model Code of Judicial Conduct (Code of Judicial Conduct) (reference (k)) applies to all military and appellate judges and to all other covered USG attorneys performing judicial functions under the JAG's supervision within the DON.

- JAGINST 5803.1E OJAG (Code 13) 20 Jan 2015

Army

- *The “Code of Judicial Conduct for Army Trial and Appellate Judges,”* dated 16 May 2008 (available on JAGCNet), is applicable to all trial and appellate military judges and military magistrates.
- Encouraged to look at other recognized sources – State/Federal Court/ABA ethics opinions
- *Army Reg 27-10, Military Justice,* 11 June 2016

Army/ 4 Canons

- CANON 1: A JUDGE SHALL UPHOLD AND PROMOTE THE **INDEPENDENCE, INTEGRITY, AND IMPARTIALITY** OF THE JUDICIARY, AND SHALL **AVOID IMPROPRIETY** AND THE APPEARANCE OF IMPROPRIETY.
- CANON 2 :A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE **IMPARTIALLY, COMPETENTLY, AND DILIGENTLY**.
- CANON 3 : A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO **MINIMIZE THE RISK OF CONFLICT** WITH THE OBLIGATIONS OF JUDICIAL OFFICE.
- CANON 4 : A JUDGE SHALL NOT ENGAGE IN POLITICAL OR **CAMPAIGN** ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR IMPARTIALITY OF THE JUDICIARY.

Know the rules that apply to you

- Teaching by way of example
 - Mostly by what NOT to do
- Examples are based on the rules that apply to that individual
- Results may vary

Let's jump in



Fiduciary Responsibility

- “The roles of lawyer and lover are potentially conflicting ones”

ABA Formal Opinion 92-364 (1992)

- See Virginia State Bar, legal ethics opinion 1853, “Sexual Relationships with a client”

- Can't ask for or accept sexual favors in lieu of fees
- Clients may feel pressure to engage in activity to ensure continued representation
- Attorneys who have engaged in sexual relationships with clients from legal aid clinics, during divorce proceedings, etc. --- have been disbarred, suspended, or reprimanded

Air Force PR program

AFI 51-110, 5 Aug 2014

78 Page AFI

88 Page Guidance Memo (additional update)

Rule 1.8. CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

Same as ABA Model Rule of Professional Conduct 1.8(j)

*BY ORDER OF THE
SECRETARY OF THE AIR FORCE*

AIR FORCE INSTRUCTION 51-110

5 AUGUST 2014

Law

*PROFESSIONAL RESPONSIBILITY
PROGRAM*

COMPLIANCE WITH THIS PUBLICATION IS MANDATORY

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(Mr. Conrad M. Von Wald)

Pages: 78

Civilian Counsel sees the problem

- *United States v. Cain*, 59 M.J. 285 (CAAF 2004)
 - Appellant represented by Major S
 - After conviction Appellant’s parents allege Maj S coerced their son into a sexual relationship
 - Maj S denies and then commits suicide next day
 - DuBay hearing
 - Sexual relationship between TDC and client
 - Client believed only Maj S could “save him” from GCM
 - Client consults Civilian DC who says the relationship is unethical and will not work with Major S
 - Per Se Conflict of Interest: in part due to fraternization

Not per se IAC

- Married civilian DC and client develop relationship that culminates in sexual intercourse the night before last day of court-martial
- Capt B claims IAC – CMA says not per se
- DC Bar issued informal admonishment
- *United States v. Babbitt*, 26 M.J. 157 (CMA 1988)

“The Love Boat”

- Civilian counsel (married) and Capt H (single) become romantically involved during trial prep
- According to the appellant, his lawyers had put his case on the "back burner" to cruise on the "Love Boat" while TDY to UAE to prep case
- After court-martial, Mr. B sends App a bundle of case materials including epistles from Capt H to Mr. B revealing an intimate relationship
- No per se rule of IAC
- “Certain aspects of a romantic relationship between counsel can work to a client's benefit. Certainly, it cannot be said the appellant's lawyers were not talking to each other.”
- *U.S. v. Washington* 42 M.J. 547 (AFCCA 1995)

What about witnesses?

- If you are a prosecutor in a case, you shouldn't have sexual relationships with the victim/witness in your case.
- Even decades later and after you have become a judge, your past misconduct will have repercussions
- A defense of "consensual" sexual activity with a 16 year old victim/witness when you were the prosecutor, engaged to be married and over a decade older is unlikely to be persuasive

Sadly, you may have thought of a different case...

Recent News

- AG Offers Condolences to Huntsman Family
February 2, 2018
- Human Traffickers Receive Maximum Penalty
January 23, 2018
- AG's Office Releases Draft Opinion on 3rd Congressional District Special Election
January 16, 2018
- AG Reyes Presents Utah Declaration on Human Trafficking Prevention Month
January 9, 2018
- Utah Attorney General's Office Files Amended Complaint in Gold King Lawsuit
January 5, 2018
- AG Reyes Statement on the Passing of LDS Church President Thomas S. Monson
January 3, 2018
- AG Reyes Thanks Utah National Guard on Deployment to Afghanistan
December 28, 2017
- Quinlen Atkinson Sentenced for Human Trafficking
December 20, 2017
- AG Reyes Fights to Protect Utah Egg Farmers and Low-Income Families from California Regs
December 7, 2017

Op-ed: Reyes' office justified in not charging federal judge in 35-year-old case

In an op-ed for the Salt Lake Tribune, Brett L. Tolman, a former United States Attorney for the District of Utah, and Eric G. Benson, a former assistant United States Attorney, argue that the Office of the Attorney General was justified in not charging Judge Richard Roberts, a former Justice Department prosecutor and current federal judge, with the sexual assault of a woman 35 years ago.

The AG's office received notice of the incident in 2014 and quickly assigned veteran investigators to conduct interviews and collect evidence and senior prosecutors to screen the case. Additionally, Reyes enlisted former federal judge Paul Cassell as a special prosecutor to review the case and issue findings and recommendations. Cassell, known for his painstaking attention to detail and his advocacy for crime victims, compiled a report outlining the salient facts and evidence and advised the attorney general on the best course of action going forward.

In his report, Cassell determined that Roberts could not be prosecuted for having sex with a 16-year-old based on the existing criminal laws in 1981. Without an option to prosecute Roberts for having sex with an under-aged minor, prosecutors would need to pursue a full-blown rape charge.

2:53 PM
2/8/2018

Results

- Utah Office of the Attorney General: the report in no way excuses [Chief Judge] Roberts' actions and recommends the attorney general report the judge to various agencies for **numerous ethical and professional violations**.
- Chief Judge of the U.S. District Court for the District of Columbia
- **Retired** for “unspecified health reasons” same day a lawsuit was filed by the former witness
- No Disciplinary Action

Results

- No judicial disciplinary action
 - Misconduct prior to becoming a federal judge is not within the jurisdiction of the Judicial Conduct and Disability Act
 - No continuing duty for federal judge to report pre-appointment misconduct
 - Claim of disability for retirement was not dishonest
- **Could still be impeached** since receiving retired pay as a federal judge

Judges and Clerks

- Judge Alex Kozinski, 9th Circuit Court of Appeals
- 6 Former law clerks or staffers claimed inappropriate sexual conduct or comments
 - View pornography not related to any case
 - Suggested another judge's clerk should workout naked in the courthouse gym
- Reported in Washington Post on 8 Dec 2017
 - Told LA Times, "If this is all they are able to dredge up after 35 years, I am not too worried."
- Retirement on 18 Dec 2017

Judge and Counsel

- What if MJ and TC are involved in an intimate/sexual relationship?
 - “Judges, like Caesar’s wife, should always be above suspicion.”
 - MJ social gatherings w/TC, perceived close friendship, TC says if not for my current boyfriend something could happen w/MJ
 - 6 cases with MJ & TC; ½ before 4 Dec 1987 and ½ after
 - 4 Dec 1987 – MJ & TC first attempted to have sexual intercourse but were unsuccessful
 - *US v. Berman*, 28 MJ 615 (AFCMR 1989)

The Appellate Judge's Philosophy Degree

- “Appellate government counsel's request that we select 4 December 1987, as the date Judge Miniclier began his affair with Captain Edgar, is akin to seeking to accomplish the task achieved by the **Irish theologian, Bishop James Ussher. Bishop Ussher, in the 17th century, concluded that the universe was created on the morning of 13 October in the year 4004 BC.** Unlike Bishop Ussher, we are unwilling to be that exact in our judgment of when Judge Miniclier became disqualified. What happened on 4 December and after between himself and Captain Edgar is relevant to our assessment of their relationship prior to that date. In determining a trial judge's disqualification to sit we do not require proof beyond a reasonable doubt, but rather some probative evidence that convinces us that the judge in question lacks the appropriate degree of impartiality.”

Not Limited to the United States

The screenshot shows a web browser window displaying the website <https://www.ilfattoquotidiano.it/premium/articoli/minigonne-trucco-e-fidanzati-scandalo-al-consiglio-di-stato/#cComments>. The page features a navigation bar with categories like SEZIONIPRIMO PIANO, EDITORIALE, COMMENTI, POLITICA, ECONOMIA, CRONACA, ITALIA, MONDO, CULTURA, and SPORT. The main article is titled "Consiglio di Stato, minigonne obbligatorie e il divieto di matrimonio: scandalo alla scuola per futuri magistrati" and includes a sub-headline "Pugno duro - Verso la destituzione il consigliere Bellomo: gli strani criteri di selezione della sua scuola per futuri magistrati". A central image shows the facade of a grand building, likely the Palazzo di Giustizia in Rome. On the right, a vertical advertisement for Fundrise promotes becoming a real estate investor, listing benefits such as 9-11% expected annual returns, broad diversification, and a minimum investment of \$500. The browser's taskbar at the bottom shows the time as 3:15 PM on 2/8/2018.

il Fatto Quotidiano SEZIONIPRIMO PIANO EDITORIALE COMMENTI POLITICA ECONOMIA CRONACA ITALIA MONDO CULTURA SPORT Accedi il Fatto Quotidiano Social

» POLITICA venerdì 08/12/2017

Consiglio di Stato, minigonne obbligatorie e il divieto di matrimonio: scandalo alla scuola per futuri magistrati

Pugno duro - Verso la destituzione il consigliere Bellomo: gli strani criteri di selezione della sua scuola per futuri magistrati

BECOME A REAL ESTATE INVESTOR.

- ✓ 9 - 11% expected annual returns
- ✓ Broad diversification
- ✓ Start with just \$500

FUNDRISE GET STARTED

3:15 PM 2/8/2018

Judge and School Director

- Director of School that prepared students for judicial exam
- Ran it in a cult like fashion
- Top Students received scholarships if they **pledged loyalty** to Bellomo himself, took a **vow of secrecy** and relinquished the freedom to date whom they pleased (any significant others needed to be approved).
- Comply with a **detail-obsessed dress code** that required women to wear miniskirts leaving at least two-thirds of the thighs exposed.
- Pressured female students to have sex with him (not illegal in Italy) but then **intimidated students** by publishing personal information in school's academic journal, sending police to student's house and threatening legal action

Light at the end of the tunnel



Friendship and other relationships

- Rule:
 - Personal and professional relationships between members of the judiciary and witnesses or other participants are not per se disqualifying.
 - Social relationship creates special concerns not present in a professional relationship
 - U.S. v. Wright, 52 MJ 136 (CAAF 1999)
 - Prior professional relationship between MJ (when TC) and NCIS agent
 - U.S. v. Norfleet, 53 MJ 262 (CAAF 2000)
 - Accused (DP) and MJ had same Commander, AFLSA/CC, who also forwarded the charges & specifications

Family Friends

- What if V is a close friend of MJ's 13 year old daughter?
 - MJ denies request for judge alone due to appearance
 - U.S. v. Sherrod, 26 MJ 30 (CMA 1988)
 - Must the MJ recuse from the court-martial with members?
 - Yes, abuse of discretion not to recuse
 - If recused from being judge alone, then recused from serving as military judge with members

US v. Butcher, 56 MJ 87 (CAAF 2001)

- Court-martial from 22 June to 8 July
- Weekend recess from 2 – 6 July
- 3 July, Friday – MJ at TC's home for a Party
 - “To Promote Peace, Love and Harmony Among Trial & Defense Counsel...Yeah, Right”
 - Trial defense counsel did not attend but other defense attorneys were there
- 4 July, Saturday: 2 hour tennis match
 - MJ & TC were doubles partners

Professional Friendship

- Constitutional Right to an Impartial Judge
- Director of Appellate Gov't Division is TC
- “Air Force friendship” between MJ and TC
 - Not per se disqualifying
- Professional Duty Conflict?
 - App Gov't “defends” decisions by TC and MJ
 - Sort of...but Gov't is client not TC or MJ
 - In IAC cases, also “defends” the TDC
 - No per se disqualification

Questions?



Attorney General & his son, the Judge

- Ohio Attorney General Mike DeWine (father)
- Ohio Supreme Court Justice Patrick DeWine (son)
 - Recuses himself from some cases
 - Does not recuse from other cases
- Grandson is intern with County Prosecutor
- Ethics complaint brought by law student who was not allowed to take bar exam
 - Due to statements about motor vehicle infractions

Married to the County D.A.

- Can Attorney who is married to a county prosecutor represent criminal defendants in that county?
- Rule 1.7(b) requires both clients be told of potential conflict and provide written consent
- Problem: No mechanism for State to provide written consent
 - Therefore not permitted
- However, brother/sister are OK!