

**A PARTISAN AGENDA THAT PROMOTES NON-PARTISAN JUDICIAL DIVERSITY  
AND INTEGRITY**

**An Evaluation of the Propriety and Effectiveness of the American Bar Association's  
Inclusion of the Term "Domestic Partner" in the 2007 Model Code of Judicial Conduct.**

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# **A PARTISAN AGENDA THAT PROMOTES NON-PARTISAN JUDICIAL DIVERSITY & INTEGRITY**

## **An Evaluation of the Propriety and Effectiveness of the American Bar Association's Inclusion of the Term "Domestic Partner" in the 2007 Model Code of Judicial Conduct.**

### **I. Introduction**

In 2007, the American Bar Association (ABA) created a Model Code of Judicial Conduct (MCJC) that included the term "domestic partner," and defined such as "a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married."<sup>1</sup> The ABA asserts that the addition of the term "domestic partner," hinged "on the theory that now commonplace 'non-traditional' relationships that exist outside marriage are deserving of treatment equal to that afforded marital relationships in evaluating their potential conflict-of-interest implications" for the purposes of the MCJC.<sup>2</sup> The ABA emphasized the rules that prohibit family influences to influence judicial conduct and expanded the definition of family to preserve the integrity and/or perceived integrity of the judicial institution.<sup>3</sup>

However, the Federalist Society, in its "ABA Watch" newsletter, represents the widely-held conservative perspective that the ABA unfairly forces its marginalized liberal agenda onto mainstream America.<sup>4</sup> Although most states that have updated their code of judicial conduct have included the term "domestic partner," some states have declined to do so. Of course, the underlying question for the states who have chose to reject such term asks, "does the ABA's

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<sup>1</sup> Model Code of Jud. Conduct (2007).

<sup>2</sup> Reporter's Explanation of Changes [to] ABA Model Code of Jud. Conduct at 4, [www.americanbar.org/content/dam/aba/migrated/judiciaethics/mcjc\\_2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/mcjc_2007.authcheckdam.pdf) (accessed on Feb. 8, 2012 ) (2007).

<sup>3</sup> *Id.* at 10.

<sup>4</sup> The Federalist Society. [www.fed-soc.org/publications/page/aba-watch](http://www.fed-soc.org/publications/page/aba-watch) (accessed on Apr. 29, 2012).

inclusion of the term ‘domestic partner’ in the 2007 MCJC reflect a non-partisan approach to sincerely improve judicial integrity, or does such reflect LGBT lobbying efforts at the ABA?” If the inclusion of the “domestic partner” term merely represents LGBT activism within the ABA, then states whose public policy rejects LGBT rights should rightly reject the inclusion of such term in the codes of judicial conduct for their states.

The ABA does have a partisan history of supporting LGBT equality, especially when the ABA in 2010 recommended that all state governments legalize same-sex marriage, when such did not reflect the view of most Americans. Even though “domestic partner” could refer to many heterosexual relationships, the ABA has advocated the use of the term “domestic partner” to promote the rights of gays and lesbians. An analysis demonstrates that the ABA’s introduction of the term “domestic partner” will probably promote judicial integrity and that the ABA has failed to take other comparable measures that could have promoted equality for transgender people in the 2007 MCJC. California considered “domestic partner” to mean same-sex couples, while states that had already legalized gay marriage presumably included the term “domestic partner” as a mean of advocating for LGBT rights. Most of the states that did exclude the term “domestic partner,” from their codes of judicial conduct did such solely out of opposition to gay and lesbian rights. Although the ABA has traditionally engaged in partisan advocacy to advance the rights of LGBT people, the ABA’s inclusion of the term “domestic partner” represents an intelligent, non-partisan effort to improve the public’s perception of the judiciary.

## **II. ABA’S Recent History of Engaging in Gay and Lesbian Advocacy.**

While asserting neutrality in the same-sex marriage debate, the ABA adopted a series of policies urging state legislatures and state courts to provide legal protections for children in

families headed by unmarried or same-sex partners. In Aug. 1995, the ABA promoted state statutory and common law that would ensure that child custody or visitation is not restricted on the basis of a parent's sexual orientation.<sup>5</sup> In Feb. 1999, the ABA encouraged "the enactment of laws and implementation of public policy [providing] that sexual orientation shall not be a bar to adoption when the adoption is determined to be in the best interests of the child."<sup>6</sup> In Aug. 2003, the ABA encouraged state statutory and common law changes to permit second parent adoptions by unmarried persons, including lesbian and gay partners.<sup>7</sup> In Aug. of 2010, the ABA formally broke neutrality through voting overwhelmingly to adopt a resolution urging state government to permit same-sex marriage.<sup>8</sup> When the ABA passed its resolution urging state governments to permit same-sex marriage, only five states and the District of Columbia had legalized gay marriage.<sup>9</sup>

### **III. Although "Domestic Partner" Constitutes Language that Advances the LGBT Agenda, the MCJC Denies Rights to Transgender People, Even When Such Would Have Appropriately Reflected Relevant Supreme Court Jurisprudence.**

#### **A. Relationships Covered by the Term "Domestic Partner."**

The ABA has used "domestic partner" to refer to heterosexual relationships and wrote a definition that could encompass relationships other than same-sex relationships, however, the use of the term, "domestic partner" undeniably advocates for gays and lesbians. Since the ABA had also advocated for unmarried couples, along with same-sex couples, the ABA may have considered opposite-sex common law marriages in jurisdictions that didn't recognize common-

<sup>5</sup> ABA, *Sexual Orientation and Gender Identity Policies*, at 2-3, [www.americanbar.org/content/dam/aba/migrated/2011\\_build/sexual\\_orientation/sexual\\_orientation\\_and\\_gender\\_identity\\_policies.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/sexual_orientation/sexual_orientation_and_gender_identity_policies.authcheckdam.pdf), (accessed on Feb. 6, 2012).

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Human Rights Campaign, *Maps of State Laws & Policies*, [www.hrc.org/resources/entry/maps-of-state-laws-policies](http://www.hrc.org/resources/entry/maps-of-state-laws-policies) (accessed on Feb. 8, 2012).

law marriages when using the term “domestic partner.” In strictly using its definition, “domestic partner” could refer to polyamorous or polygamous sexual relationships where more than two people live together. “Domestic partner” could also refer to a close relationship between people who live together, but do not have sexual relations. The MCJC later uses the word “intimate” to mean private or closely personal, in describing close-knit organizations that could constitutionally discriminate against protected classes.<sup>10</sup> Under such a non-sexual definition, a live-in servant who has become emotionally, but not sexually, involved with their employer, like Tony Danza’s character on “Who’s the Boss,” would qualify as a domestic partner. Non-related, non-sexually involved “couples” like Peter Maurin and Dorothy Day, who lived together for spiritual and/or ideological reasons, would also qualify as domestic partners.

#### **B. Gay and Lesbian Advocacy Through the Use of the Term “Domestic Partner.”**

The MCJC’s definition suggests that “domestic partner” primarily refers to a same-sex partner who would be a “spouse” if lawfully married. Advocates for same-sex marriage publicly juxtapose gay and lesbian relationships to comparable heterosexual relationships to advocate for same-sex marriage. On Nov. 2007, the Bar Association for San Francisco (BASf) issued a report on the best practices for the equality and inclusion of LGBT lawyers.<sup>11</sup> Among other recommendations, the report urged employers to create an LGBT inclusive culture through the use of affirming language, specifically by using a marriage-neutral term.<sup>12</sup>

An LGBT attorney who is in a committed relationship appreciates having his or her employer show respect for that relationship. When the law office issues an invitation to a business function to employees and their ‘spouses’ without also including non-marriage specific terminology, the company fails to signal that

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<sup>10</sup> ABA, *supra* note 1 at R. 3.6, cmt 2.

<sup>11</sup> The Bar Assoc. of San Francisco Equality Comm. *Report on Lesbian, Gay, Bisexual, and Transgender Issues*, [www.sfbbar.org/forms/diversity/lgbt\\_report\\_nov07\\_basf.pdf](http://www.sfbbar.org/forms/diversity/lgbt_report_nov07_basf.pdf) (accessed on Feb. 6, 2012) (2007).

<sup>12</sup> *Id.* at 11.

invitation to a business function to employees and their “spouses” without also including non-marriage specific terminology, the company fails to signal that respect. Outside of [the few states that allow same-sex marriage], ‘spouse’ means opposite-sex husband or wife. Using the term in invitations suggests to LGBT employees that they are invisible to the employer, or that the employer does not respect their relationships. *This small change in wording can have a big impact on firm culture.* (italics added).<sup>13</sup>

The BASF, through its use of language throughout the report, made clear that “domestic partner” referred exclusively to same-sex couples and asserted that same-sex domestic partners should have complete equality in the workplace to opposite-sex couples.<sup>14</sup> Not formally approved by the ABA, the ABA Commission on Sexual Orientation and Gender Identity (CSOGI) released a report in 2011 echoing the BASF’s recommendations in its 2007 report.<sup>15</sup> In almost identical language, CSOGI’s report encourages employers to “[e]nsure that social invitations are inclusive by using wording that invites partners, not just spouses,” while defining “domestic partnerships,” as an inherently gay and lesbian issue.<sup>16</sup>

However, the MCJC falls short in regards to fulfilling LGBT law associations’ full agenda that which also seeks to protect transgender people. United States Supreme Court case law had previously laid the foundation for some federal courts to rule that discrimination against transgender people violates Title VII’s prohibition against sex discrimination.<sup>17</sup> However, the MCJC explicitly and needlessly asserts that the prohibition of judicial sex discrimination does not prohibit discrimination against transgender people.<sup>18</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> ABA Comm. on Sexual Orientation and Gender Identity. *Best Practices for Promoting LGBT Diversity*, [www.americanbar.org/content/dam/aba/administrative/sexual\\_orientation/sogi\\_best\\_practice\\_guide\\_lgbt.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/sexual_orientation/sogi_best_practice_guide_lgbt.authcheckdam.pdf) (accessed on Feb. 8, 2012) (2011).

<sup>16</sup> *Id.* at 4.

<sup>17</sup> National Center for Lesbian Rights and Transgender Law Center. *Advancements in State and Federal Law Regarding Transgender Employees: A Compliance Guide for and Employment Law Attorneys*, at 2, [www.nclrights.org/site/DocServer/complianceguideemployers.pdf?docID=1201](http://www.nclrights.org/site/DocServer/complianceguideemployers.pdf?docID=1201) (accessed on Feb. 6, 2012) (2006).

<sup>18</sup> ABA, *supra* note 2 at 15.



#### **IV. Adding the Term “Domestic Partner” Should Improve Judicial Integrity, While Promoting Diversity on the Bench**

##### **A. Not Including the Term “Domestic Partner” in the Model Rules of Professional Conduct Creates Obvious Problems that Were Absent in a Comparable MCJC.**

An analysis of the ABA’s current Model Rules of Professional Conduct demonstrates an inattention to ethical issues for gay and lesbian attorneys. As amended in 2005, the MRPC does not include the term “domestic partner” for its conflict of interest analysis. “[A] lawyer related to another lawyer . . . ordinarily may not represent a client in a matter where that lawyer is representing another party.” The MRPC defines relation as someone related through blood or marriage.<sup>19</sup> If a lawyer opposed a distant relative as counsel without the client’s consent, such would specifically violate the professional conduct rules. But if the lawyer opposed their long-time domestic partner, the two lawyers could oppose each other without notifying their clients and comply with the MRPC. However, under the 2004 MCJC without the term “domestic partner,” the definition of a member of the judge’s family residing in the judge’s household would include a same-sex partner.<sup>20</sup> Even the 2004 MCJC would require a judge to recuse one’s self if the judge’s same-sex partner had an interest in a case that the judge would preside over.<sup>21</sup>

##### **B. A Real Need Exists for Policies Relating to Gay and Lesbian Judges.**

With the growing furor that would later arise over judicial decisions in regards to LGBT-related court rulings, the ABA did right by including the term “domestic partner” in the 2007 MCJC, proactively creating policy to provide disciplinary procedures for gay and lesbian judges. Three of the seven Iowa Supreme Court judges that unanimously found Iowa’s same-sex marriage ban unconstitutional found themselves voted off the bench even though they ran

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<sup>19</sup> Model Rules of Prof’l Conduct, R. 1.7, cmt. 11.

<sup>20</sup> Model Code of Jud. Conduct (2004).

<sup>21</sup> *Id.*

unopposed.<sup>22</sup> That Iowa Supreme Court judicial election created multiple vacancies for the first time since the court's inception.<sup>23</sup> In December of 2011, the Ninth Circuit heard arguments that Judge Vaughn Walker, the judge that found a California State Amendment to ban same-sex marriage unconstitutional, should have recused himself since he had been involved in a long-time same-sex relationship.<sup>24</sup> Although the first openly gay federal judge, Judge Vaughn didn't publicly confirm his sexual orientation until he retired.<sup>25</sup> To avoid the appearance of unaccountability for gays and lesbians in the judiciary, the courts need policies for gay and lesbian judges, just like their heterosexual counterparts, to resolve such controversies as they arise.

### **C. The Inclusion of "Domestic Partner" in the 2007 MCJC Effectively Promotes Judicial Integrity, While Also Creating Redundancy.**

#### **1. Definitions of "Family" and "Household."**

The MCJC defines a member of the judge's family as a spouse, domestic partner, relative, or other "person with whom the judge maintains a close familial relationship."<sup>26</sup> "Member of a judge's family residing in the judge's household" means any relative . . . by blood or marriage, or a person treated . . . as a member of the judge's family, who resides in the judge's household."<sup>27</sup> The MCJC provides an unclear distinction exists between a "person treated as a member of the family" and "a person with whom a close familial relationship is maintained."

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<sup>22</sup> A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, New York Times, Nov. 3, 2010, [www.nytimes.com/2010/11/04/us/politics/04judges.html](http://www.nytimes.com/2010/11/04/us/politics/04judges.html).

<sup>23</sup> David Pitt and Michael Crumb, *Iowa Judges Sacked Over Gay Marriage Ruling*, Huffington Post, Nov. 3, 2010, [www.huffingtonpost.com/2010/11/03/iowa-judges-gay-marriage\\_n\\_778100.html](http://www.huffingtonpost.com/2010/11/03/iowa-judges-gay-marriage_n_778100.html).

<sup>24</sup> Bob Egelko, *Appeals Court Hears Challenges in Prop. 8 Case*, San Francisco Chronicle, Dec. 9, 2011, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/12/09/MNVL1MA76L.DTL&feed=rss.lgbt>.

<sup>25</sup> *Id.*

<sup>26</sup> ABA, *supra* note 1, at 6.

<sup>27</sup> *Id.*

An individual in a close, familial relationship, not related by blood or family, would probably, but not necessarily, means someone legally related, in that a judicially-recognized family relationship, like adoption, exists. Whereas, “treated as a member of the family” means that no legal relationship need exist. The difference in wording implies some distinction.

## **2. Distinction of “Spouse” and “Domestic Partner” for Recusal.**

If a domestic partner has the comparable influence over a judge as a spouse, than perhaps the term “domestic partner” should accompany the term “spouse,” when “spouse” has a distinct status in the MCJC. For recusal purposes, a spouse has a role of greater importance than the judge’s other relations, because the interest of a member of spouse’s extended family in a case requires a judge’s recusal from that case. The MCJC declares that a judge shall recuse one’s self when a person within the third degree of relationship to the judge, the spouse, or the judge’s domestic partner has more than a *de minimis* interest that the proceeding could substantially affect.<sup>28</sup> However, recusal shall also occur when the judge, the judge’s spouse, or the judge’s domestic partner, parent, child, or any other member of the judge’s family residing in the judge’s household, has an economic interest in the controversy’s subject matter.<sup>29</sup> In making administrative appointments, the MCJC forbids nepotism and favoritism.<sup>30</sup> The MCJC forbids appointments if the lawyer or the lawyer’s spouse or domestic partner, has contributed a certain amount to the judge’s election campaign.<sup>31</sup> The code defines nepotism as “the appointment or hiring of any relative within the third degree of relationship of either the judge or the judge’s spouse or domestic partner, or the spouse or domestic partner of such relative.”<sup>32</sup>

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<sup>28</sup> *Id.* at R. 2.11(A)(2).

<sup>29</sup> *Id.* at R. 2.11(A)(3).

<sup>30</sup> *Id.* at R. 2.13(A).

<sup>31</sup> *Id.* at R. 2.13(B).

<sup>32</sup> *Id.* at R. 2.13, cmt. 2.

### **3. Distinction of “Spouse” and “Domestic Partner” for Gifts and Reimbursement.**

However, a spouse has no distinct status in regards to determining the appropriateness for gifts or for whom a judge can claim the reimbursement of expenses. Judges may accept gifts that provide an incidental benefit and derive from any family member residing in the judge’s household, as well as spouse or domestic partner, without having to publicly report such.<sup>33</sup> Unless otherwise prohibited, a judge may accept gifts invitations to attend events without charge for the judge and the “judge’s spouse, domestic partner, or guest,” but must report such.<sup>34</sup> Judges should be aware that “a gift or other benefit is given to the judge’s spouse, domestic partner, or member of the judge’s family residing in the judge’s household . . . may be viewed as an attempt to . . . influence the judge indirectly.”<sup>35</sup> Judges may claim reimbursement of work related travel expenses “by the judge’s spouse, domestic partner, or guest,” but must publicly report such reimbursement.<sup>36</sup>

### **4. The Model Code’s Inclusion of “Domestic Partner” for the Recusal Purposes Reflects an Intelligent Plan to Promote Judicial Integrity and Diversity.**

The ABA’s usage of the term “domestic partner” represents a practical and objective strategy to promote judicial integrity in MCJC rules 2.11 and 2.13. The ABA explains that the addition of “domestic partner” in Rule 2.11 sought to present domestic partners comparably to spouses for purposes of evaluating economic conflicts.<sup>37</sup> Since most codes of judicial conduct require recusal for not just spouses, but for three or four degrees of relation to that spouse, spouses appropriately play a more important role in determining recusal for judges. Since

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<sup>33</sup> *Id.* at R. 3.13 (A)(8).

<sup>34</sup> *Id.* at R. 3.13(C).

<sup>35</sup> *Id.* at R. 3.13, cmt. 1.

<sup>36</sup> *Id.* at 3.14(C).

<sup>37</sup> ABA, *supra* note 2, at 26.

spouses play a more important role in a judge's life than relatives or roommates, the ABA had a good reason to require recusal for the spouse's relations, and not just the spouse. Of course, if a person occupies a role in the judge's life comparable to that of a spouse, then the judicial code should have the same recusal requirements for that person.

Although the previous MCJC would have provided a recusal requirement for a domestic partner as a "member of a judge's family residing in the judge's household," the 2004 MCJC required recusal if for an interest in a judge's case on behalf of anyone within three degrees of relationship to the judge or the judge's spouse.<sup>38</sup> The 2004 MCJC would only require recusal if the domestic partner, themselves, had an interest in the proceeding. A long-time same-sex partner, or one of the other domestic partner arrangements, could have as much influence over a judge as a spouse, especially an estranged, but still lawfully married, spouse who had little to no contact with the judge. Thus, when the 2007 MCJC requires recusal when someone within three degrees of relationship from a judge, a judge's spouse *or* a judge's domestic partner has an interest in a proceeding, the MCJC treats domestic partners like spouses for recusal purposes.<sup>39</sup>

Although the domestic partner definition would include spouses, the 2007 MCJC includes both the term "spouse," as well as "domestic partner," probably due to the vague definition for "domestic partner." The term "spouse" reflects a specific and easily determinable legal relationship, while no clear definition or means of evaluation exists to determine if a couple maintain a household and an intimate relationship for recusal purposes. No judge could deny a marital relationship to their spouse, but a judge could feasibly deny a relationship to a bona fide

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<sup>38</sup> ABA, *Model Code of Jud. Conduct 2004*, at 10, 22 [www.americanbar.org/content/dam/aba/migrated/judiciaethics/2004\\_CodeofJudicial\\_Conduct.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/2004_CodeofJudicial_Conduct.authcheckdam.pdf), (accessed Apr. 15, 2012).

<sup>39</sup> ABA, *supra* note 2, at 26.

domestic partner due to the vague definition of such. The inclusion of the term “domestic partner” in the MCJC for recusal purposes represents a sincere effort to strengthen judiciary integrity through requiring increased grounds for recusal in regards to a judge’s bias due to non-marital relationships that could affect a judge’s impartiality. The term “domestic partner” could not replace “spouse” as an inclusive word to represent all committed relationships that could bias a judge in the MCJC because most such relationships are, in fact, marital, and “domestic partner” does not have the same bright-line definition as “spouse.” Non-marital domestic partnerships probably form a small minority of all such long-term committed relationships involving judges.

#### **5. The MCJC Should Exclude Both “Spouse” and “Domestic Partner” for Evaluating Gifting and Reimbursement of Judges.**

The MCJC has fewer explicit rules for relationships in regards to gifting, presumably the actual potential for influence over the judge, rather than the specific relationship, would control in this matter. Regarding invitations for events or reimbursement for travel expenses, the MCJC had no objective interest in promoting judicial integrity by inserting “domestic partner” in the Rules 3.13 and 3.14. For gifting, only including the term “family member residing in the judge’s household” would have the greatest practicality, since “spouse,” “domestic partner,” and “family member residing in the judge’s household” carry equal statutory weight. Instead of having three different terms, the MCJC would have done best to only include one.

“Family member residing in judge’s household” would also include spouses and domestic partners. The only judicial integrity-related reason why the MCJC used the terms “domestic partner” and “spouse” is to designate the people so close to the judge that an interest in a case from anyone within three degrees of relationship to such people mandate the judge’s recusal. Although other people who influence the judge may require the judge’s recusal if they

have an interest in the case in question, an interest from people related to such people would not require recusal like the interest of people related to a spouse or domestic partner would. If the relationships used to determine judicial propriety all had the same statutory weight, than the MCJC could just use one, all-encompassing word and not specify different relationships. For the purposes of free entrance to events or work-related travel expenses, the MCJC could simply use “guest” and not use three different terms to describe a guest since no special statutory significance applies to domestic partners or spouses.

#### **6. Professor Abramson’s Eight Factor Test Reflects a Unique, but Probably Ineffective Strategy for Determining When to Mandate Judicial Recusal.**

Professor Leslie Abramson recommended a totally different solution to promoting judicial integrity without having to decide which relationships mandate recusal. Abramson recommended to the 2004 ABA Commission an eight point test to determine what influence a social relationship had on a judge.<sup>40</sup>

(1) the duration of the relationship or contact; (2) the content of any conversation during the relationship or contact; (3) the nature and circumstances of the relationship or contact; (4) the frequency of meetings or conversations; (5) the personal dependence of either on the relationship; (6) whether the relationship was connected with the subject matter of the proceeding; (7) in a business relationship, whether the judge receives preferential treatment not granted to others; (8) whether the relationship has been the subject of media publicity; and (9) statements attributable to the judge or any other person about the relationship.

Of course, delineating specific minimum standards, with clearly defined relationships, may not have the same flexibility to determine actual influence, but will probably have a greater affect in enforcing needed standards to ensure judicial integrity.

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<sup>40</sup> Prof. Leslie Abramson, *Suggestions sent for the Commission’s consideration by Prof. Leslie Abramson (Jan. 14, 2004)*, [www.abanet.org/judicialethics/resources/comm\\_code\\_abramson\\_011404.pdf](http://www.abanet.org/judicialethics/resources/comm_code_abramson_011404.pdf) (accessed on Feb. 5, 2012).

<sup>41</sup> *Id.*

## **V. Interpretations of “Domestic Partner” and Other Relevant Code of Judicial Conduct Variations for States that Included the Term.**

Most states did not elaborate on the sexual orientation of a domestic partner, while some states considered a domestic partner one member of a same-sex couple. Many states have revised their codes of judicial conduct, or proposed such, to include domestic partner, have the same definitions for the judge’s family and household and the same requirements for recusal and gifts. Arizona, California, New Mexico, Hawaii, Delaware, Connecticut, Maryland, Iowa, New Hampshire, Washington, Nevada, Wyoming, Kansas, Montana, Indiana, Utah, Colorado, North Dakota, Nebraska, Tennessee, and Arkansas include the term “domestic partner” in their Codes of Judicial Conduct.<sup>42</sup>

### **A. California Defined “Domestic Partner” to Mean Same-Sex Married Couples.**

California’s Code of Judicial Ethics uses the term “registered domestic partner,” which denotes a person who has registered for a domestic partnership pursuant to state law or who is recognized as a domestic partner pursuant to Family Code section 299.2(4)(B).<sup>43</sup> Aside for a narrow exception for people over 62, only same-sex couples can apply for a domestic partnership.<sup>44</sup> CA’s judicial ethics code uses standard MCJC definitions for “member of the judge’s family.”<sup>45</sup> But a “member of the judge’s family residing in the judge’s household” denotes someone who lives in the household and is related by blood, marriage, a registered

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<sup>42</sup> ABA, *Comparison of State Codes of Judicial Conduct to Model Code of Judicial Conduct*, [www.americanbar.org/groups/professional\\_responsibility/resources/judicial\\_ethics\\_regulation/comparison.html](http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/comparison.html) (accessed Feb. 8, 2012).

<sup>43</sup> CA Code of Jud. Ethics, at 4-5, [www.courts.ca.gov/documents/ca\\_code\\_judicial\\_ethics.pdf](http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf) (accessed at Feb. 5, 2012) (2009).

<sup>44</sup> Ca. Fam. Code § 297(4)(2012).

<sup>45</sup> CA Code of Jud. Ethics, at 4-5, [www.courts.ca.gov/documents/ca\\_code\\_judicial\\_ethics.pdf](http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf) (accessed at Feb. 5, 2012).



domestic partner, or someone with which the judge has a close familial relationship.”<sup>46</sup>

The CA code does not call for recusal on behalf of people who live in the judge’s house and whom the judge treats like family.<sup>47</sup> Nor does the code caution such people from accepting gifts that may indirectly influence the judge.<sup>48</sup> The California Code of Judicial Ethics provides a more specific, determinable, and narrow definition of whom a “judge’s household” includes when excluding someone whom the judge treats as a member of the family and only including a registered domestic partner. In California, a registered domestic partner would have the same specificity and determinability as would a spouse. The MCJC’s definition has a more standard and vague definition of “domestic partner” and includes someone living with the judge and whom the judge treats like family in the judge’s household.

#### **B. Some States Adopted Alternate Definitions of “Family” and “Household” in Their Judicial Codes of Conduct.**

Several states that adopted the term domestic partner had broader or more narrow definitions regarding the judge’s relationships. While accepting the term “domestic partner,” Hawaii slightly expanded the definition for a “member of the judge’s family” through including a person “who is treated by the judge as a member of the judge’s family.” The code defined “member of a judge’s family residing in the judge’s household” as any member of the judge’s family who resides in the judge’s household.<sup>49</sup> Delaware did not include family members living in the judge’s household for purposes of determining recusal.<sup>50</sup> Maryland’s code significantly expanded the definition of a “member of the judge’s household” by defining such as:

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 18-19.

<sup>48</sup> *Id.* at 28.

<sup>49</sup> HI Revised Code of Jud. Ethics, [www.courts.state.hi.us/docs/court\\_rules/rules/rcjc.htm](http://www.courts.state.hi.us/docs/court_rules/rules/rcjc.htm) (accessed at Feb. 5, 2012) (2007).

<sup>50</sup> DE Judges’ Code of Jud. Ethics, [www.courts.delaware.gov/forms/download.aspx?id=39408](http://www.courts.delaware.gov/forms/download.aspx?id=39408) (accessed at Feb. 5, 2012) (2008).

(a) if sharing the judge's or candidate's legal residence, the judge's or candidate's spouse, domestic partner, child, ward, financially dependent parent, or other financially dependent relative; or (b) the judge's or candidate's spouse, child, ward, parent, or other relative, over whose financial affairs the judge or candidate has legal or actual control.<sup>51</sup>

Connecticut narrowed the “familial relationship” language from the definition of a “member of the judge's family” while including “an individual in an adoptive relationship within the third degree.”

### **C. Iowa, New Hampshire, and Connecticut Approved the Term “Domestic Partner” Probably as an Effort to Promote Gay and Lesbian Rights.**

Three states also legalized same-sex marriage, before revising its state code for judicial conduct, subsequently defining “domestic partner” as something other than “same-sex couples who would be married, if same-sex marriage were legal.” Even though adding “domestic partner” would have had no consequences to same-sex couples whom could legally marry, two states specifically included civil unions under “spouse” or “domestic partner,” presumably to show support for gays and lesbians. For Iowa, New Hampshire, and Connecticut, the term “domestic partner” in their judicial codes of conduct presumably means primarily unmarried couples, live-in sexual relationships involving more than two people, or emotionally, but not sexually, intimate people who live together.

Iowa legalized same-sex marriage on April 3, 2009, while revising its code for judicial conduct on May, 3 2010. Connecticut made same-sex marriage lawful on Nov. 12, 2008, while a

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<sup>51</sup> MD Code of Jud. Conduct, [www.courts.state.md.us/rules/reports/codeofjudicialconduct2010.pdf](http://www.courts.state.md.us/rules/reports/codeofjudicialconduct2010.pdf) (accessed at Feb. 5, 2012) (2010).

<sup>52</sup> *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); ABA, *Comparison between proposed Iowa Code of Judicial Conduct and 2007ABA Model Code of Judicial Conduct*, [www.americanbar.org/content/dam/aba/migrated/cpr/code/ia.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/code/ia.authcheckdam.pdf), (accessed Feb. 10, 2012) (2010).

revised code for judicial conduct took effect on Jan. 1, 2011.<sup>53</sup> New Hampshire began to allow same-sex marriage on Jan. 1, 2010, while approving the new code for judicial conduct on Apr. 1, 2011.<sup>54</sup> Connecticut's Code of Judicial Conduct defined "spouse" as a person to whom one is legally married *or* joined in a civil union.<sup>55</sup> According to the Code of Judicial Conduct for New Hampshire, the definition of "domestic partner" included parties who have entered into a civil union.<sup>56</sup> Further emphasizing the legitimacy of same-sex couples, the New Hampshire's Rules of Professional Conduct advises lawyers that unmarried same-sex or opposite-sex partners "may be at least as important as blood or marital relationships."<sup>57</sup>

## **VI. Most, but Not All, States that Excluded "Domestic Partner" Probably Did So to Oppose Gay and Lesbian Rights.**

### **A. South Dakota, Mississippi, Oklahoma, and Missouri Have Laws that Reflect a Policy Which Opposes Gay and Lesbian Rights.**

Most of the states who rejected the term "domestic partner" probably did so out of opposition to gay and lesbian rights, but one state excluded the term to include terminology that would consider anyone having sexual relations with a judge for a conflict of interest analysis. South Dakota, Mississippi, Oklahoma, Missouri, Minnesota, and Maine did not adopt the term "domestic partner," but these states' codes for judicial conduct, or proposed codes, would seem

<sup>53</sup> ABA, *Comparison between proposed Connecticut Code of Judicial Conduct and 2007ABA Model Code of Judicial Conduct*, [www.americanbar.org/content/dam/aba/migrated/cpr/code/ct.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/code/ct.authcheckdam.pdf), (accessed Feb. 10, 2012) (2010); Lisa W. Foderaro, *Gay Marriages Begin in Connecticut*, New York Times, Nov. 12, 2008, [www.nytimes.com/2008/11/13/nyregion/13marriage.html](http://www.nytimes.com/2008/11/13/nyregion/13marriage.html).

<sup>54</sup> ABA, *Comparison between revised New Hampshire Code of Judicial Conduct and 2007ABA Model Code of Judicial Conduct*, [www.americanbar.org/content/dam/aba/migrated/cpr/code/new\\_hampshire.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/code/new_hampshire.authcheckdam.pdf), (accessed Feb. 10, 2012) (2010); Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, New York Times, June 3, 2009, [www.nytimes.com/2009/06/04/us/04marriage.html](http://www.nytimes.com/2009/06/04/us/04marriage.html).

<sup>55</sup> CT Code of Jud. Conduct, at 62, [www.jud.ct.gov/Publications/PracticeBook/PB\\_2011.pdf](http://www.jud.ct.gov/Publications/PracticeBook/PB_2011.pdf) (accessed on Apr. 29, 2012).

<sup>56</sup> Rules of the Supreme Court of the State of NH, R. 38; NH Code of Jud. Conduct, [www.courts.state.nh.us/rules/scr/scr-38-prelim-new.htm](http://www.courts.state.nh.us/rules/scr/scr-38-prelim-new.htm) (accessed on Feb. 8, 2012).

<sup>57</sup> NH Rules of Prof'l Conduct, R. 1.14, cmt. 5, [www.courts.state.nh.us/rules/pcon](http://www.courts.state.nh.us/rules/pcon) (accessed on Feb. 8, 2012).

to allow a judge's same-sex partner's interest in a case as grounds for determining recusal and as for the appropriateness of gifting.<sup>58</sup> South Dakota, Mississippi, Oklahoma, and Missouri all have constitutional amendments prohibiting same-sex marriage.<sup>59</sup> Aside from Missouri, these four states have no laws which specifically addresses hate crimes on the basis of sexual orientation.<sup>60</sup> These four state have no legal protections in schools, housing, hospital visitation, or employment for gays or lesbians.<sup>61</sup>

**B. Although Minnesota and Maine do not Allow Same-Sex Marriage, the Laws of Both States Reflect a Public Policy that Supports Gay and Lesbian Rights.**

Although Minnesota and Maine both have laws prohibiting same-sex marriage, both states have above-average legal protections for gays and lesbians in schools, employment, and housing.<sup>62</sup> Due to the special nature of Maine's and Minnesota's code of judicial conduct, the exclusion of the term "domestic partner" in their codes does not necessarily reflect a state policy opposed to the rights of gay and lesbian. Minnesota allows same-sex couple adoption, joint and second parent adoption in some jurisdictions, as well as recognition of same-sex couples for hospital visitation rights.<sup>63</sup> Maine allows some spousal rights and hospital visitation for same-sex couples, while allowing joint and second parent adoption for same-sex couples.<sup>64</sup> Minnesota's

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<sup>58</sup> ABA, *Comparison of State Codes of Judicial Conduct to Model Code of Judicial Conduct*, [www.americanbar.org/groups/professional\\_responsibility/resources/judicial\\_ethics\\_regulation/comparison.html](http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/comparison.html) (accessed Feb. 8, 2012).

<sup>59</sup> Human Rights Campaign, *Statewide Marriage Prohibitions*, [www.hrc.org/files/assets/resources/marriage\\_prohibitions\\_2009\(1\).pdf](http://www.hrc.org/files/assets/resources/marriage_prohibitions_2009(1).pdf) (accessed on Feb. 8, 2012) (2010).

<sup>60</sup> Human Rights Campaign, *State Hate Crime Laws*, [www.hrc.org/files/assets/resources/hate\\_crime\\_laws\(1\).pdf](http://www.hrc.org/files/assets/resources/hate_crime_laws(1).pdf), (accessed on Feb. 8, 2012) (2009).

<sup>61</sup> Human Rights Campaign, *Maps of State Laws & Policies*, [www.hrc.org/resources/entry/maps-of-state-laws-policies](http://www.hrc.org/resources/entry/maps-of-state-laws-policies) (accessed on Feb. 8, 2012).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

committee for judicial ethics discussed alternatives to the definition of “domestic partner” that could reflect the various situations where a personal relationship affects a judge’s conduct.<sup>65</sup>

**C. Minnesota Rejected the “Domestic Partner” Term to Include *Anyone* Having Sexual Relations With a Judge for Conflict of Interest Analysis Regardless of Whom They Lived With.**

Minnesota’s committee for judicial ethics felt that the requirement for recusal should include a member of the judge’s household as well as a person with whom a judge had an “intimate relationship.”<sup>66</sup> The committee chose to reject the term “domestic partner,” as well as any one term or subsequent definition, while inserting appropriate descriptive phrases.<sup>67</sup> Instead of “domestic partner,” the committee added “a person with whom the judge has an intimate relationship” for determining recusal, gifts, and more.<sup>68</sup>

Minnesota’s Code of Judicial Conduct used the standard definitions for the judge’s family and household, but did not include domestic partner or a substitute term.<sup>69</sup> However, the code did use the phrase “person with whom the judge has an intimate relationship” to replace “domestic partner” throughout the code.<sup>70</sup> The Minnesota Code of Judicial Conduct defined “intimate relationship” as “a continuing relationship involving sexual relations as defined in Rule 1.8(j)(1) of the Rules of Professional Conduct.”<sup>71</sup>

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<sup>65</sup> E. Thomas Sullivan, *Report of the Ad Hoc Advisory Committee to Review the Minnesota Code of Judicial Conduct*, [www.bjs.state.mn.us/Code%20Committee%20Final%20Rpt.pdf](http://www.bjs.state.mn.us/Code%20Committee%20Final%20Rpt.pdf), at 3 (accessed on Feb. 8, 2012) (2007).

<sup>66</sup> *Id.* at 4.

<sup>67</sup> *Id.*

<sup>68</sup> Office of the Revisor of Statutes, State of MN, *Minnesota Code of Judicial Conduct*, [www.revisor.mn.gov/court\\_rules/rule.php?name=prjudi-toh](http://www.revisor.mn.gov/court_rules/rule.php?name=prjudi-toh) (accessed Feb. 8, 2012) (2011).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Office of the Revisor of Statutes, State of MN, *Minnesota Code of Judicial Conduct*, [www.revisor.mn.gov/court\\_rules/rule.php?name=prjudi-0\\_T](http://www.revisor.mn.gov/court_rules/rule.php?name=prjudi-0_T) (accessed Feb. 8, 2012).

#### **D. Minnesota's "Person With Whom the Judge Has An Intimate Relationship" Provision Presents Problems.**

Minnesota's vague definition of a sex partner for its code of judicial conduct's conflict-of-interest analysis could prove problematic, due to the impersonal nature of some sexual partners, as well as constitutional privacy issues. Minnesota's code provides no definition of "continuing" in "continuing relationship involving sexual relations." Thus, distant people with little to no influence over judges could qualify as such, as people sometimes engage in impersonal or short-term sexual relationships. Not everyone treats their sex partners as family, so not all sex partners should qualify as a requirement for judicial recusal, like a member of the judge's household could. Seemingly impractical, Minnesota's Code of Judicial Conduct treats a sex partner as a spouse, by requiring recusal for *anyone who has an interest in the case within three degrees of relationship to a sex partner*. Inclusion of the term "domestic partner" as a "spouse" in codes of judicial conduct could work to improve judicial integrity, but not the inclusion of the judge's sex partners for the same consideration as a spouse.

Since the United States Supreme Court has generally held that the government cannot legislate regarding what two consenting adults do in their bedroom, requiring recusal in connection to a sex partner could violate one's fundamental right to privacy. Although Minnesota's Code of Judicial Ethics doesn't limit a judge's sex life, determining the judge's sex partner(s) could violate the judge's privacy. Unless judges voluntarily acknowledge their sex partners or their sex partners are publicly known, an investigation of a judge's sex partner(s) could violate the sex partner's and the judge's constitutional right to privacy. Whereas, determining one's home address, especially for people who live with a well-established person like a judge, would not present such a dilemma.

#### **E. Although Having Revised the State Code in 2009, Maine is Currently in the Process of Another Revision.**

Maine amended its code of judicial conduct in June 2009 and excluded the term “domestic partner.”<sup>72</sup> Maine’s 2009 code created a more expansive definition of the judge’s family that included “a person with whom the judge maintains a close personal relationship.”<sup>73</sup> Maine only considers gifts to a spouse or dependent child as a possible influence on a judge.<sup>74</sup> Maine seems to have a newly proposed amended code of judicial conduct that’s not accessible on the web, but may have included the term “domestic partner.”<sup>75</sup>

#### **F. Variations in South Dakota, Oklahoma, Missouri, and Mississippi’s Code of Judicial Conduct.**

South Dakota has no provision forbidding judges from discriminating on the basis of sexual orientation and excludes the term “domestic partner.”<sup>76</sup> Otherwise, definitions for a judge’s family and household mirror the ABA MCJC, as well as the rules for recusal and gifts.<sup>77</sup> Mississippi excluded “domestic partner” from its proposed changes to its code of judicial conduct, but otherwise followed the ABA MCJC for the rules regarding recusal and gifts.<sup>78</sup> Missouri deleted “domestic partner” from its revised code of judicial conduct, while not including people within three degrees of relationships for its recusal analysis. The Missouri

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<sup>72</sup> *ME Code of Jud. Conduct*, [www.courts.state.me.us/rules\\_adminorders/rules/JudCondCode8-09.pdf](http://www.courts.state.me.us/rules_adminorders/rules/JudCondCode8-09.pdf), (accessed on Feb. 8, 2012) (2009).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Letter from J. Adam Skaggs, Senior Counsel, Brennan Center for Justice, and Bert Brandenburg, Exec. Director, Justice at Stake Campaign, to Matthew E. Pollack, Exec. Clerk, Maine Supreme Judicial Court (May 12, 2011), [www.brennancenter.org/content/resource/letter\\_to\\_maine\\_supreme\\_judicial\\_court\\_on\\_proposed\\_amendments\\_to\\_code\\_of\\_co/](http://www.brennancenter.org/content/resource/letter_to_maine_supreme_judicial_court_on_proposed_amendments_to_code_of_co/) (accessed on Feb. 10, 2012).

<sup>76</sup> *SD Code of Jud. Conduct*, [www.sdjudicial.com/Uploads/downloads/Appendix%20to%2016-2.pdf](http://www.sdjudicial.com/Uploads/downloads/Appendix%20to%2016-2.pdf) (accessed on Feb. 10, 2012) (2008).

<sup>77</sup> *Id.*

<sup>78</sup> *MS Code of Jud. Conduct Study Comm., Proposed 2010 MS Code of Jud. Conduct*, [http://mjc.olemiss.edu/files/2011/07/Proposed\\_Changes\\_to\\_Code\\_of\\_Judicial\\_Conduct1.pdf](http://mjc.olemiss.edu/files/2011/07/Proposed_Changes_to_Code_of_Judicial_Conduct1.pdf) (accessed on Feb. 9, 2012) (2010).

State Court's webpage provided no definitions on its online code of judicial conduct.<sup>79</sup>

Oklahoma deleted "domestic partner," but expanded the definition of a "member of the judge's household" to mean any person residing in the judge's home on a permanent basis regardless of the relationship of that person to the judge.<sup>80</sup>

## **VII. Conclusion**

The ABA emphasized improving the integrity of this country's judicial system as a non-partisan, practical reason for including the term "domestic partner" in its 2007 Model Code for Judicial Conduct. The ABA has a recent history of supporting legal measures that would provide equal right to gays and lesbians, culminating in the ABA's 2010 recommendation for all state governments to legalize same-sex marriage. Many different types of relationships can constitute a "domestic partner," but the ABA's use of "domestic partner" probably refers to gay and lesbian couples. As stated, the ABA introduce of the term "domestic partner" to promote judicial integrity will effectively do such, while promoting diversity on the bench. California considered "domestic partner" to mean same-sex couples, while states that had already legalized gay marriage probably included the term "domestic partnership" to further support gay and lesbian equality. The few states that excluded the term "domestic partner," from their code of judicial conduct did so out of opposition to gay and lesbian rights. Although the LGBT civil rights movement has advocated for the inclusion of the term "domestic partner" as a means of advancing LGBT rights, the ABA's inclusion of such in the 2007 MCJC represents a practical effort to effectively improve judicial integrity.

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<sup>79</sup> *MO Code of Jud. Conduct*, [www.courts.mo.gov/page.jsp?id=703](http://www.courts.mo.gov/page.jsp?id=703), (accessed on Feb. 9, 2012).

<sup>80</sup> OK Bar Assoc., *OK Code of Jud. Conduct*, [www.okbar.org/public/judges/codeOfJudicialConduct.pdf](http://www.okbar.org/public/judges/codeOfJudicialConduct.pdf) (accessed on Feb. 9, 2012) (2010).