

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
TRIAL DIVISION, CRIMINAL SECTION**

COMMONWEALTH OF PENNSYLVANIA :
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 v. : CP-51-CR-0005811-2018
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 AIKEAM GAMBLE, :
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 Defendant. :
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MOTION TO DISQUALIFY JUDGE SCOTT DICLAUDIO

LAWRENCE S. KRASNER, District Attorney of Philadelphia, by his Assistant, JOHN D. PARRON, respectfully submits this Motion to Disqualify Judge Scott DiClaudio under Pa.R.Crim.P. 578(7) and Pa. Code of Judicial Conduct, Rule 2.11(A), and in furtherance of this Motion submits that:

1. The Honorable Scott DiClaudio serves as a Judge on the Court of Common Pleas of Philadelphia County in the Criminal Section of the Court's Trial Division. The Philadelphia District Attorney's Office (the "Office") represents the Commonwealth of Pennsylvania in nearly every case in which Judge DiClaudio presides.
2. Upon information and belief, Judge DiClaudio is in a domestic relationship with former Assistant District Attorney Catherine Smith. *See*

Pa. Code of Judicial Conduct, Terminology, *Domestic partner* (codified at 207 Pa. Code Ch. 33).

3. Smith served as an Assistant District Attorney in the Philadelphia District Attorney's Office until her employment ended on February 8, 2019.¹
4. After the end of her employment, Smith filed a complaint with the Pennsylvania Human Relations Commission that named the Office as a respondent, and claimed that the Office discriminated against her because she is white.

¹ Judge DiClaudio personally communicated with multiple supervisors at the Office during Smith's employment. In some of those communications, he urged that Smith be promoted to a supervisory position in the Office's Juvenile Unit. Judge DiClaudio's unprompted recommendation in support of his domestic partner's promotion was not only highly unusual, it also violated the Code of Judicial Conduct. *See* Pa. Code of Judicial Conduct, Rule 1.3 & Comment 2 (forbidding a judge from using the prestige of his or her office to advance his or her personal or economic interests); Pa. Judicial Ethics Committee Formal Advisory Op. 2015-1 (permitting a judge to provide a recommendation for a relative only if it is the type of recommendation that would normally be requested because of the judge's personal relationship with that person); Pa. Judicial Ethics Committee Informal Ethics Op. B (Jun. 26, 2001) (forbidding a judge from calling a prospective employer on a friend's behalf). In addition to promoting his personal interests, Judge DiClaudio's communications also had the potential to benefit his financial interests. This violation is especially concerning considering that Judge DiClaudio sought to promote these interests by urging that the formal representative of a party that appears before him in nearly every case take a particular action. *See* Pa. Judicial Ethics Committee Formal Advisory Op. 2015-1 (discouraging a judge from recommending a person to a lawyer or law firm that is involved in a matter before that judge).

5. The Commonwealth submits that, because of the ongoing dispute between Judge DiClaudio's domestic partner and the Office, a reasonable person would question Judge DiClaudio's impartiality in any case in which the Office represents a party. Under such circumstances Judge DiClaudio must be disqualified.
6. The Pennsylvania Code of Judicial Conduct requires disqualification of a judge "in any proceeding in which the judge's impartiality might reasonably be questioned" Pa. Code of Judicial Conduct, Rule 2.11(A).
7. When a party questions the judge's impartiality, the judge can be disqualified in two ways. First, a judge is disqualified if he or she subjectively feels unable to impartially preside over a case. *Reilly by Reilly v. Se. Penn. Transp. Auth.*, 479 A.2d 973, 980 (Pa. Super. 1984). Second, a judge is disqualified in any case in which that judge's impartiality might reasonably be questioned by an objectively reasonable person. *Id.*
8. When the Office represents the Commonwealth of Pennsylvania in cases before Judge DiClaudio, a "significant minority of the lay community could reasonably question" his impartiality due to the fact that his domestic partner is embroiled in litigation against the Office.

Commonwealth v. Druce, 796 A.2d 321, 327 (Pa. Super. 2002). This is so notwithstanding whether he personally believes he could remain impartial.

9. The Judicial Ethics Committee of the Pennsylvania Conference of State Trial Judges (the “Judicial Ethics Committee”) has explained that a judge is disqualified from any case in which a law firm that represents one of the parties (here, the Office acts as a law firm representing the Commonwealth of Pennsylvania) also represents a third party in a separate action involving the judge’s spouse. In such cases, “[i]t is mandatory for the judge to disqualify himself or herself from presiding in any case in which the law firm represents a party.” Pa. Judicial Ethics Committee Informal Ethics Op. A (Oct. 15, 2004).² This is because the “representation of a party adverse to the judge suggests that the judge might disfavor that lawyer, to the detriment of his client.” *State v. Salazar*, 898 P.2d 982, 986 (Ariz. Ct. App. 1995).
10. The case for disqualification here is even stronger than in the Judicial Ethics Committee’s opinion because, more than just representing a party in an action involving the judge’s spouse, the Office is a named

² Under the Pennsylvania Code of Judicial Conduct, spouses and domestic partners are treated identically as members of the judge’s family. Pa. Code of Judicial Conduct, Terminology, *Member of the judge’s family*.

respondent in the complaint filed by a member of the judge's family. In other words, the controversy involving Judge DiClaudio's domestic partner is directed at the Office itself, not at the party it represents. This alone is sufficient to require Judge DiClaudio's disqualification from any case involving the Office. *See Czuprynski v. Bay Circuit Judge*, 420 N.W.2d 141, 144 (Mich. Ct. App. 1988) (affirming the removal of a judge from all cases in which a lawyer who filed a grievance against the judge represented a party before that judge); *Brewton v. Kelly*, 166 So.2d 834, 836 (Fla. Dist. Ct. App. 1964) (holding that a judge is prohibited from presiding in a case where the lawyers that represent a party signed a bill of impeachment against him).

11. Similarly, other jurisdictions have required judges to recuse when they preside in one case, and simultaneously litigate (or are a litigant) against one of the parties in another.³ *See In re Braswell*, 600 S.E.2d 849, 849, 851 (N.C. 2004) (holding that a judge should have recused himself from a case because the plaintiff had filed a lawsuit against him in a separate action); *State v. Hahn*, 660 N.E.2d 606, 608-09 (Ind. Ct. App. 1996)

³ Because the Office represents the Commonwealth of Pennsylvania in almost every criminal case in Philadelphia, the Office is synonymous with the Commonwealth in the mind of the average lay person. *See* 16 P.S. § 4402(a) ("The district attorney shall . . . conduct in court all criminal and other prosecutions, in the name of the Commonwealth.").

(holding that a judge should not preside over a criminal case when the prosecuting office has previously charged him with a crime); Ill. Judges Ass'n Op. No. 96-25 (Nov. 18, 1996) (opining that the impartiality of a judge could reasonably be questioned when the judge filed a lawsuit against one of the parties in an unrelated case).

12. When a judge's family member files a lawsuit against an entity, an objectively reasonable person would question that judge's partiality in any case involving that entity. *See* Ill. Judges Ass'n Op. No. 96-25 (Nov. 18, 1996) (opining that when a judge has sued a party "[t]he judge's active, direct, and personal interest in an adversarial proceeding involving the party could lead an objective, disinterested and fully informed observer to entertain a significant doubt as to the judge's impartiality"). Common sense dictates that parties (including their family members) who file a lawsuit harbor greater animosity towards their adversary because they believe they have suffered a direct, actionable harm at the hands of the other party.
13. Here, a member of Judge DiCluadio's family has affirmatively accused the Office of discrimination. A significant minority of the lay community would expect a judge to be impartial towards a party appearing before him or her when a member of that judge's family has made a formal accusation

of discrimination against that party, or its regular representative. *See Commonwealth v. Stevenson*, 393 A.2d 386, 394 (Pa. 1978).

14. In addition to being a violation of the Code of Judicial Conduct, a failure to disqualify here presents various potential PCRA and disclosure issues.

The Commonwealth respectfully submits that Judge Scott DiClaudio should be disqualified from any case in which the Philadelphia District Attorney's Office represents a party.

Respectfully Submitted,

LAWRENCE S. KRASNER
District Attorney of Philadelphia

/s/ John D. Parron
JOHN D. PARRON
Assistant District Attorney
NANCY WINKELMAN
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Dated: April 8, 2019

VERIFICATION

The statements made in the above Motion to Disqualify Judge Scott DiClaudio are true and correct to the best of my personal knowledge and belief. I understand that a false statement in the motion would be subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsifications to authorities.

/s/ John D. Parron

JOHN D. PARRON
Assistant District Attorney

Dated: April 8, 2019