

Promoting Nonpartisan Judicial Integrity:

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

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In 2007, the American Bar Association (ABA) updated the Model Code of Judicial Conduct (the "Code") to include the term "domestic partner," which it defined 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."¹ The ABA asserted the importance of adding "domestic partner" to the Code was that "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."² This update recognized "the fact that it is desirable to have a uniform system of ethical principles that applies to all individuals serving a judicial function."³

Many states have amended their Codes of Judicial Conduct (CJs) to include the term "domestic partner." But the term "domestic partner" is often associated with same-sex relationships and is, for certain purposes, defined to exclude other types of relationships. This paper will argue that some of the states that have chosen not to include the term "domestic partner" in their CJC likely did so as a result of this term's association with lesbian, gay, bisexual, and transgender (LGBT) advocacy. States that have a history of resisting the advancement of LGBT equality have consistently chosen not to include the term "domestic partner" in their CJC, perhaps to avoid the appearance of support for LGBT equality. The exclusion of the term "domestic partner" in these states' CJs reflects a partisan stance and is based on an incomplete understanding of the benefits gained by including the term in a CJC. This paper will also acknowledge and discuss why some states chose not to include the term "domestic partner" in their CJs, despite a history of support for LGBT equality. Further, this paper will argue that the ABA's introduction of the term "domestic partner" in the 2007 Code is an intelligent and effective promotion of judicial integrity, which should be adopted by all states, notwithstanding their stance on LGBT issues.

I. "DOMESTIC PARTNERSHIPS" REFER TO MANY DIFFERENT TYPES OF RELATIONSHIPS, BUT THE TERM HAS BEEN WIDELY USED TO PROMOTE LGBT EQUALITY.

A plain reading of the ABA's definition of "domestic partner" includes unmarried heterosexual and same-sex couples whose relationships are comparable to those of lawfully married couples, but who are not married. This definition of "domestic partner" is open enough to potentially include polyamorous or polygamous intimate relationships. The ABA's definition could also refer to a close, platonic relationship between people who live together, since the Code's use of the term 'intimate' suggests that sexual relations are not an inherent prerequisite.⁴

Yet, the term "domestic partner" has been used extensively by LGBT advocates, including advocates in the legal profession. In November 2007, for example, the Bar Association for San Francisco issued a report on the best practices for employers to use to promote LGBT equality and inclusion within their workforce.⁵ For example, the report urged employers to create an LGBT-inclusive culture through the use of affirming language, specifically by using marriage-neutral terms.⁶ Specifically, the report explained:

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 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.*⁷

The term "domestic partner" within the report referred exclusively to same-sex couples.⁸

Footnotes

1. MODEL CODE OF JUDICIAL CONDUCT (2007).
2. REPORTER'S EXPLANATION OF CHANGES: ABA MODEL CODE OF JUDICIAL CONDUCT 4 (2007), http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/mcjc_2007.authcheckdam.pdf.
3. *Id.* at 5.
4. MODEL CODE, *supra* note 1, at R. 3.6, cmt. 2.

5. THE BAR ASSOC. OF SAN FRANCISCO EQUALITY COMM. REPORT ON LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ISSUES 1 (2007), http://www.sfbat.org/forms/diversity/lgbt_report_nov07_basf.pdf.
6. *Id.* at 11 (emphasis added).
7. *Id.* at 6 (emphasis added).
8. *Id.*

Further, the ABA Commission on Sexual Orientation and Gender Identity released a report in 2011 echoing the Bar of San Francisco's 2007 recommendations, though the ABA has not yet adopted the recommendations.⁹ In almost identical language, the ABA Commission's report encouraged employers to "[e]nsure that social invitations are inclusive by using wording that invites partners, not just spouses," while defining "domestic partnerships" as same-sex partnerships. Thus, LGBT advocates frequently use the term "domestic partner" to refer exclusively to same-sex couples and to promote LGBT equality.

Likewise, some states have used the term "domestic partner" to refer exclusively to same-sex couples. Instead of the ABA's broad, open-ended definition of "domestic partner," California explicitly defined "domestic partnership" by statute as a same-sex relationship.¹⁰ California's Code of Judicial Ethics uses the term "registered domestic partner" to denote a person who has registered for a domestic partnership pursuant to state law or who is recognized as a domestic partner pursuant to the California Family Code.¹¹ In California, only same-sex couples can apply for domestic-partnership status, though there is a narrow exception for unmarried heterosexual couples over 62 years of age.¹² In California, a "registered domestic partnership" is a legally recognized relationship that has the same specificity and determinability as a heterosexual marriage. Although the ABA could have Code defined "domestic partner" to refer only to same-sex relationships, it specifically opted not to do so despite the existence of exclusively LGBT definitions, such as California's. This is especially true in light of the fact that the ABA's past advocacy for same-sex marriage and LGBT adoption rights is documented.

However, the use of the term "domestic partner" in the Code's 2007 revisions arguably did not represent similar advocacy. Since California and even the ABA's Commission report define "domestic partner" as referring only to same-sex couples, the ABA would have explicitly defined a "domestic partner" as a member of a same-sex couple if the purpose of including this term was LGBT advocacy. Instead, the inclusion of the term "domestic partner" in the Code practically and intelligently holds all judges to the same level of accountability, regardless of their relationship status or sexual orientation.

II. THE INCLUSION OF "DOMESTIC PARTNER" IN THE 2007 CODE EFFECTIVELY PROMOTES JUDICIAL INTEGRITY

The Code's standard for when a judge must recuse herself or himself is the most stringent when the case regards the judge's spouse or domestic partner because it not only requires recusal from a case involving a spouse or domestic partner's interest, but also from cases which involve the interest of the spouse or domestic partner's close relatives. This standard is in recogni-

tion of the greater importance a spouse or domestic partner's family may play in a judge's life when compared to the role of the family of an acquaintance or roommate. Thus, the Code instructs judges to recuse themselves in cases where a person within the third degree of relationship to the judge, the judge's spouse, or the judge's domestic partner has more than a *de minimis* interest in the proceeding, which could be substantially impacted by the proceeding's outcome.¹³

The Code also requires judicial recusal when the judge, the judge's spouse, domestic partner, parent, child, or any member of the judge's family residing in the judge's household has an economic interest in the subject matter.¹⁴ Thus, the Code expands the grounds for recusal by requiring a judge to withdraw from a case where the judge's domestic partner, spouse, or a close family member of either has an interest in the case. The ABA explains that the addition of "domestic partner" in Rule 2.11 will require domestic partners and spouses to be treated comparably for purposes of evaluating economic conflicts.¹⁵

The ABA's 2007 Code appropriately uses "spouse" and "domestic partner" for judicial recusal purposes, as domestic partners influence judges as much as spouses. Since spouses usually play a more important role in a judge's life than any other person, the Code requires a judge's recusal for conflicts arising from the judge's relationship to the spouse *and* the spouse's relatives. Of course, if any other 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.

Absent the term "domestic partner," a judicial ethics code could inappropriately fail to mandate a judge's recusal in cases involving a cohabitating heterosexual partner or a same-sex partner and for people within three degrees of these partners simply because the person is not a "spouse" but rather a "roommate." If someone with an interest in a case is three familial degrees close to a judge's roommate, the judge need not recuse herself. A domestic partner should be treated equally to a spouse for purposes of recusal because such a partner could easily influence a judge as much as a spouse and could have more influence over a judge than an estranged, but still lawfully married, spouse. Now that the 2007 Code requires recusal when someone within three degrees of relationship of a judge's spouse *or* a judge's domestic partner has an interest in a proceeding, the integrity of the judiciary is improved.¹⁶ In fact, the ABA's use of "domestic partner" in Rules 2.11 of the Code strategically and practically promotes judicial integrity.

III. MOST LGBT-FRIENDLY STATES INCLUDED "DOMESTIC PARTNER" IN THEIR CJCS

Most states do not specify the sexual orientation of a "domestic partner," preferring instead to use the Code's broad definition that is sexuality neutral. Arizona, California, New

9. AM. BAR ASSOC. COMM. ON SEXUAL ORIENTATION & GENDER IDENTITY, BEST PRACTICES FOR PROMOTING LGBT DIVERSITY 3 (2011), http://www.americanbar.org/content/dam/aba/administrative/franchising/best_practices.authcheckdam.pdf.

10. *Id.* at 4.

11. CAL. CODE OF JUDICIAL ETHICS 4-5 (2009), http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf (last accessed on

February 5, 2012).

12. Ca. Fam. Code §§ 297(4) & 299.2(4)(B) (2012).

13. MODEL CODE, *supra* note 1, at R. 211(A)(2).

14. *Id.* at R. 2.11(A)(3).

15. REPORTER'S EXPLANATION, *supra* note 2, at 26.

16. *Id.*

Mexico, Hawaii, Delaware, Connecticut, Maryland, Iowa, New Hampshire, Washington, Nevada, Wyoming, Kansas, Montana, Indiana, Utah, Colorado, North Dakota, Nebraska, Tennessee, and Arkansas included the term “domestic partner” in their CJs.¹⁷ Iowa, New Hampshire, and Connecticut had all legalized same-sex marriage before the revision of their CJs to include the term “domestic partner.” For these three states, the term “domestic partner” in their CJs presumably refers to a person involved in a nonmarital, committed relationship, but not necessarily to a member of a same-sex couple.

Connecticut’s Code of Judicial Conduct arguably promoted LGBT rights by defining “spouse” as a person to whom one is “legally married or joined in a civil union.”¹⁸ Likewise, in New Hampshire’s code, the definition of “domestic partner” includes parties who have entered into a civil union.¹⁹ New Hampshire’s Rules of Professional Conduct instruct lawyers that unmarried same-sex or opposite-sex partners “may be at least as important as blood or marital relationships.”²⁰

States that have included “civil union” or “domestic partner” in their CJs probably did so to recognize that committed relationships that could improperly influence judges can occur outside of legal marriages. Two of the three states that legalized same-sex marriage before revising their CJs recognized a partner through a “civil union” as the legal equivalent of “spouse” or “domestic partner,” consistent with their history of support for LGBT equality. States with LGBT-friendly public policies who included “domestic partner” in their CJs, probably did so to ensure that all forms of loving relationships are considered when determining whether a potential conflict exists.

IV. MOST STATES THAT EXCLUDED THE TERM “DOMESTIC PARTNER” FROM THEIR CODES HAVE A HISTORY OF ANTI-LGBT POLICIES, BUT SHOULD STILL INCLUDE “DOMESTIC PARTNER” IN THEIR CODES DESPITE THAT HISTORY.

Many of the states that rejected the term “domestic partner” from their CJs have a demonstrated history of opposing LGBT equality. Their choice to exclude this term is consistent with that history and in most cases probably dictated this choice. For example, South Dakota, Mississippi, Oklahoma, Missouri, Minnesota, and Maine did not amend their CJs to include the term “domestic partner.”²¹ In South Dakota, no provision forbids judges from discriminating on the basis of

sexual orientation.²² Similarly, Missouri declined to introduce “domestic partner” into its revised CJC, but also did not require a judge’s recusal on cases involving the judge’s spouse’s family.²³ South Dakota, Mississippi, and Oklahoma have no laws that specifically address hate crimes on the basis of sexual orientation.²⁴ South Dakota, Mississippi, Oklahoma, and Missouri all also constitutionally prohibit same-sex marriage.²⁵ Additionally, South Dakota, Mississippi, Oklahoma, and Missouri do not protect LGBT youth in schools, do not prevent sexual orientation discrimination in housing, disallow hospital visitation, and allow employers to discriminate on the basis of sexual orientation.²⁶ In sum, most states that did not include the term “domestic partner” in their CJs had policies in opposition to LGBT rights.

There are, however, exceptions to the rule that states with anti-LGBT policies did not include the term “domestic partner” and states with pro-LGBT policies did. Take Minnesota and Maine. Although Minnesota and Maine both had laws prohibiting same-sex marriage when they decided to exclude “domestic partner” from their respective CJs, both states had pro-LGBT public policies. The omission of “domestic partner” in Maine’s and Minnesota’s codes of judicial conduct does not seem to reflect a state policy of opposition to equal rights for LGBT people. Indeed, Minnesota has since passed legislation allowing same-sex marriage, allows same-sex-couple adoption, and joint and second-parent adoption in some jurisdictions, and recognizes the rights of same-sex couples to visit one another in the hospital.²⁷ Likewise, Maine provides for some spousal rights and for hospital visitation for same-sex couples, while allowing joint and second-parent adoption for same-sex couples.²⁸ Although Minnesota’s and Maine’s CJs left out the term “domestic partner,” these states do not have a history of opposing LGBT equality. Yet, the absence of “domestic partner” terminology in their CJs is easily explained.

In fact, Minnesota rejected the term “domestic partner” and chose an even more expansive conflict-of-interest recusal requirement for judges in its state CJC. Minnesota’s Committee for Judicial Ethics decided that a need for recusal arises out of a judge’s “intimate relationship” with any person.²⁹ The committee chose to avoid the term “domestic partner” in favor of a descriptive phrase.³⁰ Instead of “domestic partner,” the committee used the phrase “a person with whom the judge has an intimate relationship” for determining when judges should

17. AM. BAR ASSOC., *Comparison of State Codes of Judicial Conduct to Model Code of Judicial Conduct*, http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/comparison.html (last visited Feb. 8, 2012).

18. CONN. CODE OF JUDICIAL CONDUCT 64 (2011), http://www.jud.ct.gov/Publications/PracticeBook/PB_2011.pdf.

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

20. *Id.*

21. ABA, *supra* note 17.

22. S.D. CODE OF JUDICIAL CONDUCT (2008), <http://www.sdjudicial.com/Uploads/downloads/Appendix%20to%2016-2.pdf>.

23. MO CODE OF JUDICIAL CONDUCT R. 2-2.11 (2012), <http://www.courts.mo.gov/page.jsp?id=703>,

24. Human Rights Campaign, *State Hate Crime Laws* (2009),

[www.hrc.org/files/assets/resources/hate_crime_laws\(1\).pdf](http://www.hrc.org/files/assets/resources/hate_crime_laws(1).pdf).

25. Human Rights Campaign, *Statewide Marriage Prohibitions* (2009) [http://www.hrc.org/files/assets/resources/marriage_prohibitions_2009\(1\).pdf](http://www.hrc.org/files/assets/resources/marriage_prohibitions_2009(1).pdf).

26. Human Rights Campaign, *Maps of State Laws & Policies*, www.hrc.org/resources/entry/maps-of-state-laws-policies (last visited Feb. 8, 2012).

27. *Id.*

28. *Id.*

29. E. THOMAS SULLIVAN, REPORT OF THE AD HOC ADVISORY COMMITTEE TO REVIEW THE MINNESOTA CODE OF JUDICIAL CONDUCT 4 (2007), <http://www.bjs.state.mn.us/Code%20Committee%20Final%20Rpt.pdf>.

30. *Id.*

recuse themselves.³¹ 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.”³² Although excluding “domestic partner” from Minnesota’s CJC, the committee substituted a phrase that is equally protective of judicial integrity and in keeping with their pro-LGBT policies.

Maine likewise protected judicial integrity and LGBT equality despite not using the term “domestic partner.” Maine amended its CJC in June 2009, but excluded the term “domestic partner.”³³ However, Maine’s 2009 CJC created a more expansive definition of family by requiring a judge to be recused when the case involves “a person with whom the judge maintains a close personal relationship.”³⁴ This definition of family conceivably includes same-sex and opposite-sex partners and therefore protects integrity like the term “domestic partnership.” But at least one recommendation was made in favor of adopting the term “domestic partner” as part of any possible amendments to Maine’s CJC.³⁵ Although Maine decided to reject the term “domestic partner” from the state’s CJC, the omission of “*domestic partner*” does not seem to reflect an anti-LGBT state policy. Still, these states are the exception, not the rule.

Although anti-LGBT states may have sought to make their CJs consistent with their policy regarding sexual orientation, their choice to exclude the term “domestic partner” in their CJs fails to protect the public from potential and actual conflicts. For example, although Missouri’s CJC did not include “domestic partner” terminology, Missouri has no recusal requirement for a judge’s heterosexual spouse’s relations and therefore creates an equality of treatment, but less protection for the public from judicial conflicts of interest. Missouri’s CJC requires recusal only if a spouse *or* a person living with a judge has an interest in a case before that judge. Because the ABA probably did not include “domestic partner” within the Code’s terminology only to champion LGBT rights, but also to improve judicial integrity, a state’s anti-LGBT policies should not impact the inclusion of the term “domestic partner” into their judicial ethics codes.

Without equal and codified recusal requirements for judges’ domestic partners, judicial integrity is at risk, and LGBT judges risk becoming targets of ethics complaints despite full compliance with existing state rules. To promote justice, efficiency, and public confidence in state judicial systems, even states with a history of opposing LGBT equality should include “domestic partner” in their CJs.

V. CONCLUSION

Despite the LGBT rights movement’s use of “domestic partner” and the ABA’s history of support for LGBT equality, the ABA emphasized the improvement of America’s judicial integrity as their reason for inserting “domestic partner” in the 2007 Code. The definition of “domestic partner” in the 2007 Code encompasses heterosexual relationships, but the common usage of the term “domestic partner” connotes advocacy for LGBT people, as demonstrated by the California Family Code and the Bar Association of San Francisco’s report. However, even acknowledging the ABA’s LGBT-friendly history, the ABA acted in the public good to create an appropriate regime for determining judicial conflicts in the 2007 Code and did not act only to promote LGBT equality.

Aside from Maine and Minnesota, a state’s policy toward LGBT rights generally determined its choice to include “domestic partner” in its CJC, with anti-LGBT states rejecting the term, even though using “domestic partner” would have been in their best interest. The Statue of Liberty, perhaps the most iconic American symbol, clearly preaches inclusion: “[G]ive me your tired, your poor, your huddled masses yearning to breathe free.”³⁶ Echoing the Statue of Liberty’s gospel, let us applaud the ABA’s practical, integrity-driven policy, which acknowledges that LGBT people serve in the U.S. judiciary and makes appropriate provisions to deal with this reality.



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31. *Id.*

32. MINNESOTA CODE OF JUDICIAL CONDUCT, R. 1.8(j)(1) (2011), http://www.revisor.mn.gov/court_rules/rule.php?name=prjudi-toh.

33. ME. CODE OF JUDICIAL CONDUCT § 3(L) (2009), www.courts.state.me.us/rules_adminorders/rules/JudCondCode8-09.pdf.

34. *Id.*

35. Letter from J. Adam Skaggs, Senior Counsel, Brennan Ctr. for Jus-

stice, and Bert Brandenburg, Executive Director, Justice at Stake Campaign, to Matthew E. Pollack, Executive 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/.

36. Emma Lazarus, *The New Colossus*, www.libertystatepark.com/emma.htm; www.statueofliberty.org/Statue_of_Liberty.html (last visited Mar. 29, 2013).