

JUDICIAL CONDUCT BOARD OF PENNSYLVANIA

NEWSLETTER

No. 3 Summer 2015

MESSAGE FROM THE CHAIR

Welcome to the Summer, 2015 edition of the Judicial Conduct Board NEWSLETTER. In this season's newsletter, Deputy Chief Counsel Francis J. Puskas explores the impact of the "New Canons" on a Magisterial District Judge's decision to use the services of a particular constable; specifically, a duly elected constable who is a relative of the Magisterial District Judge.

Historically, the Ethics and Professionalism Committee of the Special Court Judges Association has opined that judges should refrain from the use of a constable, who is also a relative of the Magisterial District Judge. While the "old rules" did not expressly prohibit the use of relative constables, the Ethics Committee relied upon an appearance of impropriety and the impact of family relationships, among other factors, that may be negatively perceived when Son Constable executes a warrant and delivers a party to Father Judge for arraignment and the assessment of costs related to the warrant service.

The opposing view has held that, in the absence of a specific prohibition, it is acceptable for a constable to serve as an independent contractor in the service of a Court, wherein the judge is a relative. This position has found strong support in the fact that constables are not a part of the Judiciary, but rather members of the Executive branch of government. Equally compelling is the reality that constables are elected public officials and as such, have a right to perform their responsibilities in service to the communities in which they were elected.

Until December 1, 2014, great minds were free to disagree on this issue. On that date, the "New Rules" took effect for Magisterial District Judges. Rule 2.13 expands the previous language of (old) Rule 5C, to include "Administrative Appointments" beyond the previously considered "staff appointments." While there is no dispute that constables are not members of any judges' staffs, there should be no dispute that the appointment of a particular constable constitutes an administrative decision.

As judges, we are bound by the rules of conduct promulgated by the Supreme Court, and should conduct ourselves accordingly. A constable's right to obtain appointments within his/her jurisdiction is a separate matter and one not within the Magisterial District Judge's purview. Frank's article provides a detailed analysis of this issue which should guide the actions of our judges.

Also in this issue are introductory articles on the Board's newly elected Vice Chair, James Schwartzman, Esquire, and the Board's newest Member, Judge P. Kevin Brobson of the Commonwealth Court. Jim was appointed to the Board by the Supreme Court in 2014. His colleagues on the Board selected him to fill the Vice Chair position that became vacant in May when Board Member Ken Lawrence resigned, Judge Brobson was appointed to the Board in August. The Supreme

Court selected him to fill the seat previously held by Judge Anne Lazarus of the Superior Court whose term ended on August 31.

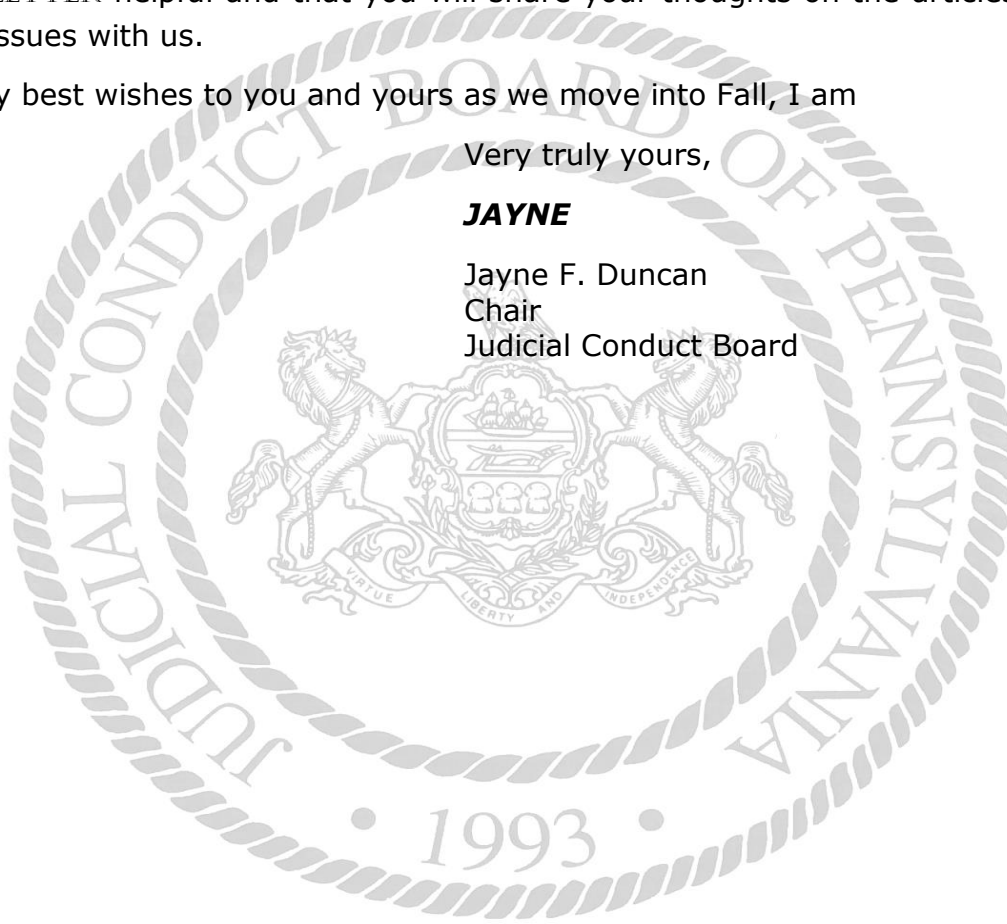
As with our prior editions, we hope that you find the information provided in the NEWSLETTER helpful and that you will share your thoughts on the articles and for future issues with us.

With my best wishes to you and yours as we move into Fall, I am

Very truly yours,

JAYNE

Jayne F. Duncan
Chair
Judicial Conduct Board



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BOARD ELECTS NEW VICE CHAIR

On May 28, 2015, citing a change in his professional responsibilities, Board Member and Vice Chair Kenneth Lawrence tendered his resignation from the Board to Governor Wolf. Member Lawrence had been appointed by Governor Tom Corbett in 2013 to fill the unexpired term of Francis Bianconi, a Lackawanna County businessman who had passed away. When that term expired, the Governor appointed him to his own term to run through 2017. In February 2014, the Board unanimously elected Ken to serve as its Secretary, part of the Board's Executive Committee. A year later, he was elected by his colleagues on the Board to serve as Vice Chair.

With Ken's resignation, the Board, at its August meeting, elected James C. Schwartzman, Esquire, as its new Vice Chair. The Supreme Court appointed Jim to a four year term on the Board beginning August 16, 2014. He serves as one of the members of the bar appointed to the twelve-member Board. He is a Republican.

Jim is a shareholder in the Philadelphia office of Stevens & Lee where he chairs the Ethics and Professional Responsibility Group. He previously ran his own firm and was a named partner in Schwartzman & Hepps. Jim has extensive experience representing and counseling lawyers, law firms and judges on ethics-related issues. He has an active federal white collar criminal defense practice and extensive trial experience in both civil and criminal matters in most of the courts in southeastern Pennsylvania. Jim holds memberships in the Philadelphia and Pennsylvania Bar Associations, the Philadelphia and Pennsylvania Trial Lawyers Associations, and the Association of Professional Responsibility Lawyers.

Jim is a former Assistant U.S. Attorney for the Eastern District of Pennsylvania and was a law clerk for the Honorable J. William Ditter, Jr., United States District Judge for the Eastern District of Pennsylvania. He has been an instructor at the United States Attorney General's Advocacy Institute and Temple University School of Law. He has served by appointment of the Supreme Court on the Disciplinary Board, the Continuing Legal Education Board, and the Interest on Lawyers Trust Account (IOLTA) Board. He served each of these Boards as both Chair and Vice-Chair. Jim has been a member of the Southeast Pennsylvania Transportation Authority (SEPTA) Board of Directors since 1991 and served as Vice-Chair from 1999 until 2013. He has also been a member of the Independence Blue Cross Board of Directors since 1993 and serves on its Executive and Finance Committee.

Selected by his peers as among the top five percent of lawyers in the Commonwealth, Jim has been recognized as a Pennsylvania Super Lawyer from 2004 through 2014. He was named one of the top 100 Super Lawyers in Pennsylvania in 2009, 2010 and 2012, and one of the top 100 Super Lawyers in Philadelphia in 2010 and 2012. In addition, Jim has been selected by his peers as one of The Best Lawyers in America for his work in Malpractice Law and Ethics and Professional Responsibility Law, and he has been named Lawyer of the Year in the areas of Ethics and Professional Responsibility Law and Legal Malpractice Law.

Jim joins Board Chair Jayne Frances Duncan, a Magisterial District Court Judge from Elizabethtown, Lancaster County, and Board Secretary Gary Scheimer of Allegheny County on the Board's Executive Committee. They will serve until the Board elects its new officers at its February 2016 meeting.

MEET THE BOARD'S NEWEST MEMBER

By Order dated August 21, 2015, the Pennsylvania Supreme Court has appointed Judge P. Kevin Brobson of the Commonwealth Court to a four year term on the Judicial Conduct Board commencing August 31, 2015. Judge Brobson will serve as the appellate court member appointed to the twelve-member Board. The Constitution requires that no more than half of the Board Members may be of the same political party. Judge Brobson is a Republican.

Judge Brobson was elected to the Commonwealth Court in November 2009 and took office on January 4, 2010. Prior to taking office, Judge Brobson was a shareholder in the Harrisburg office of Buchanan Ingersoll & Rooney PC where he served as Chair of the firm's Insurance & Reinsurance Practice Group. While in private practice, Judge Brobson focused on representing clients on matters frequently considered by the Commonwealth Court, such as insurance and health care regulation, professional licensure, and government contracting. He represented numerous clients in cases before the court and various state agencies.

He received several professional recognitions while in private practice including being rated among the Best Lawyers in America in 2009 and 2010. He was a recipient of the *Legal Intelligencer* and *Pennsylvania Law Weekly* "Lawyers on the Fast Track" award and the *Central Penn Business Journal* "Forty Under 40" award.

In every aspect of his life, Judge Brobson has been a strong proponent of community and pro bono service. Prior to being commissioned Judge, he received awards and recognition from both the Dauphin County Bar Association and the Pennsylvania Bar Association for his role in designing and implementing an innovative pro bono legal services program for nonprofits. He also served on the Middle Paxton Township Planning Commission and is a past chair and member of the Board of Directors of Jump Street, a nonprofit community arts and outreach organization. Judge Brobson currently serves on the Advisory Board of The Four Diamonds at Penn State Hershey Children's Hospital and served as Chair of the Advisory Board from 2012 to 2014. In 2013, the Penn State IFC/Panhellenic Dance Marathon (THON) presented Judge Brobson with the Diamond of Honesty Award in recognition of his support for and commitment to the Four Diamonds and THON.

Judge Brobson received his undergraduate degree from Lycoming College, *magna cum laude*. He graduated second in his class from the Widener University School of Law - Harrisburg Campus (now the Widener University Commonwealth Law School) *summa cum laude*. In law school, he served as the Internal Managing Editor of the school's Law Review. In 2015, Judge Brobson was appointed to the Board of Overseers for his alma mater.

Immediately following law school, Judge Brobson clerked for the Honorable James McGirr Kelly, United States District Court for the Eastern District of Pennsylvania. He is a member of the American Bar Association, the Pennsylvania Bar Association, the Dauphin County Bar Association, and the James S. Bowman Chapter of the American Inns of Court.

Born in Montoursville, Pennsylvania, Judge Brobson now resides just outside of Harrisburg in Middle Paxton Township, with his wife Lauren (Cotter) and his three children - Claire, Will, and Gabe.

Judge Brobson replaced Superior Court Judge Anne E. Lazarus as the appellate court judge member of the Board. She had served her full four year term, including service as Board Chair and Vice Chair. Her term ended on August 31.

***Nepotism and Constable Relatives:
May a Magisterial District Judge Use the Services
of a Constable Relative?***

By

Francis J. Puskas II, Deputy Chief Counsel, Judicial Conduct Board

When the New Code of Judicial Conduct ("New Code") became effective on July 1, 2014, a significant development was not only the inclusion of a direct prohibition against nepotism, but the fact that the word nepotism, which previously had not been referenced in the Old Code of Judicial Conduct ("Old Code"), was now a part of the new provision.¹ In this regard, the Old Rules Governing Standards of Conduct of Magisterial District Judges ("Old Rules") were prescient in already providing a template for the New Code, since the Old Rules always contained a direct prohibition against nepotism in staff appointments and specifically used the word "nepotism."

Old Rule 5C

Old Rule 5C directed that with regard to employing people,

Magisterial district judges shall not make unnecessary appointments to their staff. They shall exercise any such power of appointment that they may have only on the basis of merit, *avoiding nepotism* and favoritism.

Old Rules, Rule 5C (emphasis added).

Old Rule 5C was directed at "appointments to their staff" and required that when a magisterial district judge made such appointments that they: (1) not make unnecessary appointments; (2) appoint only on the basis of merit; (3) avoid nepotism; (4) and avoid favoritism.

When considering nepotism, the logical import of Old Rule 5C was to prohibit magisterial district judges from appointing relatives "*to their staff.*" The question that Old Rule 5C left unanswered, however, was this: What persons were considered "*staff?*" As Old Rule 5C gave no definition for the term "*staff,*" and the Court of Judicial Discipline had no occasion to consider the issue as part of any case that came before it, what the term meant was, at best, unclear.

From a general and common sense perspective, the staff of a magisterial district judge would arguably include clerks, secretaries, assistants, and administrative support personnel. The thornier question was whether constables fell into this category. Were constables, who were duly elected officials chosen by

¹ New Code, Canon 2, Rule 2.13(A)(2).

voters to serve in particular wards, boroughs, or townships, considered part of a magisterial district judge's staff? Did Old Rule 5C preclude a magisterial district judge from using the services of a constable relative?

While the issue of whether constables fell under the nepotism prohibition of Old Rule 5C never came before the Court of Judicial Discipline, and thus was officially unsettled, the status of constables, and their relation to the Unified Judicial System, was addressed by the Supreme Court of Pennsylvania in *In re Act 147 of 1990*, 598 A.2d 985 (Pa. 1991).

In re Act of 147 of 1990 was a declaratory judgment action brought by the Court Administrator of Pennsylvania challenging the constitutionality of legislation affecting the status of constables and deputy constables. The legislation, Act 147 of 1990 ("Act 147"), provided for the supervision, training, and certification of constables and deputy constables engaged in "judicial duties" by the Supreme Court through the Administrative Office of Pennsylvania Courts. Act 147 required constables to collect a surcharge of \$2.00 on each fee payable to a constable for duties performed on behalf of the judiciary to fund these training and certification programs. It also provided a system of discipline for constables and deputy constables with mandatory decertification for certain criminal convictions and discretionary disciplining by president judges of the courts of common pleas. Finally, Act 147 included a nonseverable provision directing that constables and deputy constables "shall enjoy all the rights and privileges accorded to constables by . . .the Public Official and Employee Ethics Law," which was an attempt to restrain the Supreme Court from imposing limitations on political activity by constables.

The Supreme Court held that Act 147 violated the separation of powers doctrine because it attempted to place constables within the judicial branch of government under the supervisory authority of the judicial branch. In reaching this conclusion, the Supreme Court discussed the status of constables and made a number of observations.

First, the Supreme Court, referencing its 1983 decision in *Rosenwald v. Barbieri*, 462 A.2d 644 (Pa. 1983) ("*Rosenwald*"), recognized that a constable was an elected official authorized to appoint deputy constables. The Supreme Court stated that a constable "is an independent contractor and is not an employee of the Commonwealth, the judiciary, the township, or the county in which he works." *In re Act 147 of 1990*, 598 A.2d at 986. It further explained that a constable "is a peace officer. . .charged with the conservation of the peace, and whose business it is to arrest those who have violated it," as well as a process server. *Id.* at 990. As both a peace officer and process server, the Court found that "a constable belongs analytically to the executive branch of government, even though his job is obviously related to the courts." *Id.* A constable's job was to enforce the law in the same fashion as district attorneys, sheriffs, and the police generally. *Id.*

Second, because constables were neither acting for, nor under the control of, the Commonwealth, they could not be considered employees of the Commonwealth and were, therefore, not entitled to be provided with legal representation provided by the Commonwealth. *Id.* at 987.

The issue of entitlement to legal representation was the focal point of *Rosenwald* and the platform for the Court's discussion of the constable's relationship to the Unified Judicial System. *Rosenwald* involved a constable who was sued by a property owner for alleged libel and negligent infliction of emotional distress in connection with the posting of a property. The constable claimed he was entitled to be provided with legal representation in defense of the suit and filed a declaratory judgment action in Commonwealth Court against five defendants: the Attorney General of Pennsylvania, the Court Administrator of Pennsylvania, the President Judge of Montgomery County, a Magisterial District Judge, and a local township. The constable sought a declaration as to which defendant, if any, was required to represent or appoint legal representation for him. The Commonwealth Court sustained preliminary objections as to all defendants except the Court Administrator. Both the constable and the Court Administrator appealed to the Supreme Court, which affirmed the Commonwealth Court sustaining of preliminary objections, but reversed its overruling of the Court Administrator's preliminary objections.

In *In re Act 147 of 1990*, the Supreme Court observed that in *Rosenwald* it found that the Court Administrator was not obligated to provide legal representation to the constable based on the Rules of Judicial Administration. Specifically, under Rule 102 of those rules, constables did not fall within the definition of "personnel of the system," which was defined as including "judges and other judicial officers, their personal staff, the administrative staff of courts and justices of the peace, and the staff of the Administrative Office and other central staff." Because they were not personnel of the system, under the Rules of Judicial Administration they did not qualify to be provided with legal representation. *In re Act 147 of 1990*, 598 A.2d at 987.

Further, while the Court did not find that constables were "personnel of the system," it did find that under Rule 102 constables were "related staff," which was defined to include "[a]ll individuals employed at public expense who serve the unified judicial system, but the term does not include personnel of the system." The Court explained that "related staff" covered "those whose function aids the judicial process but who are not supervised by the courts." *Id.*

Viewed through the lens of *Rosenwald* and *In re Act 147 of 1990*, the implication appeared strong that a constable could never be considered a member of a magisterial district judge's staff. A constable belonged to the executive branch of government and was not considered personnel of the Unified Judicial System, which by definition included "personal" and "administrative" staff of a judge. A constable was considered "related staff" paid by public funds and serving the judiciary, but not considered a part of the judiciary or a Commonwealth employee.

Therefore, how could Old Rule 5C, which pertained only to a magisterial district judge making “appointments to their staff,” apply to constables, who could never be considered personal or administrative staff of a judge? The simple answer was that it logically could not apply. In fact, this appeared to be the prevailing view. The services of constables who were relatives of magisterial district judges were used by magisterial district judges. Further, the Judicial Conduct Board brought no cases before the Court of Judicial Discipline charging magisterial district judges who did so with violating Old Rule 5C.

Additionally, the Special Court Judges Association of Pennsylvania (SCJAP) found no application of Old Rule 5C to the question of whether a constable who was a relative could be used by a magisterial district judge. In an advisory opinion responding to an ethical inquiry, the Ethics and Professionalism Committee of the SCJAP addressed the use of constables who were relatives of magisterial district judges.² In doing so, it did not reference Old Rule 5C as applicable to its analysis of the issue. Instead, the SCJAP took the position that it was “inappropriate” for a magisterial district judge to assign work to a constable relative based on a combined reading of different parts of four rules which the SCJAP felt were implicated in different ways and might be violated if a magisterial district judge engaged in the practice:

Old Rule 1 – Old Rule 1, in part, stated that a magisterial district judge “should participate in establishing, maintaining and enforcing, and shall themselves observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved.” The SCJAP concluded that using constables who were related to the judge “clearly do not depict a preservation of the integrity and independence of the judiciary.”³ *Id.* at 1.

Old Rule 2A – Old Rule 2A, in part, required that magisterial district judges “conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Magisterial district judges shall not allow their family, social or other relationships to influence their judicial conduct or judgment.” The SCJAP concluded that using a constable relative “unquestionably fails to promote public confidence in the day-to-day workings of a District Court.” The SCJAP reasoned that any defendant who has been in contact with a constable

² See Docket #2014-08, dated May 19, 2014.

³ Since *In re Larsen*, Canon 1 of the Old Code, which is virtually identical to Old Rule 1 of the Old Rules, has been viewed primarily as “a statement of purpose and rule of construction, rather than a separate rule of conduct.” *In re Larsen*, 532 Pa. 326, 387, 616 A.2d 529, 558 (1992)). The Court of Judicial Discipline applied the same view to Old Rule 1. *In re Trkula*, 699 A.2d 3, 8-9 (Pa.Ct.Jud.Disc. 1997). In short, Old Rule 1 was never perceived as a chargeable offense of judicial misconduct.

who is a relative of the magisterial district judge “has every reason to question the timeliness of warrants being issued, the costs approved by the Magisterial District Judge and the weight to which their input on the credibility of a fee bill is given.” The SCJAP expressed that daily contact between a constable who is a relative and a magisterial district judge could affect the judge’s judgment. *Id.* 2.

Old Rule 4A – Old Rule 4A, in part, required a magisterial district judge to be “unswayed by partisan interests, public clamor or fear of criticism.” The SCJAP found that potential conflicts of interest that might arise from a magisterial district judge using a relative constable constituted a partisan interest which could shape the judge’s decisions. *Id.* at 2.

Old Rule 4D – Old Rule 4D, in part, prohibited a magisterial district judge from initiating or considering ex parte communications about a pending or impending proceeding. The SCJAP concluded there was a danger of ex parte communications when a judge used a constable who was a relative because the relationship, “for obvious reasons, more likely than not result in some type of ex parte communication regarding the defendants brought before them by the constables in question.” *Id.* at 2.

Old Rule 8A(4) – Old Rule 8A(4) required disqualification where the magisterial district judge, his or her spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person, was “(a) a party to the proceeding, or an officer, director or trustee of a party; (b) is acting as a lawyer in the proceeding; (c) is known by the magisterial district judge to have an interest that could be substantially affected by the outcome of the proceeding; (d) is to the knowledge of the magisterial district judge likely to be a material witness in the proceeding.” The SCJAP found that magisterial district judges “are not, and should not be, in the business of making decisions to keep relatives. . .happy.” The SCJAP opined that the involvement of a relative constable in a matter before the magisterial district judge “unquestionably affect the outcome of proceedings.” *Id.* at 2.

The SCJAP ultimately determined that a magisterial district judge who engaged in the practice of using the services of a related constable “will have to answer for their conduct,” regardless of the fact that the practice may have been ongoing for a long time. *Id.* at 3. “Just because a longstanding practice has been occurring it does not mean the practice is correct or ethical.” *Id.*

Consistent with the SCJAP view that it was inappropriate for a magisterial district judge to use a constable who was a relative under the Old Rules (excluding Old Rule 5C), at least one Pennsylvania county prohibited the practice if the constable was a spouse, child, parent, or sibling of the magisterial district judge.⁴

Prior to the adoption of the New Rules Governing Standards of Conduct of Magisterial District Judges (New Rules), the Joint State Government Commission

⁴ See Administrative Regulation No. 8-2012 dated August 23, 2012, issued by then-Chester County President Judge James P. MacElree.

(Joint State Government Commission)⁵ issued a report in April 2014 entitled "Constables in Pennsylvania: Proposed Statutory Reforms," which made recommendations for amending the primary statute relating to constables. The Commission's key proposals for reform included, under the heading "Conflicts," prohibiting magisterial district judges, and also his or her staff, from working together with a constable if there was a "close filial or household relationship" between the judge and the constable, or between staff and the constable, in order "to reduce the temptation to inflate the accrual of fees." Joint State Gov't Comm'n, *Constables in Pennsylvania: Proposed Statutory Reforms* (April 2014), p.2. The Commission elaborated:

The final recommendation relating to conflicts is to forbid the opportunity for nepotistic approval of fees. Typically, magisterial district judges assign work and authorize the charges payable to constables and deputy constables. Staff became aware of allegations of phony bills being submitted to collect constabulary fees for services never actually performed. This could be especially tempting if a constable is married to a magisterial district judge's clerk. To reduce this temptation, constables would be forbidden to accept work from a magisterial district judge if there is a close relationship or household membership involved. Conversely, a magisterial district judge would be forbidden to request services from a constable due to the same conflict. The prohibition on nepotistic [sic] approval of fees could help facilitate equitable work opportunities for constables.

Id. at 25.

In fact, the SCJAP advisory opinion (Docket #2014-08), which came the next month after this report, echoed this same concern about constable fees as part of its analysis that Old Rule 2A might be violated.

With the adoption of the New Rules, which became effective December 1, 2014, there is now a provision that more clearly resolves the issue of a magisterial district judge using a constable who is a relative, namely New Canon 2, Rule 2.13. While New Rule 2.13 continues the prohibition on nepotism found in Old Rule 5C, it now reaches the use of constables who are relatives with its more broad and general language and, consistent with the concerns of the SCJAP and the Joint State Government Commission, prohibits it.

⁵ The Joint State Government Commission was authorized by 2013 House Resolution 138, to study the constable system in Pennsylvania and report findings and recommendations for reform to the Chief Justice of the Pennsylvania Supreme Court and the chairs of the Judiciary Committee of the Pennsylvania House of Representatives.

New Rule 2.13

New Rule 2.13 applies to the utilization of constables by magisterial district judges because unlike Old Rule 5C, it is no longer limited to a magisterial district judge's staff, but encompasses "administrative appointments and hiring decisions" generally:

Rule 2.13. Administrative Appointments.

(A) In making administrative appointments and hiring decisions, a magisterial district judge or President Judge:

(1) shall exercise the power of appointment impartially and on the basis of merit; and

(2) shall avoid nepotism, favoritism, and unnecessary appointments.

(B) A magisterial district judge or President Judge shall not approve compensation of appointees beyond the fair value of services rendered.

Comment:

[1] The concept of "appointment" includes hiring decisions. Appointees of a magisterial district judge or President Judge include personnel such as clerks and secretaries. Consent by the parties to an appointment or an award of compensation does not relieve the magisterial district judge or President Judge of the obligation prescribed by paragraph (A).

[2] Nepotism is the appointment of a magisterial district judge's or President Judge's spouse or domestic partner, or any relative within the third degree of relationship of either the magisterial district judge or President Judge, or the magisterial district judge's or President Judge's spouse or domestic partner, or the spouse of a domestic partner of such relative.

Unlike Old Rule 5C, New Rule 2.13 provides definitions in the Comment for the terms "appointment" and "nepotism." Appointment and hiring are basically interchangeable terms without distinction. Nepotism means that a magisterial district judge cannot hire a wife, husband, or domestic partner, or a relative in the third degree of relationship to either of them. The Terminology section of the New Rules defines "domestic partner" 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." It defines the third degree of relationship as including a "great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece."

While constables are duly elected to their position by the voters, in order for them to serve, the constables must be assigned to do the court's work. How does this happen? It happens when a constable, as independent contractor, is engaged like any other independent contractor to do a specific job. This is what occurs when a magisterial district judge gives a constable a particular court assignment to carry out, such as directing a constable to serve a warrant or complaint. Doing so does not convert constables into personnel of the judicial system or personal staff, but it also does not change the fact that they have been appointed or assigned by the judicial system to, as the Supreme Court recognized in *Rosenwald* and *In re Act 147 of 1990*, "aid the judicial process."

Therefore, under New Rule 2.13, which is written in general terms of "administrative appointments and hiring decisions," if a magisterial district judge gives work from his or her court to a person in the third degree of relationship to the judge, then the judge has appointed someone on the basis of nepotism. If a magisterial district judge assigns arrest warrants to a constable who is the judge's father, wife, domestic partner, sister, daughter, or grandson, the judge violates New Rule 2.13.

This same interpretation of Rule 2.13 was reached by the SCJAP. In an advisory opinion responding to an ethical inquiry, the Ethics and Professionalism Committee of the SCJAP addressed the use of constables who are relatives of magisterial district judges under the New Rules.⁶ The SCJAP took the position that it could "find no basis under which constables, who were improperly serving process as a spouse under the prior Rules of Conduct, would be permitted to engage in this practice under the New Rules." Specifically, the SCJAP identified the following New Rules as being implicated: New Rule 2.13 (Administrative Appointments), New Rule 2.4 (External Influences on Judicial Conduct), New Rule 2.11 (Disqualification), and New Rule 1.2 (Promoting Confidence in the Judiciary). The SCJAP opined

Comment [2] of Rule 2.13 speaks to prohibition of appointments by magisterial district judges of their spouse or domestic partner, or any relative within the third degree of relationship to the judge. Clearly the use of a constable who is a spouse or a relative in the third degree of relationship would be considered an appointment by the judge within the meaning of the Rule. The fundamental tenet of Canon 1 is to uphold and promote the independence, integrity, and impartiality of the judiciary, and avoid impropriety and the appearance of impropriety. Utilizing your spouse as a constable in your magisterial district court most certainly compromises promoting confidence in the judiciary.

⁶ See Docket #2015-12, dated June 25, 2015.

Id. at 2.

The SCJAP emphasized concern about the appearance of impropriety (New Rule 1.2) arising from a magisterial district judge using a constable relative and referenced issues it previously raised in its 2014 advisory opinion, *supra*, as being implicated by the practice: “questioning the timeliness of warrants being issued, the costs approved by the magisterial district judge and the weight to which one may question the credibility of a fee bill submitted, the fact that the constable-spouse derives income from the various services performed as a constable and having these services approved for payment by the judge who is the constable’s spouse.” *Id.* at 2-3. The SCJAP referenced New Rule 2.4 as pertaining to the issue because the “use of a spouse to perform services as a constable conveys the impression that the constable/spouse is in a position to influence the magisterial district judge.” *Id.* at 3.

Additionally, some Pennsylvania Counties have likewise supported this interpretation of New Rule 2.13 and issued administrative orders directing that constable relatives not be used by a magisterial district judge. For example, the President Judges in Dauphin and Northampton Counties, citing to New Rule 2.13, have issued administrative orders directing certain magisterial district judges to immediately cease using constables who were the spouses of the respective judges.⁷

For magisterial district judges who have been using constable relatives for many years, New Rule 2.13 necessarily disrupts what may have been a longstanding operation. Though the constable was duly elected by the voters to serve a particular ward or township, because the constable is related to the magisterial district judge in whose district the ward or township is located, the constable can get no work assignments from that judge. Rule 2.13 effectively ties the hands of the magisterial district judge from giving the constable relative any court assignments.

In fact, this circumstance was recognized by attorney Samuel Stretton in his “Ethics Forum” article entitled “Anti-Nepotism Provision Should Have Exceptions” (Samuel C. Stretton, “Anti-Nepotism Provision Should Have Exceptions,” *The Legal Intelligencer*, Ethics Forum, July 14, 2015). While Mr. Stretton expressed that combatting nepotism was good policy generally, he argued that New Rule 2.13 went too far because it prohibited a magisterial district judge from using a constable relative who was elected by the voters to serve a particular district within the magisterial district judge’s jurisdiction. This, he asserted, infringed on the constable’s First Amendment rights:

⁷ See Administrative Order 2015-4 dated May 15, 2015, issued by Northampton County President Judge Stephen G. Baratta and Administrative Order 09-2015 dated June 4, 2015, issued by Dauphin County President Judge Richard A. Lewis.

It is one thing for anti-nepotism rules to prevent hiring relatives so the perception of favoritism is avoided, but it's another thing to prohibit a duly elected constable to be precluded now because his or her spouse happens to be the district judge or the judge happens to be a relative within the third degree. It would appear there is a First Amendment right for elected constables to receive these appointments if they do their job properly. It also appears that the district judge should not be precluded from utilizing that constable.

Id. Mr. Stretton further argued there may be a "separation of powers" doctrine issue, as the judiciary does not have the right to override the duties of the constable's office. He suggests that a rigid policy can result in injustice and undermine other elected responsibilities and expresses that the solution may be to modify the New Rules

to at least encompass the concept of relatives who are elected in their own right and who have duties and responsibilities conferred upon them by their election by the voters. Further, these elected officials have a First Amendment right to associate and perform their duties. These anti-nepotism provisions cannot undermine those elected responsibilities.

Id.

While the issues raised by Attorney Stretton may have validity for the elected constable, they are issues for the constable to raise in a legal challenge and have, in practicality, no bearing on whether a magisterial district judge must comply with the ethical dictates of New Rule 2.13 so long as it remains in effect. New Rule 2.13 does not regulate the conduct of constables. It is a "canon of ... judicial ethics" referred to in Article V, § 17(b) of the Pennsylvania Constitution which governs the conduct of magisterial district judges. It was adopted by the Supreme Court of Pennsylvania pursuant to its constitutional power set forth in Article V, § 10(c) of the Constitution to prescribe general rules governing the conduct of all courts and justices of the peace (now magisterial district judges).

The clear message of New Rule 2.13 is that nepotism in any form will not be tolerated, whether it involves the hiring of an office secretary, a clerk, a janitor to clean the office, a contractor to reupholster the waiting room furniture, or the appointment of or assignment to a constable to serve arrest warrants or other process. Rule 2.13 applies to hiring decisions or appointments across the board so long as they involve anyone who is a relative of the magisterial district judge within the third degree of relationship. Unless and until Rule 2.13 is amended or set aside, it governs the conduct of magisterial district judges and limits their authority to make appointments and hiring decisions and they are duty bound to follow its dictates.