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Charitable contributions as part of sentences by Cynthia Gray

If authorized to do so by law, a judge may require a defendant to make a charitable contribution as part of the disposition of a criminal case. For example, considering a statute that expressly allowed a condition that a defendant make donations to "community or charitable work service projects" as part of a deferred-sentence agreement, the Colorado judicial ethics committee concluded that a judge's approval of such a condition would not violate the code of judicial conduct. *Colorado Advisory Opinion 2008-7* (http://tinyurl.com/p5d3of6). The judge would not be engaging in fund-raising for the charitable organization, the committee reasoned, but "advancing the public policies" behind the statute, that is, "the rehabilitation of certain categories of defendants."

Absent statutory authority, however, advisory committees agree that a judge may not require a contribution to a charity as part of a sentence. For example, in its opinion discussed above, the Colorado committee emphasized that its advice only applied to approval of deferred-sentence agreements authorized by the statute, not to contributions in a context where there was no similar statute. In addition, judges have been disciplined for requiring a charitable contribution as part of a criminal disposition.

Rationale for the rule

A judge may not dispose of criminal cases in a manner that is not prescribed by statute or case law. *Public Warning of*

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Improper delegation of adjudicative responsibilities

by Cynthia Gray

"It is fundamental to the independence, impartiality and integrity of the judiciary for a judge to exercise the powers of office without undue or unauthorized reliance upon non-judges." *New York State Commission on Judicial Conduct 2016 Annual Report*, at 18 (http://tinyurl.com/hurxwpo). A prohibition on improper delegation of judicial duties is inherent in the requirements of the code of judicial conduct that a judge "perform judicial and administrative duties competently and diligently" (Rule 2.5(A)), "hear and decide matters assigned to the judge" (Rule 2.7), "uphold and apply the law" (Rule 2.2), "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary" (Rule 1.2), and refrain from conveying or permitting "others to convey the impression that any person or organization is in a position to influence the judge" (Rule 2.4(C)). (References are to the 2007 American Bar Association *Model Code of Judicial Conduct*.) Judges have been disciplined for inappropriately entrusting their judicial duties to court staff, prosecutors, and law enforcement officers.

For example, the California Supreme Court found that a bailiff's direct participation in sentencing was

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Recent advisory opinions

• When a statute authorizes ex parte hearings on an application for a temporary domestic violence protection order, a judicial officer may question the petitioner during the ex parte hearing. *Washington Opinion 2016-6* (http://tinyurl.com/zeej9e3).

• A judge who presides over criminal arraignments may advocate at public meetings of governmental boards for an increase in staff for the district attorney and public defender and for a centralized arraignment court. *New York Opinion 2016-116* (http://tinyurl.com/zqgff9o).

• A judge may not connect on LinkedIn with an attorney who is reasonably likely to appear before him. *Massachusetts Letter Opinion 2016-8* (http://tinyurl.com/zvd9299).

• A judge may discuss her history with a not-for-profit organization and the community on a video that will be played at a fund-raiser honoring her if there is no solicitation of funds on the video. A judge may not participate in a university's video entitled "Our Successful Graduates" that will be posted on its web-page to be viewed by potential students. A judge may participate in a videotaped interview about gay marriage, adoption, and employment issues that an organization that promotes fair treatment of gay and lesbian students will make available to schools as an educational tool. A judge may participate in a videotaped interview about how much she relies on CASA volunteers that the CASA program will use to recruit volunteers even if it will be used at a fund-raiser as long as the video itself does not solicit funds. A judge may not participate in a video produced by MADD that discusses the impact of drunk driving on victims. A judge may not participate in a video for a youth mentoring program that begins, "We need your financial support to continue this worthy program in our community." A judge may not participate in a video for a drug rehabilitation program used by the court that will be used to advertise that specific program. *California Judges Association Opinion 72* (2016) (http://tinyurl.com/z74she3).

• A judge's picture and story may be used in promotional materials to attract students to a private college, but not in a fund-raising brochure. Judges, individually or as a group, may support the creation of a panel of volunteer criminal defense attorneys, provide brochures about their services, and periodically announce their availability. A judge may become a member or director of a minority bar association that promotes the hiring of minority lawyers by law firms. A state supreme court justice may sign a letter on judicial stationery to be mailed by the state bar association encouraging lawyers to provide pro bono legal services and to contact the bar association for information. *Minnesota Opinion 2016-1* (http://tinyurl.com/ot2ao3v).

• A judge may not solicit from the bar association donations of used books for the jail to be brought to the judge or the judge's office or post on his Facebook page that he wants to collect used books for the jail. *Florida Opinion 2016-14* (http://tinyurl.com/zphdott).

• A judicial official who will provide assistance such as planning, acting as an usher, or preparing food for a fund-raiser for a non-profit organization that is not related to the law, the legal system, or the administration of justice may be listed, without her title, in a fund-raising journal under a heading that recognizes volunteers. *Connecticut Informal Opinion 2016-13* (http://tinyurl.com/jo4owvl).

• A judge's presence may be acknowledged at a non-fund-raising reception for a domestic violence center that is not an advocacy group. *Florida Opinion 2016-16* (http://tinyurl.com/gt44q2a).

• A judge may agree to be the guest of honor at a non-profit entity's fund-raising dinner that will take place after her retirement if her participation is not announced or publicized until after her retirement. *New York Opinion 2016-136* (http://tinyurl.com/zb84qxo).

• A judge may chair a non-profit organization's development committee but should clarify that he will not be involved in fund-raising and recommend that a vice chair be named to cover all fund-raising during his tenure. *Maryland Opinion Request 2016-26* (http://tinyurl.com/gsakemd).

• A judge may write a letter on behalf of a non-profit organization's grant application to assist crime victims describing only his experience with the organization and limited to objective facts. *New York Opinion 2016-95/2016-107* (http://tinyurl.com/z7sob5u).

• A judge may not judge a mock trial organized by a private law firm for its associates and its client's in-house attorneys. *New York Opinion 2016-128* (http://tinyurl.com/jgzdbrj).

• Although a judge's spouse or significant other may post political signs on their jointly-owned property, the judge should explain the public perception issues and request that the signs not be put up. If a spouse, significant other, or other family member has no ownership interest in the property, the judge should not allow a political sign on her solely-owned property. *Arizona Opinion 2016-3* (http://tinyurl.com/jlhduxn).

• In a written advertisement, a judicial candidate may compare his record as an attorney with his opponent's record as long as he has a good faith basis to believe that the information is accurate and fairly presented. *North Dakota Opinion 2016-3* (http://tinyurl.com/zly66cr). ★

The Center for Judicial Ethics has links to judicial ethics advisory committees at www.ncsc.org/cje.

Inaugural events

A judge may attend the inauguration of elected public officials. As the South Carolina advisory committee explained, swearing-in ceremonies are not political activities, but "governmental activities in which every citizen regardless of their official position should be allowed to participate."

> By attending the inauguration ceremonies ... a judge simply participates as a spectator to a time honored tradition of government that symbolizes and celebrates the orderly and legal transition of elected officials. Also, by attending as a spectator the judge is merely showing respect, in a dignified manner, for a branch of government other than his own, which thus avoids harming the integrity and impartiality of the judiciary and avoids any appearance of impropriety.

South Carolina Advisory Opinion 2-1995 (http://tinyurl.com/hgjnp9e). *Accord Colorado Advisory Opinion 2006-10* (http://tinyurl.com/zxmrehp) (gubernatorial inauguration); *Florida Advisory Opinion 1992-41* (http://tinyurl.com/hfj3ws9) (presidential inauguration); *New York Advisory Opinion 1997-145* (http://tinyurl.com/j9s39ov) (municipal induction ceremony).

A judge may also attend an inaugural ball or similar event if any fee charged covers only the costs of the event or goes to a charity, but a judge may not attend if the event is a fund-raiser for a political candiate or party. For example, the Colorado advisory committee stated that a judge may attend a dinner, concert, and whistle-stop tour following a gubernatorial inauguration when any interested citizen may purchase a ticket for a nominal fee that covers the costs of the event only, with no part going to a political party. *Colorado Advisory Opinion 2006-10* (http://tinyurl.com/zxmrehp). The committee cautioned that the judge should not engage in fund-raising to pay for attending the event, should not use his attendance as an opportunity to seek elevation to a higher bench, should attend as any member of the public without being seated on the dais or in any position that suggests a particular allegiance with the governor, and should be identified by name without reference to his judicial title to the extent possible. *See also Connecticut Advisory Opinion 2010-36* (http://tinyurl.com/hega97z) (a judge may, along with a guest, attend at no cost a gubernatorial inaugural ball and dinner that will raise funds to support and maintain an armory); *Florida Advisory Opinion 1992-41* (http://tinyurl.com/hfj3ws9) (a judge may attend a presidential inaugural ball provided no funds are paid to a political organization and attendance is not limited to members of one party); *New York Advisory Opinion 1997-145* (http://tinyurl.com/j9s39ov) (a judge may not attend a ball following the swearing-in ceremony for local officials when the $250 ticket price will be used to pay campaign debts incurred by the one of the officials); *New York Advisory Opinion 1998-12* (http://tinyurl.com/jurdqzm) (a judge may attend an inaugural ball for a mayor if any net proceeds will go to a charitable organization and the event is not a political gathering); *New York Advisory Opinion 2008-213* (http://tinyurl.com/jqwe2vv) (a judge may attend the presidential inauguration but not an inaugural ball hosted by a state political delegation, a political organization, or a political interest group, unless the judge is currently a candidate); *Pennsylvania Informal Advisory Opinion 12/17/01* (http://tinyurl.com/jgqecme) (a judge may attend an elected official's inaugural ball if it is a social event, not a partisan event or a fund-raiser); *Pennsylvania Informal Advisory Opinion 1/5/04* (http://tinyurl.com/jgqecme) (a judge may attend the inaugural ball for county commissioners but cannot attend the fund-raiser that precedes the ball); *South Carolina Advisory Opinion 2-1995* (http://tinyurl.com/hgjnp9e) (a judge may attend an inaugural ball if any fee covers only the cost and will not be retained by any political party). *Cf., Arkansas Advisory Opinion 1992-5* (http://tinyurl.com/z2zk8px) (a judge who holds an office filled by election may purchase tickets to and attend an inaugural ball for the President regardless whether the ball is considered a political gathering and whether the admission charge is used to defray the costs of the event, is given to a charitable organization, or is used to support Democratic Party activities). ★

Recent cases

Personified incivility

Approving the findings and recommendations of the Judicial Qualifications Commission, which the judge accepted, the Florida Supreme Court publicly reprimanded a judge for sending an ex parte e-mail to the public defenders' office, failing to recuse or transfer when an appeal of his refusal to recuse based on the e-mail effectively froze his division, and making impertinent and belittling remarks in open court about that appeal; the Court also ordered that the judge send a letter of apology, continue judicial mentoring for three years, complete a mental health program, and pay the costs of the proceedings. *Inquiry re Contini* (Florida Supreme Court December 1, 2016) (http://tinyurl.com/zb6ewca).

The judge took office in January 2015. In March 2015, during his first day at the Florida Judicial College, the judge

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sent the public defenders' office an ex parte e-mail that suggested the use of a proposed order as a general template for downward departure motions in sentencing. The e-mail was not copied or forwarded to the state attorney's office at that time; instead, the judge waited seven days, until he returned home, to distribute the order to several state attorneys. After learning of the ex parte communication, the state attorney's office filed a motion to disqualify the judge from all pending criminal cases. The judge denied the motion as legally insufficient.

On April 9th, the state attorney general petitioned the court of appeal for a writ of prohibition disqualifying the judge from a list of 962 cases. On June 10th, the court of appeal issued an order to show cause concerning the writ that stayed proceedings in the cases to which it applied. Although there was no formal stay in effect until the show cause order, all parties had acted as though a stay was in effect after March 26th. Thus, the Court stated, the judge's "division—the criminal division—was essentially frozen, yet he neither recused himself sua sponte nor sought an administrative transfer. Instead, he remained within the division hoping for personal vindication."

While the writ proceedings were pending, the Commission served the judge with a notice of investigation about the e-mail. In response, the judge acknowledged that the e-mail was a "serious mistake" and explained that he denied the disqualification motion because the e-mail was general and unrelated to any particular case.

After meeting with the Commission, the Court explained, the judge apparently "became increasingly frustrated until he lost his temper in open court" during hearings on August 11th and 12th. In one hearing, he said, "And if a prosecutor, someone with the AG's office, wants to put that person's case on their disingenuous list of cases that are pending sentencing, that's a lie from the pit of hell, and that is a fraud" on the court of appeal. He expressed the wish that the court of appeal would "spank the person who put [a case on the] disingenuous list" and "ream out the idiot who put [that case] on the list." The assistant attorney general who signed the list of cases was not present, but the judge chastised her by name for "misleading" and committing "fraud on" the court of appeal. In another hearing, the judge threatened a state attorney with contempt, raising his voice, accusing the attorney of inappropriate behavior, and demanding that the attorney admit to helping create the list. After the exchange, the judge ordered bailiffs to escort the state attorney from the courtroom. Almost immediately following those hearings, the judge sought an administrative transfer.

The Commission determined that "Judge Contini was a new judge, who underestimated the process of transitioning from a well-respected, professional lawyer to a judge, and made a series of significant missteps."

Difficult position

Based on agreed statement of facts and joint recommendation, the New York State Commission on Judicial Conduct admonished a judge for, on three occasions, asserting the prestige of judicial office while attempting to enter a county-owned building in possession of a firearm, in violation of a local law. *In the Matter of Moskos*, Determination (New York State Commission on Judicial Conduct October 3, 2016) (http://tinyurl.com/z8vdynt).

Posted by the door to the public entrance of a county office building was a sign stating "No Weapons Permitted," and below that was a copy of a local law that prohibits, "any individual from bearing or having in his/her possession, either openly or concealed, any firearm ... in any building owned, leased, or operated by the County of Otsego." The law also states, "This local law shall not apply to law enforcement officials only."

The judge attempted to bring his pistol into the office building three times. For example, in the third incident, the judge entered the public entrance, and, when the security officer, who recognized him from the first incident, asked if he was carrying his pistol, the judge said yes and that he was permitted to carry his firearm into the building. The security officer directed the judge's attention to the sign and the posted law. The judge stated that he had just left another county building where he had been permitted to carry his pistol inside. The security officer told the judge he could either secure his pistol in his vehicle or in the office of an investigator for the district attorney's office. The judge chose the latter, and the security officer escorted the judge to the investigator's office. The judge identified himself to the investigator as New Lisbon Town Justice Bruce Moskos and stated that he visits courts all over the state and that he frequently enters government and/or court buildings, without having to surrender his pistol, including Otsego County buildings and buildings in New York City. The judge further stated that he had just attempted to visit Judge Brian Bums during lunchtime and asked whether they would subject Judge Coccoma or Judge Bums to the same treatment. The judge's pistol was secured in a lockbox, and the judge later returned to the office to retrieve it.

The Commission found that the judge's actions "created at least the appearance that he was attempting to use the prestige of his judicial office to enter the building with his pistol," contrary to a local law. ★

Charitable contributions as part of sentences (continued from page 1)

McDougal (Texas State Commission on Judicial Conduct June 30, 1999). The judge in *McDougal* admitted that he was not aware of any statutory or other legal authority for his sentencing practice: providing defendants in traffic cases with the option of making donations to a private charity chosen by the prosecutor in exchange for dismissal of their traffic tickets. Because the city attorney regularly selected a city public safety committee that, as the judge was aware, assisted the city's police department, the Texas State Commission on Judicial Conduct also noted that, by approving the donations, the judge risked creating the public perception that the police department was in a special position to influence him. *See also Kansas Advisory Opinion JE-108* (2001) (http://tinyurl.com/qjhd4sg) (a judge may not allow a contribution as an alternative to a fine unless authorized by statute to do so); *Missouri Advisory Opinion 172* (1998) (absent a state statute or constitutional provision, a judge may not impose as a condition of probation payments to the county treasury, a county crime reduction fund, or a specified charity). *But see Michigan Advisory Opinion JI-130* (2004) (http://tinyurl.com/p5cot9j) (disapproving previous advisory opinions to the extent they expressly or impliedly stated that any sentence not expressly authorized by law was unethical).

> [T]he prohibition on incorporating contributions into sentences is a corollary to the rule that, no matter how commendable the cause, a judge may not personally solicit contributions to charities or use the prestige or power of the judicial office to do so.

In addition, the prohibition on incorporating contributions into sentences is a corollary to the rule that a judge may not personally solicit contributions to charities or use the prestige or power of the judicial office to do so, no matter how commendable the cause. The Maryland advisory committee noted that making a contribution part of a sentence is "tantamount" to the judge solicitating funds for a charitable organization. *Maryland Advisory Opinion 1999-8* (http://tinyurl.com/pu2x87j). The Michigan advisory committee explained:

> Underlying the prohibition against judicial solicitation is the notion that it is not ordinarily possible to solicit without raising the suspicion that the judge is using the power and prestige of judicial office to persuade or coerce others to contribute. No matter how well intentioned, the work of solicitation for charitable purposes is better left to persons other than those who occupy the bench. . . .
>
> If judges are forbidden to solicit for charity, clearly judges cannot direct contributions by requesting or requiring offenders to donate contributions in lieu of fine or jail time to charities designated by the judge.

Michigan Advisory Opinion JI-48 (1992) (http://tinyurl.com/ocsyblq).

Similarly, the Florida committee stated:

> The power to control the pocketbook of another person so as to cause him to take that which is his own and give it to another is an awesome power; it is tantamount to the authority to tax. If a judge exercises this power in such a way as to convey the impression that he is advancing the private interest of a particular charity, he may be improperly lending the prestige of his office to that charity. This may reflect adversely upon the impartiality and integrity of the judge.
>
> . . . . In this case, it is not the prestige alone which is being used but the power of the judicial office in imposing a charitable contribution requirement as part of a sentence, and the infringement of the Canons is clear.

Florida Advisory Opinion 1984-11 (http://tinyurl.com/qd5ruca) (a judge may not require defendants in criminal cases to pay money directly to a charity named by the judge as part of a sentence). *See also Minnesota Advisory Opinion 2016-1* (http://tinyurl.com/ot2ao3v) (a judge may not order criminal defendants to make contributions to charities).

Further, the Texas committee explained that "[j]udicial power should not be used to force litigants to provide gifts or services to specified charities, or to other organizations; judges should not be choosing among competing charities." *Texas Advisory Opinion 241* (1999) (http://tinyurl.com/o3ftxos). Thus, the committee applied the rule to advise that a judge may not order defendants to donate items such as toys, clothing, diapers, and food to specific charities as a condition of community supervision.

Even when a judge is authorized by statute to approve a charitable contribution as part of a sentence, to avoid the appearance of fund-raising, the judge may not choose or suggest the charity to which the defendant would make the donation. *Colorado Advisory Opinion 2008-7* (http://tinyurl.com/p5d3of6). The Colorado committee also concluded that a court could not maintain a list of charities from which a defendant could choose as that list might also "be seen as bearing the court's imprimatur" and raise similar concerns

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Charitable contributions as part of sentences (continued from page 5)

about fund-raising.

Although the impropriety may be more obvious if the judge chooses the charity, the practice is inappropriate even when the judge allows the defendant to choose where the donation goes because there is still the appearance of fund-raising. *See Florida Advisory Opinion 1987-6* (http://tinyurl.com/o7zdlua) (a judge may not accept a negotiated plea requiring the defendant to make a contribution to a charitable foundation even if the judge does not suggest the organization or set the amount of the contribution); *Kansas Advisory Opinion JE-108* (2001) (http://tinyurl.com/qjhd4sg) (a judge may not permit a defendant convicted of a misdemeanor to make a contribution to a charity of the defendant's choice in lieu of the usual fine); *Nevada Advisory Opinion 2000-3* (http://tinyurl.com/phrf4u5) (a judge may not order a defendant to make a charitable contribution even if the judge does not select the charity or the amount of the contribution).

In addition, sentences that impose contribution requirements improperly divert money from the treasury of the government entity that would otherwise receive the fine by law. *Nevada Advisory Opinion 2000-3* (http://tinyurl.com/phrf4u5). For example, the Missouri constitution provides that "penalties, forfeitures and fines collected . . . for any breach of the penal laws of the state" are "distributed annually to the schools of the several counties according to law." The Missouri advisory committee concluded that a judge's approval of a plea bargain that would require that money be paid to charities or funds set up by municipal or county ordinance "would divert monies paid as a consequence of violations of the law from schools" and create an appearance that the judge was not being faithful to the law. *Missouri Advisory Opinion 172* (1998). The opinion added that a municipal or county ordinance creating a fund for payments in lieu of fines did not create the authority to override the state constitutional directive. *See also In the Matter of Davis*, 946 P.2d 1033 (Nevada 1997) (removal of a judge who, in addition to other misconduct, directed or suggested that persons found guilty contribute to charities in lieu of paying fines, "thereby diverting money from the city treasury of North Las Vegas"); *Washington Advisory Opinion 2004-5* (http://tinyurl.com/oljjfeb) (a judge may not approve an agreement that requires a defendant, in return for the dismissal of a charge, to make a monetary donation to the city contrary to a statute providing that all monetary obligations imposed by a municipal court for the violation of municipal ordinances be collected by the court clerk with a portion then distributed to the state treasurer).

Thus, ordering donations as part of a disposition is prohibited if unauthorized even if the recipient is a government program, not a private charity. Advisory committees have disapproved judicially mandated contributions to any "civil, ecclesiastical, and other philanthropic enterprises" (*Michigan Advisory Opinion JI-48* (1992) (http://tinyurl.com/ocsyblq)), including to a fund for the probation department or other community programs (*Florida Advisory Opinion 1985-13* (http://tinyurl.com/nn7p238)); to a county treasury or crime reduction fund established by county ordinance to collect and distribute such payments to law enforcement agencies (*Missouri Advisory Opinion 172* (1998)); or to a county school fund (*Missouri Advisory Opinion 180* (2002)).

Finally, because the practice is popular with the public and frequently attracts positive press attention, donations-in-lieu-of-fines sentencing may create at least the appearance that the judge is improperly using the judicial sentencing authority to improve his chances of being re-elected. *See Nevada Advisory Opinion 2000-3* (http://tinyurl.com/phrf4u5). *See also In the Matter of Davis*, 946 P.2d 1033 (Nevada 1997) (removal of judge who "to enhance his electability" directed or suggested that persons found guilty contribute to charities, in addition to other misconduct).

Plea bargains

The prohibition against ordering charitable contributions applies even if a judge is simply approving a plea bargain in which the contribution was agreed to between the prosecutor and defendant. Although it could be argued that by accepting a plea bargain, a judge is merely acquiescing in the imposition of the donation and not soliciting it, "regardless of whose idea the 'donation was at its inception, it is the court's order that directs the 'donation' to a particular charity." *Maryland Advisory Opinion 1999-8* (http://tinyurl.com/pu2x87j). Similarly, the Missouri committee stated that, even if the judge does not impose a charitable or civic payment as a part of the sentence or condition of probation, "when the judge knows such a payment is a precondition

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to receiving the [plea agreement] recommendation, the appearance of a 'payoff' remains" and the "judge has the obligation to review the plea agreement and exercise discretion in a manner so as not to create the appearance of a 'payoff.'" *Missouri Advisory Opinion 176* (2000) (a judge may not accept a plea bargain if the judge knows that payment of money to a specified charity, the county treasury, or a county crime reduction fund is part of the defendant's agreement with the prosecution). *Accord Minnesota Advisory Opinion 2016-1* (http://tinyurl.com/ot2ao3v) (a judge may not accept plea agreements that require criminal defendants to make contributions to charities); *Missouri Advisory Opinion 180* (2002) (a judge may not approve a plea bargain that the judge knows requires, in lieu of a fine, a donation to the same county school fund that received fine money); *Nevada Advisory Opinion 2000-3* (http://tinyurl.com/phrf4u5) (a judge may not approve a plea agreement between the prosecutor and the defendant that includes an agreement by the defendant to make a charitable contribution); *Texas Advisory Opinion 241* (1999) (http://tinyurl.com/o3ftxos) (a judge may not order defendants to donate items to specific charities as part of a plea bargain). *But see New York Advisory Opinion 2008-67* (http://tinyurl.com/p3xgked) (a judge may approve an agreement that includes a requirement that the defendant donates to the county STOP DWI Program if the judge determines that the plea bargain is legally appropriate and ethical under the code of professional responsibility).

In *In the Matter of Storie*, 574 S.W.2d 369 (Missouri 1978), the judge had created, at the city prosecutor's suggestion, a library fund to improve his courtroom, which was "a total disgrace to any kind of judicial system." Without consulting the judge, the prosecutor and the defense attorney would agree on the amount to be contributed to the fund in consideration for a reduced charge, dismissal, or a nolle prosequi. The judge would use the funds to pay for court maintenance and furnishings, law books, wages for a part-time court employee, and insurance on the county bar law library.

In disciplining the judge, the Missouri Supreme Court criticized him for considering "himself a 'rubber-stamp, of the prosecutor," noting this is not "a proper perspective of judge-prosecuting attorney relationship in acceptance of plea bargaining" and that "[p]lea bargaining contemplates a judicial determination of the sentence." Thus, the Court stated that, although in requiring a contribution to the fund, the judge "may have acted without an evil intent," "the practical effect to the public is that of a 'pay-off.'" Similarly, the Texas Commission noted that a judge implicitly approved the city attorney's selection of a charity each time he granted the city attorney's motion to dismiss traffic tickets in exchange for a donation, thereby lending the prestige of his office to the charity. *Public Warning of McDougal* (Texas State Commission on Judicial Conduct June 30, 1999).

Application

As the decisions and advisory opinions discussed above illustrate, the prohibition applies to all types of dispositions, not just sentencing, including contributions in exchange for dismissal of charges, reducing charges, withholding adjudication, and nolle prosequi and in lieu of community service or attorney sanctions. *See, e.g.*, *Texas Advisory Opinion 241* (1999) (http://tinyurl.com/o3ftxos) (a judge may not grant a motion to dismiss knowing that the state has required the defendant to make a charitable donation).

In *In re Shannon*, 637 N.W.2d 503 (Michigan 2002), the judge had dismissed the tickets of defendants who pleaded responsible or were found responsible, but then advised them to purchase tickets for the Detroit Fire and Police Field Day from the police officer sitting at a table in the courtroom. Some defendants were asked how many children they planned to take, and, if the number was too low, they were told they needed to take more. Others were told to "dig deeper," call someone, or go to an ATM. After one defendant said he had $116 on him, the judge told him to buy $100 worth of tickets. The average ticket purchase was approximately $50 a person. In a finding adopted by the Michigan Supreme Court, the Judicial Tenure Commission stated that the judge's "conduct, whether well intentioned or not, gave the appearance of using the powers of his position as magistrate to solicit money from defendants for a charitable cause." *See also In re Richter*, 409 N.Y.S.2d 1013 (New York Court of the Judiciary 1977) (a judge conditionally discharged or dismissed charges after defendants on his order made contributions to various charities); *In re Felsted*, Stipulation and order (Washington State Commission on Judicial Conduct September 7, 1990) (http://tinyurl.com/pz2xwzs) (a judge allowed selected individuals to make voluntary contributions to law enforcement-related services, such as a SWAT team or K-9 unit, in exchange for dismissal of their tickets).

In addition, judicial ethics committees have advised judges against offering defendants the option of making charitable contributions in lieu of performing community service. The Missouri committee noted that the absence of statutory authorization distinguished payments to charities from community service as part of a sentence. *Missouri Advisory Opinion 173* (1999). In *Michigan Advisory Opinion JI-48* (1992) (http://tinyurl.com/ocsyblq), the Michigan committee considered a court's practice of giving defendants the choice of performing a designated number of hours of community service or making a cash contribution to a charity designated by the judge. Each participating

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judge set the amount to be paid by the offender; one judge set the amount at $5.00 an hour while another set it at the offender's actual hourly wage rate. All donations were paid into the court clerk's office and deposited into a county "restitution" account from which disbursements were made randomly each quarter to the charities selected by the sentencing judges.

The Michigan committee concluded:

> Just because the option of making cash contributions to the court's charity in lieu of performing a certain number of hours of community service work is in addition to the more traditional sentences of time and fine does not make the sentencing practice any more acceptable. The sentencing judge is left open to the accusation that a particular community service alternative is intentionally more burdensome than required in order to encourage monetary contributions to the judge's charity.

The opinion stated that the "judicial imposition of dollars for hours also discriminates in favor of those more affluent offenders who have the means to buy out of community service work."

The opinion stated that the "judicial imposition of dollars for hours also discriminates in favor of those more affluent offenders who have the means to buy out of community service work." The committee also noted that it could not "find any authority in law which allows the sentencing practices described." *See also Florida Advisory Opinion 1985-13* (http://tinyurl.com/nn7p238) (a judge may not allow defendants to receive credit on the community service that is required for DUI convictions by making donations that will generate additional funding for the county probation department or other county projects such as expanding programs in the recreation department, adding park facilities, or providing additional funding for indigent services). *Cf.*, *Michigan Advisory Opinion JI-130* (2001) (http://tinyurl.com/p5cot9j) (defendants may be offered the opportunity to perform services for certain companies/organizations to "work off" their restitution obligation under a criminal sentence if the court and its personnel are not involved in soliciting or contracting with the companies/organizations, in assigning defendants for work, or in soliciting or handling funds paid to victims).

Finally, allowing an attorney to make a charitable contribution to discharge a monetary sanction imposed by the judge is also prohibited. In *In the Merritt*, 432 N.W.2d 170 (Michigan 1988), the judge had created a fund to assist indigent drug and alcohol abusers, and some of the money for the fund was contributed by attorneys whom the judge had amerced for filing pretrial statements late, being tardy for court appearances, or failing to appear on court dates. In a finding adopted by the Michigan Supreme Court, the Judicial Tenure Commission stated, "[i]n essence, the respondent's conduct, whether well intentioned or not, gave the appearance of using the powers of his judicial office to solicit monies from attorneys for the . . . fund."

Agreeing, the Hawaii advisory committee stated that, "[i]n intent and result, ordering an attorney or litigant to make a charitable contribution as a monetary sanction is indistinguishable from soliciting funds for charitable organizations and would use not only the prestige but also the power of the judicial office to raise funds for charities." *Hawaii Advisory Opinion 2001-1* (http://tinyurl.com/pqnycr9). "Given the discretion judges have when imposing a monetary fine for civil contempt or other sanctionable conduct," the committee explained, "allowing such payments to go to charities would reasonably lead to creating the appearance that the judge is abusing that discretion to help charities or to increase his or her popularity by helping charities." The committee acknowledged that "the impropriety is more apparent when the judge chooses the charity," but concluded that "allowing the litigant or attorney being sanctioned to choose the charity does not fundamentally change the fact that the judge is personally raising funds for a charity and using the power of the office to do so."

The opinion also noted that "'ordering a payment to charity, whether chosen by the judge or by the person sanctioned, may not be authorized by law and may therefore be inconsistent with a judge's duty to 'be faithful to the law and maintain professional competence in it.'" Finally, the committee suggested that "[o]rdering payment of a fine to a charity may even dilute its effectiveness as a punishment or deterrent if the payee is able to claim a charitable deduction," noting that the "purpose of imposing a fine for civil contempt or other sanctionable conduct is to compel compliance with court rules and orders, not to raise funds for charities." *But see Washington Advisory Opinion 1999-10* (http://tinyurl.com/oljjfeb) (a judge may give an attorney the option of paying fines levied for violation of civil scheduling orders to a bar association pro bono or volunteer lawyer program or a charitable organization instead of the county as long as the judge does not select the organization). ★

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Improper delegation of adjudicative responsibilities (continued from page 1)

"transparently injudicious" and "in clear disregard of the most fundamental concepts of our legal system." *McCartney v. Commission on Judicial Performance*, 526 P.2d 268 (California 1974) (censure for this and other misconduct). The judge had conferred with his bailiff at the bench in cases in which the defendants were representing themselves and then immediately imposed the sentences proposed by the bailiff. When the bailiff suggested that they be less obvious, the judge started calling him to the bench on the pretext of giving him an errand to run.

The Court found that these bench conferences were "repeated and flagrant abdications of judicial functions" in which the judge had "delegated to a nonjudicial officer a power to impose punishment constitutionally vested in the judiciary" and deprived the defendants "of a proper trial in the sentencing stage of the proceedings." Further, the Court explained the appearance of impropriety that the judge had created.

> Even if the bailiff's suggestions to the judge did not ultimately find their way into the actual sentence imposed, the visual image of the bailiff's active presence at the bench immediately prior to sentencing undoubtedly carried the appearance that the bailiff had joined in the fashioning of the sentence (excepting, of course, those instances in which the court adopted the unconscionable subterfuge of ostensibly calling the bailiff to the bench to run errands).

See also In re Foret, 144 So.3d 1028 (Louisiana 2014) (60-day suspension without pay for a judge who, in addition to other misconduct, frequently allowed the court constable to "assist" with hearings, including questioning witnesses, especially in criminal matters); *In the Matter of Walsh*, 587 S.E.2d 356 (South Carolina 2003) (removal of a judge for, in addition to other misconduct, soliciting input from another judge and a clerk about the appropriate sentence for a defendant he had held in contempt); *In the Matter of Tesmer*, 580 N.W.2d 307 (Wisconsin 1998) (reprimand of a judge who had had a law professor prepare her opinions on dispositive motions in 32 cases).

Like sentencing, setting bail is a judicial function and therefore a non-delegable judicial duty. In 1992, the New York State Commission on Judicial Conduct admonished 11 non-lawyer town court justices who had authorized the sheriff's department to release defendants from jail without a judge's review when a certified bondsman presented a bail bond. In accordance with that authority, the sheriff had released 74 defendants who had been committed to jail by the judges. Emphasizing that, under state statutes, it was the judge's responsibility to ensure that a bail bond assured that a defendant would return to court, the Commission noted that judicial duties cannot be delegated to jailers or any other non-judicial officers. *New York State Commission on Judicial Conduct 1993 Annual Report*, at 10 (http://tinyurl.com/j57cmce).

Similarly, judges have been sanctioned for pre-signing orders that allowed non-judges to set bail and procure release of defendants. For example, in 1973, the California Supreme Court censured two judges who regularly furnished to a bail bondsman orders that were blank except for the judge's signature; as the judges were aware, the bail bondsman filled in the orders to fix bail without authority from a judicial officer and used the orders to secure the release of prisoners arrested for felonies. *In re Chavez*, 512 P.2d 303 (California 1973); *In re Sanchez*, 512 P.2d 302 (California 1973). *See also In re Landry*, 157 P.3d 1049 (Alaska 2007) (censure of a former judge for making pre-signed bail orders available for prosecutors to use for out-of-custody arraignments, in addition to other misconduct).

Some discipline cases on improper delegation involve a judge's practice of, in effect, turning over part of the judge's docket to prosecutors.

Review and approve

Some discipline cases on improper delegation involve a judge's practice of, in effect, turning over part of the judge's docket to prosecutors. For example, a California judge had no involvement in 90 to 95% of the cases on his misdemeanor pretrial calendar in which the defendants were not in custody; instead, the deputy district attorney determined the sentences, sitting at counsel table in the courtroom and discussing cases with defense counsel who lined up to talk to him in the judge's absence. *Inquiry Concerning Sheldon*, Decision and order (California Commission on Judicial Performance October 23, 1998) (http://tinyurl.com/zag88t2) (admonishment). When a plea agreement was reached, the defendant and his attorney would fill out a change-of-plea form indicating that the defendant understood and waived his constitutional rights and a form about terms of probation. The forms would be submitted to the clerks, and the clerks would file the forms, enter the plea and sentence into the computer, and generate a minute order. Initially, the clerks brought the files to the judge for his signature, but he gave them the option of stamping his name on the forms, and their use of the stamp became part of the routine without his reviewing the court files. The California Commission on Judicial Performance noted that

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defense counsel and the prosecutor liked this method of handling the judge's pretrial calendar and believed that the pleas entered were valid.

However, the Commission found that the judge had abandoned his duty to be on the bench when cases were adjudicated, to determine that a defendant had freely entered a plea with a knowing, intelligent, and voluntary waiver of his constitutional rights, to approve a sentence agreed upon by the attorneys, and to impose a sentence. Noting the special masters' statement that there "is an appropriate expectation that it is the judge who makes an independent evaluation of all issues presented to the court," the Commission concluded that, by allowing the district attorney to determine the sentence and by failing to appear in court to impose the sentence, the judge had undermined the public's confidence in an independent judiciary. The Commission also stated that the judge had knowingly permitted the creation of inaccurate and misleading court records by allowing clerks to stamp his name on forms attesting that he had reviewed them and made findings when he had not.

Similarly, a New York judge was disciplined for failing to review dispositions and sentences negotiated by the deputy town attorney with defendants in traffic cases. *In the Matter of Calano*, Determination (New York State Commission on Judicial Conduct May 9, 2016) (http://tinyurl.com/zngvsdq) (admonishment for this and other misconduct). The judge was not present when the deputy town attorney conducted conferences with defendants in vehicle and traffic law cases each Tuesday. In the majority of cases, an agreement was reached involving a plea to reduced charges, the imposition of fines and surcharges, and, in some instances, dismissal of the charges. At the conferences, as the judge knew, the deputy town attorney advised defendants that the proposed dispositions required a judge's approval; however, the judge did not review or approve the agreements reached at the Tuesday conferences.

The New York Commission found that the judge had effectively permitted the deputy town attorney to dispose of cases without judicial oversight. It emphasized:

> Only judges have authority and responsibility to accept or reject a negotiated plea; and dismissing and reducing charges, convicting defendants and imposing sentences are quintessential judicial functions requiring the exercise of judicial discretion. Placing such responsibilities in the hands of the prosecutor, who is not a neutral arbiter but an advocate, is especially problematic.

The Commission stated that the judge's occasional conversations with the deputy town attorney about "parameters" for negotiated dispositions were "no substitute for reviewing dispositions in individual cases," even if, as the judge testified, the deputy town attorney "was an officer of the court whom she trusted to act appropriately." The Commission also found that the fact that these practices pre-dated the judge's tenure did not excuse her misconduct. *See also In the Matter of Greenfield*, 521 N.E.2d 768 (New York 1988) (removal of a judge for allowing the deputy village attorney to conduct conferences with defendants in the judge's absence, accept guilty pleas, determine the amount of fines, and enter the disposition of cases on official court records).

Fine schedules

In New York, both the conduct commission and the advisory committee have disapproved of the practice of judges' delegating to court staff the setting of fines in traffic cases even if the judges adopted a fee schedule for the clerks to follow. In *New York Advisory Opinion 2015-127* (http://tinyurl.com/joq9bx2), the New York Advisory Committee on Judicial Ethics responded to an inquiry from a supervising judge about whether the judges who report to her could create a fixed schedule of fines for traffic infractions and, by a standing order, delegate to their court clerks the task of accepting written guilty pleas and applying that schedule "in a ministerial fashion, without further judicial review" and with no discretion to deviate from the schedule. Motorists would be free to reject the process and appear personally before a judge. The committee noted that it had previously distinguished between "ministerial functions," which may be delegated, and "judicial functions," which may not. Applying that distinction in prior opinions, the committee had advised that a judge may delegate researching whether a litigant's address is located within a particular geographic boundary, but not the determination whether filed papers may be refused on jurisdictional grounds (*New York Advisory Opinion 2014-137* (http://tinyurl.com/gmjncbk); may delegate the counting of posted cash for bail, but not the determination whether the bond was adequate (*New York Advisory Opinion 1993-88* (http://tinyurl.com/zutb5yt)); and may authorize a law clerk to conduct conferences and share with the parties the clerk's view of the case and issues only if the clerk makes clear that the judge will make an independent judicial decision (*New York Opinion 2009-211* (http://tinyurl.com/gp7brzj)).

Thus, in response to the subsequent inquiry, the committee advised that "the imposition of a fine, even if only for an arguably 'routine' traffic infraction, is a nondelegable judicial duty" and "a judge may not by court order delegate to the court clerk the authority to impose pre-determined fines for traffic infractions." The committee also concluded that, because a fine should be set on a case-by-case basis, a binding schedule constitutes impermissible pre-judgement. The opinion noted that a schedule could "result in error through inadvertent or deliberate misreading by the court clerk, or through the schedule's failure to reflect

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subsequent changes in the law." *But see New York Advisory Opinion 2015-220* (http://tinyurl.com/gwaeovs) (if applicable law permits judges to delegate authority to accept guilty pleas and set fines to court clerks who serve in a municipality's traffic violations bureau, it would also be ethically permissible for a judge to do so).

In its discussion of the use of fine schedules, the New York State Commission on Judicial Conduct acknowledged that "[t]he process of accepting pleas and imposing fines in speeding, seat-belt and other 'routine' traffic matters may seem monotonous or inconsequential," but emphasized it is "an adjudicative role that is to be fulfilled only by the judge of the court with jurisdiction." *New York State Commission on Judicial Conduct 2016 Annual Report*, at 18 (http://tinyurl.com/hurxwpo). It noted:

> That there may be mitigating or aggravating circumstances in a particular case, such as prior convictions against the motorist, would only underscore the importance in assuring that a judge was reviewing the record and making the decision. In such a situation, the judge may find it appropriate to impose a fine lower or higher than a formulaic guideline from which a clerk or other designee could not veer.

In some cases of improper delegation, judges have allowed court staff to preside over court proceedings as if they were the judge.

The Commission disciplined a judge who, as a general practice, allowed his court clerk to impose fines for mailed-in guilty pleas to certain traffic offenses pursuant to a schedule created by the judge, including three traffic tickets issued to the judge's nephews, in addition to other misconduct. *In the Matter of Menard*, Determination (New York State Commission on Judicial Conduct October 13, 2010) (http://tinyurl.com/je5yay9) (censure for this and other misconduct).

Signature

In another type of improper delegation, a judge allows court staff to sign orders and other judicial documents or use the judge's signature stamp to do so without the judge reviewing the documents. An Indiana judge, for example, permitted the clerk's office to routinely affix his stamped signature to an emergency protective order at the time a petition was filed without the judge reviewing the petition. Thus, when the judge's father filed a petition to prevent a utility from installing sewer lines, the judge's signature stamp was used to enter an emergency protective order, creating the appearance that the judge had granted his father's request. *In the Matter of Funke*, 757 N.E.2d 1013 (Indiana 2001) (15-day suspension without pay for this and related misconduct). *See also Inquiry Concerning Green*, Report of Disposition (Georgia Judicial Qualifications Commission October 13, 1992) (reprimand and 30-day suspension without pay for a judge who had permitted clerks and other court employees to use a rubber stamp to affix his "signature" to court documents that he had not seen or read, in addition to other misconduct); *Office of Disciplinary Counsel v. Kubilus*, 800 N.E.2d 1131 (Ohio 2003) (reprimand of a judge who had approved his administrative assistant's signing of his name on a form and her writing "denied" on a sentence reduction request without consulting him first and who had a practice of allowing his assistant to create arraignment hearing entries); *In the Matter of Sons*, 517 S.E.2d 214 (South Carolina 1999) (reprimand of a judge who allowed court assistants to sign their names to orders); *In the Matter of Wyatt*, 367 S.E.2d 22 (South Carolina 1988) (reprimand of a judge who, in addition to other misconduct, instructed a court employee to sign an order of release if she was unable to contact another judge and allowed an employee to sign an arrest warrant).

In addition to the ethical violation inherent in improper delegation, several cases illustrate the abuse of power that can result if a judge allows court staff to perform judicial duties. For example, a Mississippi judge's policy of allowing the court clerk or highway patrol officers to adjudicate traffic tickets allowed them to dismiss approximately 102 tickets absent any trial or hearing. *In re Seal*, 585 So. 2d 741 (Mississippi 1991). By permitting her constable to use her signature stamp, a Louisiana judge enabled him to misrepresent judicial authority and collect worthless checks on behalf of local merchants in a process that did not comply with the law. *In re Frederic-Braud*, 973 So. 2d 712 (Louisiana 2008) (15-day suspension without pay for this and other misconduct).

A New York judge allowed his clerk to use his signature stamp to issue notices in a small claims case that were blatantly erroneous. *In the Matter of Miller*, Determination (New York State Commission on Judicial Conduct December 30, 2002) (http://tinyurl.com/z4wascj) (censure for this and other misconduct). The notices, issued when the defendant did not pay, were captioned as if the case was a criminal case and stated that a warrant would be issued for the defendant's arrest if he did not appear in court to pay the judgment. The Commission stated that the judge "showed poor judgment in allowing his clerk to use his signature stamp on the court notices" without personally reviewing the notices. The Commission concluded that the

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judge was responsible for the incorrect notices even though they had been issued by his clerk because he "was required to exercise supervisory vigilance to ensure the proper performance of the clerical functions."

Presiding over proceedings

In some cases of improper delegation, judges have allowed court staff to preside over court proceedings as if they were the judge. In a Missouri case, that role-substitution was routine: the judge regularly had her deputy clerk make the first docket call and announce continuance dates, dismissals, and the issuance of warrants for failure to appear in court. While the clerk was performing those judicial acts, the judge was not on the bench and sometimes was not even in chambers. The Commission on Retirement, Removal, and Discipline found that this practice created the appearance that the clerk was functioning as a judge, noting attorneys who frequently appeared in the judge's court referred to her clerk, Whitney Taylor, as "Judge Whitney." *In the Matter of Peebles*, Findings of fact, conclusions of law, and recommendation (Missouri Commission on Retirement, Removal, and Discipline August 30, 2012) (http://tinyurl.com/jf75feg). (Without opinion, the Missouri Supreme Court suspended the judge without pay for six months based on the Commission recommendation that she be removed for this and other misconduct. *In the Matter of Peebles*, Order (Missouri Supreme Court March 29, 2013).)

In other cases, a judge delegated one court session to court staff when a scheduling conflict or other issue arose. For example, the New Mexico Supreme Court sanctioned a judge for calling his secretary and instructing her to handle his cases that morning because his return from a Las Vegas vacation had been delayed. Following that directive, his secretary performed his duties for the traffic docket, using his signature stamp. *Inquiry Concerning Griego*, Order (New Mexico Supreme Court February 8, 2007) (http://tinyurl.com/jd7w848) (reprimand and $500 fine).

The West Virginia Judicial Investigation Commission publicly admonished a judge for delegating to his law clerk responsibility for presiding over two hearings on name change petitions. *In the Matter of Yoder*, Public Admonishment (West Virginia Judicial Investigation Commission September 2011). After scheduling the hearings, the judge had received notice that, on the same date, legislators would be speaking at a luncheon about the legislative session, and he believed that he should attend as a member of the legislative committee of the judges' association. Prior to the hearings, the judge signed orders permitting the name changes. The judge's law clerk, with the bailiff's help, presided over both hearings, asking, as the judge had instructed, the same questions the judge would have asked.

Emphasizing that, "[i]t is the judge and not his law clerk, who is the arbiter of facts and law for the resolution of name change requests," the Commission noted that "the name change petitions were not necessarily 'routine'" and could have raised issues that a young law clerk would not necessarily recognize, requiring the judge's presence. The Commission concluded that the judge "harmed the public trust and confidence in the judicial system by assigning his authority and responsibility to his law clerk."

In New York, after being suddenly taken ill, a judge directed his wife, who was also his court clerk, to attend his court that evening and advise the defendants in the 10 traffic cases scheduled that they could have a two-week adjournment or plead guilty and pay a fine. The judge wrote on the margin of the court's copy of each ticket the amount of the fine to be imposed if there were a guilty plea. His wife followed his directions, and at least six of the defendants believed that she was setting fines and reducing charges on her own authority as though she were an acting judge. Seven defendants pled guilty and paid the fines the judge had written on their tickets. When three defendants requested to plea bargain, the judge's wife telephoned him, and he and the assistant district attorney discussed those three cases over the telephone and agreed to reductions in each case. *In the Matter of Hopeck*, Determination (New York State Commission on Judicial Conduct August 15, 1980) (http://tinyurl.com/zmu9lbc) (removal for this and other misconduct).

"[T]o advise the judiciary as to potential misconduct that may be avoided," the New York Commission noted in an annual report its concern with "situations in which judges have delegated authority to court attorneys or law clerks to act in a manner that creates the appearance that they are judges." *New York State Commission on Judicial Conduct 2016 Annual Report,* at 18 (http://tinyurl.com/hurxwpo). The Commission explained:

> While it is not uncommon or inappropriate for a judge to ask a court attorney to conduct conferences with the lawyers or parties in a case and make recommendations, at times such assignments constitute improper delegations of judicial authority. Some court attorneys take the bench to conduct conferences, or have made express references to "my ruling," "my cases" or "my decision," or otherwise convey the impression that they are the judges. Some have acted in a manner that encourages lawyers and parties to call them "Your Honor" or "Judge."
>
> While a court attorney should know better than to foster such an appearance, it is the judge who is ultimately responsible. A judge is obliged not only to safeguard the independence and integrity of the judiciary but also to "require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge…." ★