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U.S. Supreme Court Holds “Announce Clause” Unconstitutional

By a vote of 5 to 4, the U.S. Supreme Court held that under the First Amendment, judicial candidates may not be prohibited from announcing their views on disputed legal and political issues. *Republican Party of Minnesota v. White*, 122 S.Ct. 2528 (2002), reversing in part, 247 F.3d 854 (8th Circuit 2001).

The Court was reviewing a challenge to a provision in the Minnesota code of judicial conduct that the district court, the 8th Circuit, and the Minnesota Supreme Court had construed to reach only a candidate’s views on disputed issues that are likely to come before a candidate if she or he is elected judge. The majority concluded, however,

“limiting the scope of the clause to issues likely to come before a court is not much of a limitation at all” because “[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction” (quot-

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Law Clerk’s Future Employer

A judge is not disqualified from cases in which a law clerk’s future employer or prospective future employer represents a party, but, under most authority, the judge should exclude the law clerk from any participation in those cases. For example, the Arizona advisory committee stated that “[w]hile nothing prohibits a law clerk from accepting an offer of employment by a law firm to commence upon the completion of the clerkship, the acceptance creates a relationship requiring that the law clerk be screened from all cases involving her future employer.”

Arizona Advisory Opinion 02-2.

The obligation to exclude the clerk from cases involving a prospective employer is triggered at least as soon as the law clerk receives an offer of employment. For example, the D.C. advisory committee stated that when a law clerk has been offered employment and the clerk has not rejected the offer, the judge shall exclude the clerk from working on any matters in which the prospective employer is a party, counsel, or amicus curiae. *D.C. Advisory Opinion 1* (1991). Similarly, the advisory committee for federal judges stated that the obligation “arises

whenever an offer of employment has been extended to the law clerk and either has been, or may be, accepted by the law clerk; the formalities are not crucial.” *U.S. Advisory Opinion 74* (revised 1984). The committee noted that, in appropriate circumstances, the judge may decide to disclose to the parties that the law clerk may have a prospective employment relation with counsel in a case and that the policy of excluding the clerk from involvement in the case is being followed.

The D.C. committee also advised

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Ex Parte Communications: Recent Cases

Several recent cases illustrate the importance of judges' adhering to the prohibition on ex parte communications despite seemingly innocuous motives for exchanging information outside the adversary context.

Adopting the recommendation of the Judicial Qualifications Commission, the Florida Supreme Court publicly admonished a judge who, while presiding over a trial, solicited communications from computer consultants and experts concerning technical issues relating to damages without the involvement of the litigants or their attorneys. *Inquiry Concerning Baker*, 813 So. 2d 36 (Florida 2002). In the underlying case, Universal Business Systems, Inc. had sued Disney Vacation Club Management Corp. for failure to preserve and deliver software modifications DVC had made to software purchased from UBS, pursuant to its agreement with UBS.

At the trial, the judge expressed concern that UBS had not established the fair market value of the software. In his memorandum of ruling, the judge expressly stated that he had made a few inquiries of computer consultants and experts. He had described to them the general nature of the case and asked if there were a practical way to approximate the cost to take the original UBS software and bring it up to the modified version. Based on his conversations, the judge found that the UBS's evidence was insufficient to support the \$2 million in damages found by the jury, and he reduced the amount of damages awarded to UBS. The court of appeals had reversed the judge on several grounds, including that he had erred in

receiving input from the computer experts. *Universal Business Systems, Inc. v. Disney Vacation Club Management Corp.*, 768 So. 2d 7 (Florida Court of Appeal 5th District 2000).

Independent investigations

The judge admitted the ex parte communications to the Commission adjudicative panel, although he also said he could not remember with whom he talked or what they said, that he had "since found out" that one of people he

where *all* the witness must publicly testify and then have the judge contact experts who might well influence the judge in his final post-verdict decision, rendering the jury verdict ineffective. Counsel are entitled to try the case in the courtroom and not to be told, after the fact, that the judge has already sought out and received input from other sources.

Rejecting the judge's argument that his ex parte communications were a mere legal error that did not rise to the level of an ethical violation, the panel noted that ex parte contacts may constitute revers-

ible legal error but also directly violate a specific canon. *See also In re Hutchinson*, CJC No. 93-1652-F-47, Commission decision (Washington State Commission on Judicial Conduct February 3, 1995) (www.cjc.state.wa.us) (censure of

“Such conduct . . . conveys the appearance that [the judge] . . . had abandoned her proper role as a neutral magistrate.”

talked with was his son-in-law and another was a friend of his, but he was not sure if there might have been others. The panel accepted the judge's assertion that he was only seeking the truth but stated:

Judge Baker's approach is particularly troublesome for trial counsel. Counsel could not explain to their clients how a judge can preside over a complex trial

a judge for initiating and considering ex parte communications with several medical organizations to investigate gender reassignment regarding petitions for name changes filed by men going through gender reassignment surgery; and using words and descriptions that humiliated petitioners).

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Personal Vendetta Against Attorney: Recent Case

Affirming a decision of the State Commission on Judicial Conduct, the Special Court of Review Appointed by the Texas Supreme Court publicly reprimanded a judge who had engaged in a personal vendetta against a young prosecutor; used profane, distasteful, and inappropriate language in a letter to the district attorney; and publicly attacked the district attorney's office by sending the letter to the media. *In re Davis*, Order (July 2, 2002). The court also ordered the judge to receive 8 hours of instruction from a mentor judge.

The judge had conducted a probation revocation hearing in which the state was represented by Laura Cass. The judge declined to revoke probation, deciding to leave the defendant free to file an income-tax return that might produce a refund to be credited against the probationer's child support obligations. At her supervisor's direction, Cass telephoned the assistant attorney general in charge of another matter in which there was an outstanding arrest warrant for the defendant, to inform him that the defendant's probation had not been revoked. She mentioned that if the warrant were entered in the system, the defendant would be arrested when he next reported to his probation officer.

When the judge learned of this phone call, he became enraged. The judge immediately contacted the judge who had issued the outstanding warrant to have it dismissed. The judge summoned Cass to his courtroom for a "status hearing." Cass denied "pushing" the warrant and said

she followed office procedure. Her supervisor informed the judge that he had instructed Cass to make the call and that this was standard procedure. In open court, with various members of the public present, the judge stated:

Ms. Cass, I conclude that you have engaged in conduct that is sneaky, surreptitious, and was deliberately calculated to undermine this Court's intention with respect to this defendant, Joe Friday Rodriguez, Jr. You are not welcome in the Court.

“This is a perversion of the trial judge’s time-honored role to mentor young attorneys.”

In a letter to Bill Turner, the district attorney, the judge expressed his displeasure with Cass's "gross misconduct" and concluded, "I think that it would be best for all involved if you were to assign a different prosecutor to this Court in Ms. Cass' stead." Turner refused to remove her from the judge's court, to avoid giving the impression that he agreed with the judge's accusations.

The judge forwarded a copy of his letter to Turner to various media. The story about the judge's accusations against Cass was on television and the radio and in the local newspaper. The newspaper article included comments from a law professor that the prosecutor was only doing her job and that the judge should not try to use the media to pressure the DA. In a letter to the newspaper reporter, the judge stated: "Through your reporting, the DA's office was enabled to convey a false im-

pression to the public that 'this poor little prosecutor' was doing her job."

Next, the judge wrote another letter to Bill Turner. The letter stated:

Do you not know that I anguish in prayer before God over many of my decisions? By mocking them, you invade God and my relationship, and *it is as if you have defecated on Mt. Sinai, holy ground . . .* In Deuteronomy, it is written: The man who shows contempt for the judge or for the priest who stands ministering there to the LORD your God must be put to death.

You must purge the evil from Israel. All the people will hear and be afraid, and will not be contemptuous again. Therefore, you brother, commit a capital sin in God's economy whenever you are contemptuous. When you say such things, it is just as bad in God's sight *as if you were to duck into one of your assistant's offices and fornicate with one of your assistants*. Furthermore, these

sins have accumulated over time.

In reference to Cass, the judge stated:

I look out over the courtroom and see a prosecutor whom I do not trust, whom I believe is treacherous, *whom I believe probably has the compassion of an Auschwitz camp guard*, and whom I believe would do anything to get her way.

The court found by a preponderance of the evidence that Cass did not act unethically and that even if she had "pushed" the warrant, Cass's "behavior, while it might irritate a judge, would never justify the extreme retaliatory actions taken by Judge Davis." Noting the judge had already taken steps to have the outstanding warrant recalled, the court concluded that it was not a threat to his "authority but an affront to his pride that prompted his humiliation

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ing *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Circuit 1993)). The majority also concluded that allowing general discussions of case law and judicial philosophy is “of little help in an election campaign” because “philosophical generalities” have “little meaningful content for the electorate unless . . . exemplified by application to a particular issue . . .,” which would be prohibited by the announce clause.

Strict scrutiny test

Applying the strict scrutiny test, the majority considered whether the announce clause was narrowly tailored

to serve a compelling state interest. The majority noted that supporters of the rule argued that the clause was justified by the state’s interests in (1) preserving the impartiality of the state judiciary because it protects the due process rights of litigants and (2) preserving the appearance of the impartiality of the state judiciary because it preserves public confidence in the judiciary. The majority described three meanings of impartiality in the judicial context. First, its root or traditional sense was the “lack of bias for or against either *party* to the proceeding,” which was, according to the ma-

jority, the sense underlying the proposition that an impartial judge is essential to due process. The second meaning was the “lack of preconception in favor of or against a particular *legal view*,” relating not to “guaranteeing litigants equal application of the law,” but to “guaranteeing them an equal chance to persuade the court on the legal points in their case.” The third definition the majority recognized was openmindedness, demanding not that a judge “have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to per-

States’ responses to the decision

Only 6 states (including Minnesota) had the “announce clause” in their codes of judicial conduct at the time of the *White* decision, most others having eliminated it after the American Bar Association removed it when the model code was revised in 1990. Most states with an elected judiciary do have restrictions prohibiting judicial candidates from making “pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office” and making “statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.” The decision in *White* stated that the “pledges and promises” clause was not challenged in the case and that it was not expressing a view on its constitu-

tionality. The majority noted that the defenders of the announce clause, including the ABA in an amicus brief, argued that the announce clause, as construed to reach only disputed issues that are likely to come before the candidate if elected, was no broader than the “commitments” prohibition. The majority stated: “We do not know whether the announce clause . . . and the 1990 ABA canon are one and the same. No aspect of our constitutional analysis turns on this question.”

Missouri was one of the states that retained the “announce clause” in its code. On July 18, 2002, the Missouri Supreme Court issued an order stating that, in consideration of the *White* decision, the “announce clause” will not be enforced but also noting, “Recusal, or other remedial action, may nonetheless be required

of any judge in cases that involve an issue about which the judge has announced his or her views as otherwise may be appropriate under the Code of Judicial Conduct.” Furthermore, the court stated that the other provisions (the pledges and promises rule and the prohibition on misrepresentations) “shall otherwise remain in full force and effect.”

Several other states have also issued statements affirming the continuing validity of other restrictions on campaign speech. For example, after carefully studying Georgia’s code of judicial conduct in light of the *White* ruling, the Judicial Qualifications Commission stated “going forward in this election season, the Commission will be vigilant in enforcing” the prohibitions on pledges and promises, commitments with respect to cases, and misrepresentations.

suaion, when the issues arise in a pending case,” and guaranteeing “each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so.”

The majority held that the announce clause was not narrowly tailored to serve impartiality or the appearance of impartiality in the sense of bias for or against a party “inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*.” The majority acknowledged, “[w]hen a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose.” However, the Court stated that loss is “not because of

any bias against that party, or favoritism toward the other party. *Any* party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.

The majority held that impartiality in the second sense of lack of bias on issues “may well be an interest served by the announce clause, but it is not a *compelling* state interest.” Concluding “a judge’s lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice,” the majority stated (1) it is virtually impossible to find a judge who does not have preconceptions about the law; (2) having no preconceived views on legal issues “would be evidence of lack of qualification, not lack of bias;” and (3)

because “avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the ‘appearance’ of that type of impartiality can hardly be a compelling state interest either.”

Although stating impartiality in the third sense of openmindedness might be desirable in the judiciary, the majority concluded that the intent of the announce clause was not to promote that purpose. The majority stated that if openmindedness was the purpose, the clause was underinclusive because it did not apply to commitments on legal issues judicial candidates made before becoming candidates and to expressions of their views after becoming judges both

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Similar statements have been issued by the Florida Supreme Court Judicial Ethics Advisory Committee, the Kentucky Judicial Conduct Commission, and the Ohio Supreme Court Board of Commissioners on Grievances and Discipline. The Ohio Board also issued an advisory opinion with 11 guidelines on campaign speech for judicial candidates. (www.sconet.state.oh.us/Judicial_Candidates/notes/notice0820.asp).

Following the decision in *White*, the U.S. District Court for the Western District of Texas declared unconstitutional a provision in the Texas Code of Judicial Conduct that provided: “A judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individual’s judicial philosophy is appropriate if conducted in a manner which does not suggest to a

reasonable person a probable decision on any particular case.” *Smith v. Phillips*, No. A-02- CV 111 (August 6, 2002). The court found “no distinction” between Minnesota’s canon and Texas’ provision.

On August 22, the Texas Supreme Court amended its code of judicial conduct. The revisions extend the prohibition on public comments on pending cases to apply to judicial candidates as well as judges and revised the pledges and promises provision. The new version of the pledges and promises canon states:

A judge or judicial candidate shall not make pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge.

Noting a more extensive study of the rules would be undertaken, the

court explained “the immediacy of pending elections requires that these amendments be undertaken without the full and deliberate study the Court would ordinarily employ.”

After reviewing the decision in *White*, the California Commission on Judicial Performance dismissed formal charges it had filed against a former judge without further explanation. *Inquiry Concerning Former Judge Patricia Gray*, Decision and Order of Dismissal (California Commission on Judicial Performance August 27, 2002) (cjp.ca.gov/pubdisc.htm). The charges were based on a mailer from the judge’s election campaign (which she lost). For example, the mailer, referring to her opponent, a criminal defense attorney, contained the statements “Elliot Daum Cares About the Rights of Violent Criminals. Judge Patricia Gray Cares About the Rights of Crime Victims.” 

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in rulings and in classes, books, and speeches. Therefore, the clause was “so woefully underinclusive,” the majority concluded, that its purpose “is not openmindedness in the judiciary, but the undermining of judicial elections.” The majority held: “We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.”

The majority rejected the argument in the dissent written by Justice Ginsburg that due process would be denied if an elected judge sat in a case involving an issue on which he or she had previously announced a view. The majority stated:

But elected judges—regardless of whether they have announced any views beforehand—*always* face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench. Surely the judge who frees Timothy McVeigh places his job much more at risk than the judge who (horror of horrors!) reconsiders his previously announced view on a disputed legal issue. So if, as Justice Ginsburg claims, it violates due process for a judge to sit in a case in which ruling one way rather than another increases his prospects for reelection, then—quite simply—the practice of electing judges is itself a violation of due process.

Stating that the dissent “greatly exaggerates the difference between judicial and legislative elections,” the majority reasoned, “Not only do state-court judges possess the power to ‘make’ common law, but they have the immense power to shape the States’ constitutions as well.”

Justice O’Connor joined the majority but wrote separately to express her concerns about judicial elections generally, stating “even aside from what judicial

candidates may say while campaigning, the very practice of electing judges undermines “the state’s interest in” impartiality. However, she concluded, “If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.”

Justice Kennedy also joined the majority but wrote a concurring opinion to stress his view “that content-based speech restrictions that do not

ing to recognize the difference between statements made in articles or opinions and those made on the campaign trail, the Court defies any sensible notion of the judicial office and the importance of impartiality in that context.” Justice Stevens emphasized that “opinions that a lawyer may have expressed before becoming a judge, or a judicial candidate, do not disqualify anyone for judicial service because every good judge is fully aware of the

distinction between the law and a personal point of view.” His dissent concluded “the judicial reputation for impartiality and openmindedness is compromised by electioneering that emphasizes the candidate’s personal predilections rather than his qualifica-

tions for judicial office.”

A dissent written by Justice Ginsburg, in which the other three dissenting justices concurred, emphasized that “Minnesota’s choice to elect its judges . . . does not preclude the State from installing an election process geared to the judicial office.” According to Justice Ginsburg, the announce clause permits a candidate to make a wide range of comments that may be highly informative to voters. What candidates may not do under the announce clause, Justice Ginsburg concluded, was “simply or with sophistication” remove themselves from “the constraints characteristic of the judicial office and declare how they would decide an issue, without regard to the particular context in which it is presented, *sans* briefs, oral argument, and, as to an appellate bench, the benefit of one’s colleagues’ analyses.” 

“[A]ll interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence.”

fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests.”

The legal profession, the legal academy, the press, voluntary groups, political and civic leaders, and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence. Indeed, if democracy is to fulfill its promise, they must do so. They must reach voters who are uninterested or uninformed or blinded by partisanship, and they must urge upon the voters a higher and better understanding of the judicial function and a stronger commitment to preserving its finest traditions.

Four dissents

A dissent written by Justice Stevens, in which Justices Ginsburg, Souter, and Breyer concurred, argued that “by obscuring the fundamental distinction between campaigns for the judiciary and the political branches, and by fail-

In brief

✦ The California Commission on Judicial Performance publicly admonished a judge who pled nolo contendere to a misdemeanor charge of willful or negligent cutting or mutilation of trees growing on public land without permission. The judge had cut trees and removed limbs from trees in a public park to improve his view of a nearby river. *Public Admonishment of McBrien* (April 25, 2002) (cjp.ca.gov/publicdisc.htm).

✦ The Iowa Supreme Court publicly reprimanded a judge who had (1) given permission for a campaign sign supporting the sheriff to be placed in the yard outside his home and (2) told the Judicial Qualifications Commission it was his wife who had authorized the sign. A letter from the Commission informing the judge that the complaint against him had been dismissed crossed in the mail with a letter from the judge admitting his initial explanation was false and that he was the person who consented to the sign. The judge testified that he decided to respond truthfully after his conscience began to bother him, he had difficulty sleeping at night and working during the day, and he sought advice from another judge. The court noted it was not addressing “the responsibilities of a judge whose spouse places a political campaign sign in the yard of the marital home.” *In the Matter of McCormick*, 639 P.3d 735 (Iowa 2002).

✦ Accepting the recommendation of the Judiciary Commission and the judge’s stipulation, the Louisiana Supreme Court publicly censured a judge for making contributions from his excess campaign funds to candidates for public office.

In re Shea, 815 So. 2d 813 (Louisiana 2002).

✦ The Michigan Supreme Court censured and suspended for 30 days a magistrate who advised defendants found guilty of traffic citations to purchase tickets to Detroit Fire and Police Field Day from a police officer sitting 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 children. Others were told to “dig deeper,” call someone, or go to an automated teller machine. After one defendant said he had \$116 on him, the magistrate told him to buy \$100 worth of tickets. *In re Shannon*, 637 N.W.2d 503 (Michigan 2002).

✦ Based on an agreed statement of facts and joint recommendation, the New York Commission on Judicial Conduct determined that admonition was the appropriate sanction for a judge who had (1) permitted another judge to participate in a conference in chambers and did not rebuke him when he stated that the alleged victim of the assault was a “piece of shit” and a stalker, (2) failed to report the other judge’s misconduct to the Commission, and (3) failed to maintain complete and accurate records of the receipt and disbursement of court funds and to timely deposit funds. *In the Matter of Restino*, Determination (November 19, 2001) (www.scjc.state.ny.us/restino.htm).

✦ Based on an agreed statement of facts and joint recommendation, the New York Commission determined that censure was the appropriate sanction for a non-lawyer town court justice who had (1) written an article for a newsletter in which he

attempted to obtain support among local residents for construction of a highway bypass and stated that he had increased the fines on truck drivers to discourage them from using local routes, and that he would continue to do so and (2) in 16 cases after accepting guilty pleas, imposed fines that were \$20 to \$70 in excess of the statutorily authorized maximum fine for the specific convictions. *In the Matter of Reid*, Determination (May 17, 2002) (www.scjc.state.ny.us/reid.htm).

✦ The New York Court of Appeals held that simply using the phrase “law and order” in judicial campaign literature was not a prohibited pledge, promise, or commitment because the phrase is “widely and indiscriminately used in everyday parlance and election campaigns.” However, the court accepted the Commission’s determination that a judge be admonished for referring to herself as a “graduate” of the judicial law courses that she took in her capacity as court clerk. *In the Matter of Shanley*, 98 N.Y.2d 310 (2002).

✦ In an attorney disciplinary proceeding, the Ohio Supreme Court indefinitely suspended an attorney who, while serving as a court of appeals judge, received loans from attorneys who regularly appeared before him. *Office of Disciplinary Counsel v. Cox*, 770 N.E.2d 1007 (Ohio 2002).

✦ Based on stipulated facts, the Ohio Supreme Court publicly reprimanded a judge who asked state highway patrol officers to keep the number of traffic tickets level so that he would not have to raise court costs. *Office of Disciplinary Counsel v. Kiacz*, 763 N.E.2d 590 (Ohio 2002).

Removal Following Criminal Conviction

In approximately 11 states, a judge is removed from office when he or she is convicted of certain types of crimes and that conviction becomes final. A variety of means are used to affect that removal.

In some states, a judge's office is automatically declared vacant if he or she is convicted and the conviction becomes final. For example, in **Georgia**, upon a judge's final conviction of a felony under Georgia or federal law with no appeal or review pending, "the office shall be declared vacant and a successor to that office shall be chosen as provided in this Constitution or the laws enacted in pursuance thereof." Georgia Const., art. 6, §7, ¶ VII. Similarly, in **Texas**, "A judge is automatically removed from the judge's office if the judge is convicted of or is granted deferred adjudication for: (1) a felony; or (2) a misdemeanor involving official misconduct." Texas Gov. Code, §33.038. In **Pennsylvania**, "A justice, judge or justice of the peace convicted of misbehavior in office by a court . . . shall forfeit automatically his

judicial office and thereafter be ineligible for judicial office." Pennsylvania Const., art S, § 18 (d)(3).

In other states, an affirmative act of the conduct commission is necessary to remove the judge, but the provisions require that the commission *shall* remove the judge if the conviction becomes final. For example, the provision in **California** states:

The Commission on Judicial Performance shall suspend a judge from office without salary when in the United States the judge pleads guilty or no contest or is found guilty of a crime punishable as a felony under California or federal law or of any other crime that involves moral turpitude under that law. If the conviction is reversed, suspension terminates, and the judge shall be paid the salary for the judicial office held by the judge for the period of suspension. If the judge is suspended and the conviction becomes final, the Commission on Judicial Performance shall remove the judge from office.

California Const., art. 6, § 18(c). See also **Montana** Const., art. 5, § 24.

In other states, the actor in the re-

quired suspension and subsequent removal is the supreme court, not the commission. See **Colorado** Const., art. 6, § 23 ("of its own motion or upon petition filed by any person"); **Indiana** Const., art. 7, § 11 ("on recommendation of the commission on judicial qualifications or on its own motion"); **Missouri** Const., art. 5, § 24 ("on recommendation of the commission"); **Nebraska** Const., art. V, § 30 ("on recommendation of the Commission on Judicial Qualifications or on its own motion"); **Rhode Island Statutes**, § 8-16-8 ("on its own motion"); Rule 5(2), Rules of the **Vermont** Supreme Court for Disciplinary Control of Judges.

Finally, in some states, the supreme court *may* suspend a judge following a guilty plea or conviction, and *if a judge is suspended* and the conviction becomes final, the supreme court *shall* remove him from office. See **Arizona** Const., art. 6.1, § 3; **Minnesota** Statutes, § 490.16. **New York** Const., art. 6, § 22. 

Provisions Regarding Dissents

A few conduct commissions have provisions specifically providing for the filing of a dissent or minority report by a commission member. For example, Rule 2 of the **Tennessee** Court of the Judiciary Rules of Practice and Procedure states, "Any member may write a concurring or dissenting opinion." See also Rule 32, **Colorado** Rules of Judicial Discipline; Rule 9.221(A), **Michigan** Rules of Court; Rule 39(12)(d), **New Hampshire** Supreme Court Rules. The **Nevada** rules require that, when findings of fact and conclusions of law have been prepared, "any sitting commission member who wishes to dissent or protest

must be allowed 10 days for that purpose." Rule 30, Administrative and Procedural Rules for the Nevada Commission on Judicial Discipline.

Other rules contemplate the filing of dissents by specifying that any dissents be included in the record sent to the supreme court. For example, the rules in **Alaska** provide:

If a member or members of the Commission dissent from the determination or recommendation for sanction, a minority report shall be transmitted with the majority recommendation to the court.

Rule 15, Alaska Commission on Judicial Conduct Rules of Procedure. See also Rule 11H, **Arkansas** Judicial Discipline and Disability Commission

Rules of Procedure Rule 14(b), Rules of the **Georgia** Judicial Qualifications Commission; Rule 16-808(j)(4), **Maryland** Rules of Procedure; **Massachusetts** Statutes, § 211C.7(10); Rule 11(e)(3), Rules of the **Minnesota** Board on Judicial Standards; Rule 8(G), Rules of the **Mississippi** Commission on Judicial Performance; Rule 16F, Rules of the **North Dakota** Judicial Conduct Commission; Rule 26(d), **South Carolina** Rules for Judicial Disciplinary Enforcement; Rule 24(d), **Washington** Commission on Judicial Conduct Rules of Procedure. 

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that an invitation to interview that the clerk has not declined is the “precipitating event” for excluding the clerk. *D.C. Advisory Opinion 1* (1991). The committee stated, “Any incentive on the part of the law clerk to attempt to act favorably towards the prospective employer might reasonably be viewed as being at least as strong during active negotiations for employment as it would be after an offer has been made and accepted.” According to the federal advisory committee, the occasion for precautionary measures “does not arise merely because the law clerk has submitted an application for employment,” but cautioned that the nature of the litigation or the likelihood that future employment may render it advisable for the judge to exclude the clerk at a preliminary stage of employment discussion. *U.S. Advisory Opinion 74* (revised 1998).

The federal advisory committee requires application of precautionary measures even when the prospective employer is the United States attorneys’ office. *U.S. Advisory Opinion 81* (revised 1998). The committee recognized that the U.S. attorney’s office is not a law firm and a law clerk would have no financial interest in cases handled by that office, but concluded that there would be an appearance of impropriety unless the judge isolated the clerk from cases involving the particular United States attorney’s office that will employ the clerk after the clerkship. (The committee also stated that, while working in the U.S. attorney’s office, the law clerk would be disqualified from working on any cases that were pending in the court during the law clerk’s employment.)

In contrast, the D.C. advisory committee created an exception when a law clerk’s prospective employer is a high-volume litigator in the judge’s jurisdiction. *D.C. Advisory Opinion 1*

(1991). The committee noted that the U.S. attorney for D.C., the city corporation counsel, and the public defender service “cumulatively account for a very substantial percentage of the litigation” before the D.C. courts and that each superior court judge has only one law clerk. Concluding that “[u]nder these circumstances, the disqualification of a law clerk from so great a part of a judicial officer’s caseload would be extremely burdensome,” the committee advised that a law clerk may, in the judge’s discretion, continue to work on cases in which those offices appear even after an offer of employment has been proffered. However, the committee emphasized that in those cases the judge must “closely supervise[] the clerk and scrutinize[] the clerk’s work product to ensure that no conscious or unconscious bias on the part of the clerk has affected or may impair the impartiality of the court.”

Keeping informed

The rule requiring a law clerk to be excluded from cases involving prospective employers imposes on a judge an obligation to keep informed of a law clerk’s job search and on a law clerk an obligation to keep the judge informed. The federal advisory committee, for example, stated, “[t]o deal appropriately with this problem, the judge should take reasonable steps to require that law clerks keep the judge informed of their future employment plans and prospects.” *U.S. Advisory Opinion 74* (revised 1984). The D.C. judicial ethics committee advised that a law clerk has an obligation (1) to apprise a judge that he or she is seeking future employment and (2) to inform the judge of the identities of prospective employers who have or may have a matter pending before the judge when (a) the prospective em-

ployer invites the clerk to an interview unless the clerk has declined the interview or (b) offers the clerk a position without an interview unless the clerk has rejected the offer. *D.C. Advisory Opinion 1* (1991). See also *Arizona Advisory Opinion 02-2*.

Code provisions

The Texas code of conduct for law clerks and staff attorneys provides:

If a law clerk or staff attorney, after beginning employment with the Court, interviews with or accepts an offer of employment, he or she must promptly report the name and address of the interviewing firm or prospective employer, in writing, to the Chief Justice, the Justice to whom they are assigned, and to the Clerk.

Further, the rule requires the clerk of the court to “maintain a list of current law clerks and staff attorneys who have accepted an offer of future employment” that will be made “available to the public on request for one year after the law clerk or staff attorney leaves the Court’s employment.”

In contrast, Canon 5E of the Delaware code of conduct for law clerks provides that a “law clerk is not disqualified *per se* from working on a case in which a prospective employer is involved.”

If any lawyer, law firm or entity with whom a law clerk is seeking or has obtained future employment appears in any matter pending before the appointing judge, the law clerk should promptly bring this fact to the attention of the appointing judge, and the extent of the law clerk’s performance of duties in connection with such matter will be determined by the appointing judge. 

Copies of the advisory opinions cited in this article are, with the kind permission of the judicial ethics committees, available on the Judicial Conduct Reporter page on the AJS website (www.ajs.org/ethics/eth_reporter_home.asp).

Ex Parte Communications: Recent Cases *(continued from page 2)*

Discussions with prosecutor's supervisor

Approving an agreed statement of facts and joint recommendation, the New York State Commission on Judicial Conduct determined that censure was the appropriate sanction for a judge who, among other misconduct, engaged in an improper ex parte conversation with a prosecutor's supervisor. *In the Matter of Recant*, Determination (New York State Commission on Judicial Conduct November 19, 2001) (www.scjc.state.ny.us/recant/htm). In the criminal case underlying the discipline case, an assistant district attorney had made an application to introduce prior convictions under the wrong theory. Later that day, the judge asked to see the attorney's supervisor in chambers where, without advising defense counsel, the judge told the supervisor what had happened. Subsequently, the supervisor arranged for a more experienced assistant district attorney to review the rules with the assistant district attorney, who amended his application, which the judge granted in part.

The Commission found that the judge's:

out-of-court conversation with the supervisor about an application the ADA had made, even if intended as administrative or instructive, was highly inappropriate, especially since respondent failed to inform defense counsel of the conversation. Such conduct not only violated a specific prohibition against ex parte communications . . . but conveys the appearance that respondent was providing out-of-court legal assistance to the prosecution and that she had abandoned her proper role as a neutral magistrate.

Conversations with one side

Approving a conditional agreement for discipline, the Indiana Supreme Court publicly reprimanded a judge who (1) had an ex parte conversation with the attorneys for the father in a custody case in which the attorneys told the judge that a psychologist who had counseled the mother and children had committed forgery; (2) at the father's attorney's suggestion, had referred the matter to the police without

pelled to do so. The judge contacted a prosecuting attorney who sent a sample letter to the judge for use in making the state police referral, gratuitously adding a hand-written note stating, "Good Hunting." Thereafter, the judge forwarded the materials to the state police. There was an investigation, but no charges were filed because the recollections of the various witnesses were not as reliable as the affidavits suggested. The judge

did not disclose to the mother's attorneys the ex parte communication or his referral and denied the motion to disqualify filed by the mother's attorney after he discovered the "Good Hunting" note and the correspondence to the state police in the court

file. The judge denied the father's motion for a change in custody but stated that the father had established that the psychological reports were forged and that the therapist was the "leading candidate" in a forgery.

The court agreed with the parties that the judge violated the prohibition on ex parte communications by engaging in a conversation with the father's attorneys that included commentary on the strength of the mother's motion and an expressed desire that the judge initiate a criminal investigation of the therapist. The court also concluded that a reasonable person would have doubted the judge's impartiality and his disqualification was required. The court stated the complaint against the judge might have been avoided by prompt disclosure of the ex parte communication and the criminal referral. The court noted in mitigation, that the judge stated that he sin-

The complaint might have been avoided by prompt disclosure of the ex parte communication.

telling the mother's attorney or disqualifying himself from the case; and (3) made comments about the alleged forgery. *In the Matter of Morton*, 770 N.E.2d 827 (Indiana 2002).

In a motion to set aside a custody decision, the father asserted that a clinical psychologist's signature had been forged on reports submitted by a therapist who had counseled the mother and children, supported by affidavits from the clinical psychologist and the therapist's secretary. When the father's attorneys hand-delivered the motion to the judge, one of the attorneys told the judge that he thought the judge would find the motion "very interesting reading" and that it established a "lay down" case of forgery against the therapist. The attorney told the judge that he felt that, because of a protective order, he could not refer the alleged forgery to law enforcement himself, but that he expected the judge would feel com-

cerely but mistakenly believed that his conduct was appropriate to the situation.

Communication from victim

Pursuant to a stipulation and agreement, the Washington State Commission on Judicial Conduct publicly admonished a judge for receiving and considering an ex parte communications from the victim in a criminal case and failing to disclose the communication prior to trial. The judge also agreed to complete a course on general jurisdiction or ex parte com-

munications at the National Judicial College or a similar course and to refrain from retaliatory conduct. *In the Matter of Lukevich*, CJC No. 3514-F-96, Stipulation, Agreement and Order of Admonishment (Washington State Commission on Judicial Conduct May 9, 2002) (www.cjc.state.wa.us).

The judge had released a defendant on his own recognizance at arraignment following the defendant's representation that he would stay away from the victim. The victim then appeared at the counter before the judge and explained her fear that the

defendant's release would result in her death. The defendant had already left the courtroom. At sentencing, the judge disclosed the communication for the first time, noted that the victim was terrified, crying, and upset, and stated that he was imposing the sentence "with the vivid memory of Ms. Thiele in my mind." The conviction had been reversed and the case remanded to a different judge because of the judge's reliance on the ex parte communication and failure to disclose prior to trial. 

Personal Vendetta Against Attorney: Recent Case (continued from page 3)

of Ms. Cass, his fight with the district attorney, and the unfavorable publicity about this dispute." "Resoundingly" rejecting the judge's "justification," the court stated it was "concerned that any judge would choose to use such disturbing tactics and inappropriate language to respond to those who might question his decisions."

This is a perversion of the trial judge's time-honored role to mentor young attorneys who practice before his court. . . . Had Mr. Turner not risked incurring the wrath of this judge by standing up for his assistant district attorney, Judge Davis might have destroyed the career of a young attorney who demonstrated to this special court remarkable restraint and a proper respect for the legal system, despite this unfortunate ordeal.

Rejecting the judge's reliance on the First Amendment, the court held that the judge's comments to the media did not address a matter of legitimate public concern. Noting judges should not confuse offenses to their personal sensibilities with obstruction of the administration of justice, the court stated the judge was pursuing retaliatory action against a pros-

ecutor whom he perceived had challenged his authority, not speaking out concerning the administration of the courts. Furthermore, the court found, "by going to the media with this dispute, Judge Davis used the prestige of his office to attempt to manipulate the personnel decisions in the DA's office, a matter beyond his authority."

The judge attempted to explain his letter to Turner as a theological rebuke to a personal friend who shared his faith and a private expression of his religious views. The court found that

the letter did not principally address spiritual and personal matters between friends but was focused almost entirely on the professional relationship between the court and the district attorney's office.

The terms Judge Davis used to "rebuke" the district attorney shock the conscience. . . . Judge Davis has cloaked his rebuke of the district attorney in theological terms, but he is being sanctioned not for his religious beliefs but for his failure to live up to the ethical standards of conduct required of a judge. 

Judicial Ethics News

To supplement the quarterly *Judicial Conduct Reporter*, the Center for Judicial Ethics has begun a weekly feature on its web-site called "Judicial Ethics News." Each Wednesday, a new story will be added about a recent decision, a change in conduct or procedural rules, or other developments. The stories will be archived for three months. The link to "Judicial Ethics News" can be found at www.ajs.org/ethics. The Center's web-site, like the other parts of the AJS web-site, reflects a re-design implemented in July.



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JUDICIAL CONDUCT REPORTER

The 18th National College on Judicial Conduct and Ethics

Chicago, Illinois October 24–26, 2002

Earn 11 General and 7 Ethics Continuing Legal Education Credit Hours

The Center for Judicial Ethics will hold its 18th National College on Judicial Conduct and Ethics on October 24–26, 2002, at the Embassy Suites Downtown Lakefront, 511 N. Columbus, Chicago, Illinois. Registration for the College is \$250. The rate for rooms is \$169 a night (for single occupancy; \$189 a night for double occupancy), plus tax.

The National College provides a forum for judicial conduct commission members, staff, judges, and judicial educators to learn about and discuss professional standards for judges and current issues in judicial discipline. The College will begin Thursday afternoon with registration. Friday through Saturday morning, there will be six sessions with three or four

concurrent workshops offered during each session. Topics to be discussed include: the repercussion of *Republican Party of Minnesota v. White*; sanctions; issues for new members of conduct commissions; issues for public members; conduct commissions and the media; misuse of office; disqualification; rural judges; how to write judicial ethics advisory opinions; ethical guidelines for commission members; the relationship between attorney discipline and judicial discipline; judicial speech; settlement of discipline cases; and ex parte communications.

Registration materials, descriptions of the sessions, and a schedule are available on the AJS website, www.ajs.org or contact cwells@ajs.org or 312-357-8813.