



To promote
the effective
administration
of justice

JUDICIAL CONDUCT REPORTER

A publication of the American Judicature Society Center for Judicial Ethics
Vol 24, No 3 Fall 2002

The Importance of a Judge's Conduct During Judicial Discipline Proceedings by Cynthia Gray

In many judicial discipline cases, a judge's conduct in response to the judicial conduct commission's proceedings has been cited either as an aggravating factor in determining the appropriate sanction or as a separate ground for finding misconduct. An inappropriate reaction to a commission investigation may take several forms.

For example, the failure to show remorse has been treated as evidence that a sanction such as a reprimand or suspension would not cause the judge

to change his or her behavior, leaving removal the only option. Noting that a "judge who refuses to recognize his own transgressions does not deserve the authority or command the respect necessary to judge the transgressions of others," the Florida Supreme Court concluded it could "only presume that if this Court reprimanded [the judge], he would continue to violate the precepts of the Code of Judicial Conduct." *Inquiry Concerning Graham*, 620 So. 2d 1273 (Florida 1993). The

conduct for which the judge failed to show remorse and for which he was removed included repeatedly using his position to make unsupported allegations of official misconduct against fellow judges, elected officials, and others; imposing improper sentences and improperly using the contempt power; acting in an undignified and discourteous manner toward litigants, attorneys, and others appearing in his

(continued on page 6)

Disqualification: Judge's Attorney Appears in a Case

by Cynthia Gray

Most judicial ethics committees that have addressed the issue have advised that a judge is disqualified from a case if one of the attorneys is also representing the judge either in personal matters, including litigation and discipline proceedings, or in lawsuits in which the judge is involved in an official capacity. For example, a judge is disquali-

fied if an attorney for one of the parties serves as the judge's attorney in connection with the development and management of commercial property (*Alabama Advisory Opinion 82-168*) or as the attorney for an estate of which the judge is the executor. *Alabama Advisory Opinion 87-313*. Similarly, a judge may not preside in a case involving an attorney the judge has re-

tained to represent the judge in a matrimonial case (*Illinois Advisory Opinion 95-2*; *Kentucky Advisory Opinion JE-84* (1993)); in adoption proceedings (*New York Advisory Opinion 94-33*; *New York Advisory Opinion 97-90*); or in a judicial discipline case. *Alabama Advisory Opinion 92-443*;

(continued on page 9)

California Commission Releases Report on Discipline

The California Commission on Judicial Performance has released a report summarizing statistics about the 499 cases from 1990 through 1999 in which judicial discipline was imposed by the Commission or the California Supreme Court pursuant to the Commission's recommendation. The report is available on the Commission web-site (<http://cjp.ca.gov/pressrel.htm>). The 499 cases included advisory letters, public and private admonishments, public reprovals, public censures, and removals.

During that 10-year period, 31.4 judges out of every thousand judges in the state were disciplined. The report compared that rate to the rate for sub-groups based on initial selection process, years on the bench, age, court size, and prior discipline. For example, the report determined that judges who were initially elected to office received sanctions at the rate of 43.6 per thousand, compared to 29.8 sanctions per thousand for judges who were initially appointed.

Judges who had served on the bench for 3 through 6 years at the time of the misconduct (calculated as of the earlier occurrence) had the highest discipline rate — 36 per thousand. For judges with less than 3 years service, the rate was 30.9; for 7 through 14 years, 30.3; and for 15 or more years, 29.5. Judges who were 30-39 years old at the time of the misconduct had a disciplinary rate of 42.2 per thousand, the highest rate. For 40 through 49 years, the rate was 31.8 per thousand; for 50 through 59 years, 32; for 60 years and older, 28.9.

The comparison based on court size used trial courts only and began with the calculation of an overall disciplin-

ary rate for trial court judges of 33.8 per thousand. In courts with 1-2 authorized positions, the rate was 56.7 per thousand; in courts with 3-9 authorized positions, it was 52.5; in courts with 10-42 authorized positions, 39.8; and in courts with 43-428 authorized positions, 29.1.


The report stated that it “presents the disciplinary statistics without analysis or interpretation. It was not within the scope of this study to actually draw inferences from the data or

to perform any statistical testing.”

The report determined that 61.7% of the discipline imposed was issued to judges who had received no prior discipline. The report also identified the type of misconduct for which judges were disciplined. In 13.4% of the cases, the misconduct was inappropriate judicial demeanor; in 9.8% of the cases, the judge had exhibited bias or the appearance of bias (not directed toward a particular class). In 9.3% of the cases, the judge had failed to disqualify or to disclose information relevant to disqualification, or had retaliated following disqualification motions. An on-bench abuse of authority was the basis for discipline in 7.9% of the cases; ex parte communications resulted in discipline in 7.6% of the cases; and delay in reaching decisions, tardiness, poor attendance, or other derelictions of duties were involved in 6.9% of the cases. 6.8% of the cases involved a failure to ensure rights, and an additional 6.8% involved off-bench abuse of office. In

6.2% of the discipline cases, the judge had abused the contempt power or the authority to impose other sanctions. The remaining cases fell within categories (none of which accounted for more than 4% of the cases) such as administrative malfeasance, comment on a pending case, failure to cooperate with regulatory authorities, improper gifts, ticket-fixing, business activities, political activities, criminal conduct, alcohol or drug-related criminal conduct, pre-bench misconduct, sexual harassment, sleeping on the bench, and substance abuse. If misconduct fit in more than one category, the case was assigned based upon the aspect of the conduct on which the

Commission focused in its decision. If the case involved more than one type of misconduct, each type was assigned to the appropriate category. However, if a judge was disciplined in a single case for repeated acts of the same misconduct, the case was assigned to the category only once.

Finally, the report analyzed the sources of the complaints. Although 78.9% of all the complaints received by the Commission come from litigants or the family or friends of litigants, only 37.4% of the complaints that resulted in discipline came from litigants or their family or friends. In 29.9% of the cases resulting in discipline, the complaints were from attorneys (compared to 7.6% of all complaints received); and in 8.1% from other judges or court staff (compared to 1.6%). The remaining discipline arose from complaints filed by other types of complainants (for example, jurors, witnesses, and government officials) and sources other than a complaint (for example, anonymous letters and news reports). 

**The report is available on
the Commission web-site
(<http://cjp.ca.gov/pressrel.htm>).**

Pending Case, Public Comment, and Course of Official Duties Defined: Recent Case

In a recent judicial discipline case, the Nebraska Supreme Court confirmed that the prohibitions on ex parte communications and public comments apply to cases pending before other judges. *In re White*, 651 N.W.2d 551 (Nebraska 2002).

At the county court level, Judge White had revoked a defendant's probation in a domestic violence case and sentenced him to the maximum statutory penalty of 180 days' confinement and a \$1,000 fine. On appeal, the district court found that a reasonable person could question the judge's impartiality, vacated the sentence, and remanded for re-sentencing to another judge.

After a deputy county attorney asked the judge for her views on the district court order, the judge engaged the attorney in a "lengthy, detailed, and largely one-sided conversation" itemizing specific arguments as to why the order was erroneous and supplying cases to support her position. The county attorney's office inadvertently failed to file a timely notice of appeal, and the defendant was re-sentenced. When the county attorney's office chose not to appeal from the re-sentencing, the judge requested the presiding district court judge in an ex parte proceeding to appoint a special prosecutor to pursue the appeal.

In general, the court found that Judge White's "quarrel with the district court's decision caused the judge to abandon the impartiality required of a judge no matter what accusations are made against those who appear before the court." The court held that the judge violated the prohibitions on ex

parte communications and public comments even though the case was pending before a different judge for re-sentencing at the time of her ex parte communications with the prosecutor and her petition for a special prosecutor. The court noted that the code does not limit the prohibition on ex parte communications "by reference to the docket of a particular judge" and stated that the "potential

"[T]he limitation precludes comments by one trial judge on a matter before another trial judge or taken to an appellate court ..."

that a case may be remanded to a trial judge provides an additional rationale for prohibiting ex parte communications between the trial judge and the parties even while the matter is on appeal." Noting the restriction on public comments expressly applied while a proceeding is pending "in any court," the court concluded that the limitation precludes comments by one trial judge on a matter before another trial judge or taken to an appellate court because such comments could affect the outcome of the case, appear to exert pressure on a judge to decide a certain way, and undermine public confidence in judicial decisions.


Noting the rule prohibits public comments by a judge that "might reasonably be expected to affect [a proceeding's] outcome or impair its fairness," the court found that the judge's motion for appointment of a special prosecutor commented on the merits of the case and was intended to force an appeal from the re-sentencing

— a result that would "undoubtedly represent a substantial interference with a fair trial or hearing." With respect to the exception allowing public comment by judges in "the course of official duties," the court held that Judge White's special prosecutor motion was not made in the discharge of any official duty because it was made after her official responsibility for the case had been terminated and she had "no official duties with respect to the disposition of the case — much less official duties that required any public statements to be made." The court also concluded that the motion was a *public* comment because, while the comments "were not made in a context as

public as, for instance, a press conference," the judge "nevertheless was in open court, thus making her comments in a public forum and preserving them as part of the public record."

Noting the record reflected the judge's concerns about domestic violence, its victims, and its effect on society, the court stated:

Domestic violence is not the issue presented in this proceeding, and the respondent is not being disciplined for her stance relative to domestic violence. Instead, the respondent is being disciplined because she abandoned her judicial impartiality to assist the State's prosecution of a criminal case, and later attempted to intervene in, and influence the outcome of, that case. The respondent's concerns about domestic violence, however well founded, cannot excuse the respondent's unethical conduct.

Adopting the findings of fact and recommendation of the Commission on Judicial Qualifications to which the judge consented, the court suspended the judge for 120 days without pay. 

In Brief: Recent Judicial Ethics Advisory Opinions

✦ A judge who is a member of the local YMCA may hear a negligence action against the YMCA if the judge knows nothing about the facts or any of the individuals involved. *Alabama Advisory Opinion 02-797*.

✦ Discussions by telephone between a judge and counsel for both parties to resolve discovery disputes without formal papers are not ex parte communications. Letters to a judge with copies to opposing counsel and letters to opposing counsel with copies to the court are not prohibited ex parte communications, but a judge should discourage letters on matters that should be addressed by formal motions. *Arizona Advisory Opinion 02-3*.

✦ A judge may submit a written statement giving the judge's opinion of an attorney's professionalism in a specialization certification proceeding even if the attorney has a case pending before the judge. *Arizona Advisory Opinion 02-4*.

✦ A judge's spouse may work as a volunteer or paid employee in a political campaign but should make all efforts to avoid any suggestion that the judge supports the candidate. *Arkansas Advisory Opinion 2002-6*.

✦ A judge who has been appointed to office may not use "re-elect" in campaign advertisements but may use "retain." *Florida Advisory Opinion 02-7*.

✦ A judge who jointly owns a parcel of real estate with an attorney is disqualified from cases in which the attorney appears, absent remittal. *Florida Advisory Opinion 02-19*.

✦ A judge may not serve as chair of the public schools foundation fund-raising gala. *Louisiana Advisory Opinion 182 (2002)*.

✦ A judge may not file an amicus brief in a case brought by other judges to determine whether certain provisions of the general appropriations bill violate the separation of powers and other provisions of the state constitution. *Massachusetts Advisory Opinion 02-10*.

✦ A judge may attend an event, sponsored by the law school from which the judge graduated, that honors judges if the event is not a fund-raiser unless the costs of the event are underwritten in part by private individuals or organizations whose identity will be disclosed to the general public or to those attending the event. *Massachusetts Advisory Opinion 02-12*.

✦ Any public comments by a judge or judges' association about any specific case about which a judge has been criticized is likely to be prohibited by the code. *Nebraska Advisory Opinion 02-5*.

✦ A part-time judge running for a judicial office may not wear a robe in campaign advertising but may state that he or she has been appointed as a part-time judge. *Nevada Advisory Opinion 02-4*.

✦ A judge may not serve as chair of United Way. *Pennsylvania Informal Advisory Opinion 5/7a/02*.

✦ A judge may not permit his name to be used in a newspaper advertisement as a person who intends to attend a religious retreat even if the judge's title is not listed. *Pennsylvania Informal Advisory Opinion 6/20/02*.

✦ A judge may, during discus-

sions with other judges, express personal feelings about whether courts of limited jurisdiction have jurisdiction over out-of-state corporations that are defendants in small claims cases and may rule consistent with those feelings as long as the ruling is based on the judge's understanding of the law. *Washington Advisory Opinion 02-12*.

✦ A judge may read and respond to a letter from an unrepresented criminal defendant as long as copies of the letter and response are provided to all parties as soon as possible. The proper response may be a form letter advising the defendant that the judge cannot respond and the defendant should contact a lawyer or schedule a hearing in accordance with the court rules. A judge is not obligated to respond to an ex parte communication from a defendant's spouse, parent, other relative, or friend but may direct court staff to send a form response advising these individuals that the court will not discuss a case with a non-party. Counsel, if any, should be provided copies of all correspondence, and copies should be retained in the court file. *Washington Advisory Opinion 02-14*.

AJS has links on its web-site (www.ajs.org/ethics/eth_advis_comm_links.asp) to judicial ethics advisory opinions from Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Massachusetts, Michigan, Nebraska, Nevada, Ohio, Pennsylvania, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

Judge's Participation in Cultural Exchange

The Kentucky Supreme Court has ruled that a judge may participate in a two-week exchange to facilitate understanding and discussion between emerging leaders in the United States and the Philippines sponsored by the American Council of Young Political Leaders. *In re Maze*, 85 S.W.2d 599 (Kentucky 2002). The court stated that it would consider four factors:

The first factor, and the factor of the greatest significance, is the judicial system's interest in appearing fair, impartial, and independent from other branches of government. The second factor is the benefit to the individual in engaging in the activity or attending the program in controversy. The third factor is the burden to the individual in foregoing the activity. Finally, the fourth factor is the burden to the judicial system in prohibiting its judges and judicial employees from engaging in the activity.


"Balancing these factors," the court established, "requires a case by case determination, a process in which the Canons of Judicial Ethics act as guideposts, not walls impervious to our better judgment and prudence."

Noting "some organizations are inherently political and cannot avoid being so by invoking claims of an educational activity," the court stated that it was not "creating a hard line rule as to what makes one activity political while the other is educational," but "that the purpose and the agenda are the two most significant factors in this determination." The court found that the trip to the Philippines posed no threat to judicial independence because it was "a predominantly educational, growth-oriented experience" and was "neither political nor partisan." Noting that in response to the judge's concern, the political affiliation of the participants would not be disclosed, the court also stated that

"the balance of Democrats and Republicans ensures that a diversity of viewpoints exists, rather than ferments a political bias that might impinge upon [the judge's] independent determination of issues." The court also concluded that the program's locale in another country "minimizes, if not negates, any appearance of impropriety," stating "the citizens of the Commonwealth of Kentucky cannot reasonably fear that a judge will become biased by virtue of exposure to a foreign culture."

The court acknowledged that its decision might be different if the judge "were attending a two-week educational conference about a special interest that frequently appears before her court" However, stating "judges pursue the truth, and few pur-

suits are more valuable than education and enlightenment," the court noted that "even learning about the culture of the Philippines would add to a body of knowledge that would make [the judge] a stronger judge as the United States becomes more culturally diverse." The court concluded:

While it is understood that one must accept some burdens in order to enjoy the other benefits of being a judge, foregoing civic opportunities such as this one tends toward the creation of an isolated judiciary out of touch with society. . . . The loss of the freedom to participate in such enriching educational experiences would discourage many of those most dedicated to the pursuit of learning from pursuing the bench. 

New Judicial Ethics Curriculum Available on CD-ROM

With a grant from the State Justice Institute, the American Judicature Society Center for Judicial Ethics has developed a three-part judicial ethics curriculum comprised of a presenter's notebook and three separate presentations that can be used with Microsoft PowerPoint© presentation software. The three presentations are: **Ethical Standards for Judges; Ex Parte Communications; and Charitable Fund-raising**. The presenter's notebook contains directions for preparing a program, including basic instructions for modifying the presentation to fit a presenter's time constraints and to reflect local rules. The CD-ROM containing the presentations and the notebook is available without charge except for \$7.50 to cover postage and handling. To order, see www.ajs.org or contact rwilson@ajs.org or 312-357-8821.

The Importance of a Judge's Conduct During Judicial Discipline Proceedings

(continued from page 1)

court; and closing and attempting to close public proceedings.

Expressions of remorse made late in the proceedings or following similar professions that did not result in changed behavior will not necessarily prevent a judge's removal. In *In re Jones*, 581 N.W.2d 876 (Nebraska 1998), the Nebraska Supreme Court noted that the judge had "said he is sorry for his actions and that he will not engage in such conduct again, making the sanction of removal unnecessary for protection of the judicial system." However, the court also noted that the "record shows a pattern of apologies by Jones following his outrageous behavior, yet Jones' undignified and abusive behavior persisted." The court concluded that removal was appropriate where the judge had consistently used intemperate, threatening language over a long period of time; sent a death threat to another judge and ignited firecrackers in that judge's office; used false signatures and odd bond amounts

on court documents; and consistently had close contacts with people placed on probation.

Blaming others

Courts also look askance at judges' attempts to blame their conduct on others or to assert that the charges are the result of a conspiracy. In *In re Peck*, 867 P.2d 853 (Arizona 1994), the Arizona Supreme Court noted its dismay at "the tone and substance" of the judge's "wild, unsubstantiated claims of conspiracy and revenge." The judge accused members of the Commission on Judicial Conduct of "academic snobbery and hypocrisy," "CORRUPTION of their office," and "collusion, suppressing dissent, and . . . furthering its own agenda." Stating these "charges have neither credibility nor factual support and will not be addressed," the court concluded that the judge's "accusations only confirm that he lacks the judgment needed to carry out his duties competently."

Respondent blames the world for his troubles, refuses to see his own shortcomings, and, consequently, does nothing to cure them. We take this as some indication that no amount of rehabilitation or education will solve these problems and that Respondent poses a danger of committing future violations bringing the judiciary into disrepute.

The court removed the judge for reinstating charges brought by two friends against his election opponent; after a private meeting with a defendant's family and employer, telling the investigating police officer that he had strong reason to believe this was a case of mistaken identity; issuing a criminal complaint against a married couple who, in an unrelated matter, owed him \$300 in unpaid rent, plus damages; and presiding over a landlord-tenant dispute in which the defendant was an individual who had previously filed a criminal complaint against the judge.

Courts and commissions also find that unfitness for office is demon-

Rules Regarding Cooperation

Several commissions have rules requiring cooperation and proscribing misrepresentations and concealment in commission proceedings. For example, Rule 5 of the **Colorado** Rules of Judicial Discipline provides: "Failure or refusal of a judge to cooperate or the intentional misrepresentation of a material fact during any stage of a disciplinary proceeding may constitute willful misconduct in office." See also Rule 2(d)(2)(ii), Rules of the **Minnesota** Board on Judicial Stan-

dards. Rule 104(a) of the Rules of the **California** Commission on Judicial Performance provides:

A respondent judge shall cooperate with the commission in all proceedings The judge's cooperation or lack of cooperation may be considered by the commission in determining the appropriate disciplinary sanction or disposition as well as further proceedings to be taken by the commission but may not be considered in making evidentiary determinations.

Similarly, Rule VIII(K)(2) of the **Indiana** Judicial Qualifica-

tions Commission states:

The failure of the judicial officer to answer or to appear at the hearing, standing alone, shall not be taken as evidence of the facts alleged or constitute grounds for discipline, retirement, or removal, however the failure to cooperate in the prompt resolution of a complaint by the refusal to respond to Commission requests or by the use of dilatory practices, frivolous or unfounded arguments, or other obdurate behavior may be considered as aggravating factors affecting sanctions or may be the basis for the filing of separate counts of judicial misconduct.

strated by a judge's lack of cooperation with a conduct commission, advancing an unlikely defense, attempting to interfere with witnesses, or attempting to mislead the commission. For example, in *In the Matter of McClain*, 662 N.E.2d 935 (Indiana 1996), the Indiana Supreme Court found that the judge's lack of integrity was verified not only by the conduct for which he was being sanctioned (harassing a court employee) but also by the "unbelievable" "eleventh hour tale of vengeance and coincidence" he told in his defense and his obstructive and uncooperative posture toward the Judicial Qualifications Commission. In *McClain*, the court considered the failure to cooperate an aggravating factor but stated such a failure could in itself constitute misconduct. The court did state that a judge's duty to cooperate with the Commission does not require an admission of misconduct or preclude the advocacy of a defense that contradicts the allegation of misconduct.

Judges have also been removed in cases in which interfering with a witness in judicial discipline proceedings

was found. *See, e.g., In the Matter of Drury*, 602 N.E.2d 1000 (Indiana 1992) (judge attempted to retaliate against witnesses); *Doan v. Commission on Judicial Performance*, 902 P.2d 272 (California 1995) (judge asked witnesses not to cooperate with investigation).

Misleading the commission

Furnishing false evidence or testimony in commission proceedings has also been one of the grounds for removal in several cases. For example, the New York Court of Appeals held that removal was the appropriate sanction for a judge who had made false statements to the State Commission on Judicial Conduct during its investigation into allegations he had passed a note to his court attorney concerning the physical attributes of a female law intern and suggested to the intern that she remove part of her apparel in his presence; the judge also gave deceitful responses to the governor's screening committee and to the staff of the senate judiciary committee when they were considering his nomination to a different court. *In the Matter of Collazo*, 691 N.E.2d 1021 (New York

1998). The court stated that the judge's ribald note and indelicate suggestion standing alone would not justify removal, but that the judge's misconduct was magnified by a pattern of evasive, deceitful, and outright untruthful behavior, evidencing a lack of fitness to hold judicial office.

The California Commission on Judicial Performance removed a judge from office for misrepresentations about his educational background, military service, and employment on his personal data questionnaires when he sought judicial appointment, to judges who could help him gain his appointment, on his judicial data questionnaire, to the judge who was to introduce him at the public enrobing ceremony, to attorneys, to a newspaper reporter, and to the Commission. *Inquiry Concerning Couwenberg*, Decision and Order (California Commission on Judicial Performance August 15, 2001) (cjp.ca.gov/pubdisc.htm). The judge had told the Commission he had worked for the CIA after his lie that he had been in combat in Vietnam

(continued on page 8)

Rule 605 of the **Kansas** Commission on Judicial Qualifications provides:

A judge shall cooperate with the commission or a hearing panel. A judge shall, within such reasonable time as the commission or hearing panel may require, respond to any inquiry concerning the conduct of a judge. The failure or refusal of the judge to respond may be considered a failure to cooperate.

The failure or refusal of a judge to cooperate in an investigation, or the use of dilatory practices, frivolous or unfounded responses or argument, or other uncooperative behavior may be considered a violation of Canon 1 of the Code of Judicial Conduct.

Rule VIII of the Rules of the

Judiciary Commission of the State of **Louisiana** states:


The failure or refusal of a judge to cooperate in an investigation, or the use of dilatory practices, frivolous or unfounded responses or arguments, or other uncooperative behavior may be considered by the Commission in determining whether or not to recommend a sanction to the Louisiana Supreme Court and may bear on the severity of the sanction actually recommended.

In **Nebraska**, Rule 5(a), of the Rules for the Commission on Judicial Qualifications provides:

[The answer] shall contain a full and fair disclosure of all facts and circumstances pertaining to his or her alleged

misconduct or physical or mental disability. Any willful concealment, misrepresentation, or failure to file such an answer and disclosure, shall be additional grounds for disciplinary action under the complaint.

Finally, Rule 4(d) of the Procedural Rules and Regulations of the **New Mexico** Judicial Standards Commission states:

The failure of any judge under investigation to comply with the reasonable requests or directives of the [Judicial Standards] Commission may be considered willful misconduct in office by the Commission. The intentional misrepresentation of a material fact during any stage of a disciplinary proceeding may constitute willful misconduct in office. 

The Importance of a Judge's Conduct During Judicial Discipline Proceedings

(continued from page 7)

was exposed and then told the Commission that he had worked in Laos for an unknown agency after the CIA disputed his claim. The Commission concluded, "Any discipline other than removal for such blatant misrepresentations might well encourage others who are investigated by the commission to prevaricate and develop faulty memories."

In *In re Ferrara*, 582 N.W.2d 817 (Michigan 1998), a witness for the judge, who had been charged with using racial epithets in a private telephone conversation, had submitted a letter stating that the judge was not racist. The letter was purportedly written by the witness to a newspaper when the controversy first arose, but, in fact, the judge had written the letter after the Judicial Tenure Commission hearing had begun. The court found that the judge "had attempted to mislead the court, or at least create a false impression, with respect to the time, motivation, and scrivener of the letter." The court concluded that the judge's failure to divulge the source and circumstances surrounding the letter constituted an obstruction of justice and lack of candor with the tribunal. The judge also made a second attempt to admit the letter. The court found that this second attempt was "glaring evidence" of the judge's inability to admit her shortcomings and to conform to judicial standards of conduct.

A contemptuous attitude toward commission proceedings has also been cited in decisions to remove a judge. For example, also in *Ferrara*, the court adopted the Commission's findings that the judge's "conduct throughout the formal hearing was in-

appropriate, unprofessional, and demonstrated a lack of respect' for the judicial discipline proceedings." Stating the incidents were too numerous to recount, the court noted that the judge failed to observe appropriate courtroom decorum, interrupting opposing counsel and the master on several occasions and making snide side comments. The court also emphasized that


Furnishing false evidence or testimony in commission proceedings has also been one of the grounds for removal in several cases.

the judge's "evidence and testimony were replete with half-truths and misleading statements" and on other occasions "were so unnecessarily vague as to hinder the proceedings and significantly interfere with the administration of justice." The court concluded that acts such as the judge's that "mislead, misrepresent, and deceive with respect to evidence and facts in legal proceedings, so seriously undermine that trust and are so fundamentally contrary to judicial temperament and obligation as to require the most severe form of discipline — removal."

Similarly, in *In the Matter of Davis*, 946 P.2d 1033 (Nevada 1997), the Nevada Supreme Court held that the Commission on Judicial Discipline rightfully considered the judge's demeanor at the hearing, including his wrongful assertion of a Fifth Amendment privilege, in determining whether he should be removed. After initially refusing to take the oath, the

judge was sworn in and then asserted a blanket Fifth Amendment privilege, refusing to answer most of the questions, including non-incriminating questions such as, "When were you first elected?" The court held:

His contention on appeal that he is entitled to relief because he was required to "humble himself" is a clear sign that he had, to a degree, lost touch with a proper sense of his public trust and decorum. Certainly, he would never have tolerated such behavior in any proceeding over which he was charged with presiding. His approach to the hearing, whether or not a predetermined strategy, cannot be condoned.

The court concluded that the "totality of the sustained charges, appellant's wrongful assertion of privilege and his contumacious demeanor at the hearing demonstrated that the totality of the offenses, sustained by clear and convincing evidence, justified appellant's removal from office." The Commission had also found that the judge borrowed money from court employees; publicly campaigned for a candidate; conducted a personal business from chambers; used court employees to perform personal errands during normal business hours; directed or suggested to persons found guilty to contribute money to certain charities in lieu of paying fines to the city; and used property owned in part by him that was zoned for residential purposes for commercial purposes. 

This article is an excerpt from the recent publication A Study of State Judicial Discipline Sanctions. For information about ordering the Study, see page 12.

Disqualification: Judge's Attorney Appears in a Case *(continued from page 1)*

New York Advisory Opinion 97-135; Utah Advisory Opinion 00-4. A judge must recuse even if the attorney is provided through an insurance company or an organization like the American Civil Liberties Union. *Washington Advisory Opinion 97-6.*

In a different approach, the Michigan judicial ethics committee has advised that, although disclosure is always required, disqualification from a case in which an attorney representing the judge in a personal suit appears is not mandatory unless the "representation is in a suit of a substantial nature, not spurious nor used as a tactic to induce disqualification, and filed against the judge personally" or the "judge's personal ethics or financial interest are directly at stake." *Michigan Advisory Opinion JI-43* (1991). See *West Virginia Advisory Opinion* (March 16, 1999) (judge may employ in adoption proceeding an attorney who frequently appears before the judge but must disclose the relationship in all cases in which the attorney appears and recuse when asked to do so).

Other attorneys

If a case involves a different member of the same law firm as the judge's personal attorney, several committees allow a judge to preside following disclosure and waiver. See *Tennessee Advisory Opinion 93-61; Utah Informal Advisory Opinion 99-9.* See also *Washington Advisory Opinion 93-14* (judge who has retained attorney in personal suit must disclose that relationship when a member of the attorney's law firm appears and should recuse if there is any objection). The

Arizona committee has advised that whether a judge who is represented by an attorney in a personal lawsuit may preside over an unrelated case in which a member of the attorney's law firm appears depends on the directness, substance, length, and continuing nature of the relationship. *Arizona Advisory Opinion 92-11.*

When a judge is represented by a

“[A] judge who is being sued may not preside over cases in which the deputy prosecuting attorney defending the judge's case participates...”

law firm rather than a specific attorney within that firm, the judge is disqualified from any case in which that law firm or any member appears. See *New York Advisory Opinion 91-10; New York Advisory Opinion 93-9; Missouri Advisory Opinion 101* (1984). Cf., *Louisiana Advisory Opinion 172* (2001) (judge who is being represented by a law firm must disclose the relationship whenever the firm appears before the judge regardless of the size of the firm).

Several advisory opinions that require a judge to disqualify from cases involving lawyers who practice with the judge's attorney do not specify whether the attorney is representing the judge in a personal or official matter. *Arkansas Advisory Opinion 92-3; Florida Advisory Opinion 99-13.*

Representation in official capacity

Disqualification is generally required when an attorney appearing before the

judge is representing the judge in a case in which the judge is being sued or is suing in his or her official capacity, but that disqualification does not apply to other attorneys in the same office. For example, the Arizona advisory committee has stated that a judge who is currently represented by the attorney general's office in litigation brought against the judge in a profes-

sional capacity must disqualify from cases in which the specific assistant attorney general who is representing the judge appears, but that the judge is not disqualified from cases in which other assistant attorneys general appear. *Arizona Advisory Opinion 02-5.*

Similarly, the Washington judicial ethics committee has advised that a judge who is being sued may not preside over cases in which the deputy prosecuting attorney defending the judge's case participates, but that disqualification does not run to other members of the prosecutor's office, and disclosure is not necessary when those attorneys appear. *Washington Advisory Opinion 95-12.* See also *Alabama Advisory Opinion 98-704; New York Advisory Opinion 98-14.* Similarly, if the judge is being represented in an official case by a private attorney, the judge is allowed to preside in cases involving other members of the attorney's firm, although unusual circumstances may make disqualification applicable to the entire firm. See *Alabama Advisory Opinion 96-616; Alabama Advisory Opinion 88-337.*

In contrast, the Michigan judicial ethics committee has advised that

(continued on page 10)

Disqualification: Judge's Attorney Appears in a Case *(continued from page 9)*

when an attorney is representing a judge in an official capacity, “disqualification is not *per se* required,” although disclosure is necessary. *Michigan Advisory Opinion JI-102* (1995). When a judge is sued in an official capacity, the committee explained:

the judge might not have personal choice of counsel, might never discuss the lawsuit directly with the counsel selected, does not personally pay the counsel, and might not even be apprised of the details of the matter as it progresses. Instead, counsel may be selected and coordinated by an insurer or at public expense.

Michigan Advisory Opinion J-5 (1992). Whether disqualification was required in a specific circumstances would, according to the Michigan committee, depend on several factors. For example, disqualification is less likely to be required if the judge is represented by a “‘public lawyer’ i.e. one without private clients and who would not personally benefit from any appearance of judicial bias” and if the representation is “‘pro forma’ because the judge has immunity.” Disqualification is more likely to be required if the representation “involves the sharing of confidences and secrets of the judicial clients that would give the judges’ advocate an advantage when appearing before the judges in unrelated matters.” See also *Kentucky Advisory Opinion JE-102* (2002) (judge who is represented by the attorney general in a suit in which the judge is sued in an official capacity may hear other cases in which the attorney general participates but should disclose the representation on the record).

Several advisory committees have established an exception allowing a judge who is sued as part of a group of judges or as a member of a court to preside in cases involving the attorney

representing the judges or court. The Arizona advisory committee has stated that a judge who has been sued with all judges in the county or state — for example, in a challenge to the entire court’s authority or an attack on a judicial policy or rule — is not disqualified from other cases in which the assistant attorney general who is representing the judges appears. *Arizona Advisory Opinion 02-5*. See also *Louisiana Advisory Opinion 179* (2001) (judge is not disqualified from cases in which one of the attorneys is representing the judges of the court in litigation against the court clerk); *New Mexico Advisory Opinion 89-8* (judges of a district are not required to recuse from cases involving law firms that are representing the judges in a pending lawsuit against the county board of commissioners, but should disclose the circumstances on the record); *New York Advisory Opinion 94-23* (individual members of a board of judges need not recuse from matters in which members of a law firm representing the board appear unless the firm represents the board members individually).

Not all advisory opinions have adopted that exception, however. The Nevada judicial ethics committee has advised that a judge is disqualified when a deputy attorney general representing all the judges of a district in a suit filed by the county clerk appears in an unrelated matter, although disqualification in cases involving other deputy attorneys general is not required. *Nevada Advisory Opinion 99-7*. Moreover, the exception would not apply if the group of judges constituted a class in a lawsuit (for example, if judges brought a class action regarding judicial salaries) and the specific judge was a named party, a named class representative, an intervenor, or

a monetary contributory. *Alabama Advisory Opinions 95-581, 582*.

Former representation

The issue whether a judge is required to continue to recuse when the judge’s former attorney appears in a case has been resolved in different ways by different committees. Some advisory committees have stated that, once the representation or the case concludes, the disqualification ceases. For example, the Tennessee judicial ethics committee has advised that a judge is not required to recuse from cases involving counsel retained by the judge after that representation has been concluded, including the payment of all fees and expenses incurred. *Tennessee Advisory Opinion 93-6*. See also *Alabama Advisory Opinion 96-616* (disqualification ordinarily ceases when the litigation concludes or the representation otherwise ceases); *Alabama Advisory Opinion 92-443* (disqualification ceases upon the official resolution of charges of unethical conduct against the judge); *Georgia Advisory Opinion 54* (1984) (disqualification not necessary where former personal attorney appears); *Kentucky Advisory Opinion JE-102* (2002) (disqualification not necessary when judge’s representation by attorney general has ceased).

In contrast, the Washington committee has advised that disqualification continues for a reasonable period after the termination of a personal lawsuit in which the attorney represented the judge (*Washington Advisory Opinion 89-13*), and the Utah judicial ethics committee has advised that a judge is disqualified from cases involving an attorney who represented the judge before the Judicial Conduct Commission for six months after the proceeding has ended. *Utah Advisory*

Opinion 00-4. The New York advisory committee has adopted a rule requiring disqualification if the representation was within the previous two years. See, e.g., *New York Advisory Opinion 92-54*. If the representation was more than two years before, the New York committee requires a judge:

to consider all relevant factors to determine if disqualification is the proper course, including the nature of the instant proceeding, the nature of the prior representation by the attorney, and its frequency and duration, the length of time since the last representation, the amount of work done for the judge by the attorney and the amount of the fee, whether the representation was routine or technical or involved the morality of the judge's conduct, whether there exists a social relationship between the judge and the judge's former attorney, and whether there are any special circumstances creating a likely appearance of impropriety.

Other judicial ethics committees have also listed factors a judge should consider in assessing whether disqualification is still necessary when the judge's former attorney appears in a case. When an assistant attorney general who used to represent a judge in a suit in the judge's official capacity appears before the judge, the Arizona committee directs a judge to consider the nature and extent of the prior litigation, whether the judge was personally involved in the matter as it progressed, and whether the judge shared any confidential information with the

attorney that might give the attorney an advantage. *Arizona Advisory Opinion 02-5*. Applied to specific situations, advisory committees have stated that a judge may hear cases involving:

- a lawyer who handled lawsuits in which the judge was a named defendant that settled within policy limits a year earlier (*Florida Advisory Opinion 95-16*);

- a large local law firm that represented the judge a year earlier in the sale of one home and the purchase of another (*Florida Advisory Opinion 93-19*);


- a lawyer who represented the judge in two routine real estate closings four and nine years ago, if the closings involved no unusual circumstances and there is no other special relationship between the judge and the attorney (*Illinois Advisory Opinion 98-17*);

- a lawyer whose representation of the judge in different proceedings ended 11 years ago (*New York Advisory Opinion 93-61*);

- an attorney who represented the judge in a civil matter that was settled two years ago where the relationship was strictly at arms length and there is no outstanding financial obligation (*South Carolina Advisory Opinion 2-1990*); and

- an attorney who represented the judge in an uncontested divorce 10 years previously (*Tennessee Advisory*

Opinion 94-2).

There is disagreement among advisory committees on the issue whether disclosure is necessary when the judge's former attorney appears. Compare *Florida Advisory Opinion 95-15* (no disclosure required where attorney represented the judge regarding custody of judge's child eight years ago) and *Illinois Advisory Opinion 98-17* (no disclosure required when attorney represented judge in two routine real estate closings, most recently four years ago) with *Michigan Advisory Opinion 11-102* (1995) (disclosure required if lawyer appearing before administrative hearing officer has previously represented officer); *New York Advisory Opinion 97-135* (disclosure required where attorney previously represented judge before State Commission on Judicial Conduct, and recusal required if there is an objection). Similarly, the Florida advisory committee has stated that whether a judge was required to disclose that an attorney appearing in a case represented the judge three years earlier in a now-closed personal case depended on the nature and the extent of the relationship, such as whether the judge and attorney maintain a strong social tie and whether the prior representation was in a high profile case or one of great personal or monetary significance to the judge or the attorney. *Florida Advisory Opinion 93-17*. 

AJS has links on its web-site (www.ajs.org/ethics/eth_advis_comm_links.asp) to judicial ethics advisory opinions from Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Massachusetts, Michigan, Nebraska, Nevada, Ohio, Pennsylvania, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

Judicial Conduct Reporter

Fall 2002

Allan D. Sobel
Executive Vice President
and Director

Cynthia Gray
Director, Center for
Judicial Ethics
cgray@ajs.org

**American Judicature
Society**
180 N. Michigan Ave.
Suite 600
Chicago, IL 60601
Phone: 312-558-6900
Fax: 312-558-9175
www.ajs.org

Published quarterly,
\$32 per year; single copy \$9
© 2002
American Judicature Society
ISSN: 0193-7367
Change of address:
dsalinas@ajs.org or
312-357-8815

An index to the *Judicial Conduct Reporter* is available on the AJS web site at www.ajs.org. Contact cgray@ajs.org for information on discounts for group subscriptions.



180 N. Michigan Ave.
Suite 600
Chicago, Ill. 60601

Nonprofit Org.
U.S. POSTAGE
PAID
Chicago, Illinois
Permit No. 2482

JUDICIAL CONDUCT REPORTER



A Study of State Judicial Discipline Sanctions

NEW!

by **Cynthia Gray, Director**
AJS Center for Judicial Ethics

With a grant from the State Justice Institute, the American Judicature Society has prepared *A Study of State Judicial Discipline Sanctions* to help judicial conduct commissions and courts bring more structure to the decision regarding the appropriate sanction in judicial discipline proceedings. The *Study* begins with a brief overview of state judicial discipline systems, supplemented by tables that identify the sanctions available in each state. All cases from 1990 through 2001 in which judges have been removed are examined. The *Study* then analyzes the cases in which the commission and the state supreme court disagreed about the appropriate sanction or there were dissents from the majority decision. The *Study* also catalogs the relevant factors in determining the appropriate sanction and discusses issues such as the importance of the judge's reputation and the role remorse plays. Finally, the *Study* makes recommendations for states to consider in pursuing the goal of fair, effective judicial discipline.

The *Study* is \$25 plus postage and handling. To order, see www.ajs.org or contact rwilson@ajs.org or 312-357-8821