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JUDICIAL CONDUCT REPORTER

A publication of the American Judicature Society Center for Judicial Ethics
Vol 25, No 2 Summer 2003

Comments During Sentencing, Involvement with Charitable Organizations, Flipping a Coin: Recent Cases

Comments during sentencing

Accepting the presentment of the Advisory Committee on Judicial Conduct, the New Jersey Supreme Court publicly reprimanded a judge for statements he made while sentencing a defendant for sexual assault that created the perception of a lack of impartiality. *In the Matter of Gaeta*, Order (New Jersey Supreme Court May 7, 2003).

The defendant pled guilty to committing a sexual assault upon one of her students who was 13 years old at the time. In the plea agreement, she

had agreed to three years incarceration, but the judge sentenced her to probation. During sentencing, the judge stated:

It's just something between these two people that clicked beyond the teacher/student relationship, beyond the friendship and the help that she extended to this young man, that evidently the help was lacking in his own family. . . . Maybe it was a way of him to, once this did happen, to satisfy his sexual needs. At 13, if you think back, people mature at different ages. We hear of – newspapers and t.v. reports over the last several months of nine-

year-old admitting having sex. So I really don't see the harm that was done here I don't see anything here that shows that this young man has been psychologically damaged by her actions. . . . And don't forget, this was mutual consent. Now certainly under the law, he is too young to legally consent, but that's what the law says. Some of the legislators should remember when they were that age. Maybe these ages have to be changed a little bit.

The sentence was reversed on appeal because the judge's emphasis on harm

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Acting as a Character Witness *by Cynthia Gray*

As a corollary to the rule that “a judge shall not lend the prestige of judicial office to advance the private interests of the judge or others,” Canon 2B of the *American Bar Association 1990 Model Code of Judicial Conduct* expressly prohibits a judge from testifying “voluntarily as a character witness.” Commentary further explains that testifying voluntarily as a character witness may place a law-

yer who regularly appears before the judge “in the awkward position of cross-examining the judge.” See *Public Reprimand of Quintero* (Texas State Commission on Judicial Conduct January 25, 2000) (public reprimand for, among other misconduct, voluntarily giving character testimony for a defendant at the request of a member of the defendants' family).

The prohibition includes not simply

providing testimony but also providing a letter that will be used as a character reference in adjudicative proceedings, and the Florida Supreme Court publicly reprimanded four judges for writing character reference letters to a federal judge on official court stationery on behalf of a friend who was awaiting sentencing after pleading guilty to

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In Brief: Recent Judicial Ethics Advisory Opinions

✦ A judge may hear post-trial matters concerning jail inmates who were represented by the judge's nephew at trial where the representation has ceased, unless, for example, the matter involves an issue the nephew litigated or questions about the nephew's representation. *Alabama Advisory Opinion 03-812*.

✦ A judge who is dating an attorney in a public defender's office is not disqualified from all cases involving the office but only from cases in which the specific attorney has appeared as attorney of record or been involved in any manner. *Nebraska Advisory Opinion 03-1*.

✦ A judge is not disqualified from a civil action in which the defendant is an assistant district attorney assigned to the judge's court. *Alabama Advisory Opinion 03-814*.

✦ A retired judge subject to recall may serve as a paid, professional witness in a civil case except in any division or court in which the judge serves repeatedly on a continuing scheduled basis. *Arizona Advisory Opinion 03-1*.

✦ If a complainant in a domestic violence case has asked that a "no contact" order be vacated, a judge may not meet privately with the complainant to ascertain whether the complainant is acting voluntarily and with full awareness or out of fear or coercion. *Arkansas Advisory Opinion 02-9*.

✦ A magistrate's spouse may serve on the county election commission. *South Carolina Advisory Opinion 01-2003*.

✦ A judge may not attend a party caucus but may vote in a primary election even if participation is conditioned on party affiliation. *Utah*

Formal Advisory Opinion 02-1.

✦ A judicial candidate should not disclose accurate information about his or her opponent's private sexual conduct unless there is a likely criminal or judicial disciplinary violation. *Illinois Advisory Opinion 03-1*.

✦ A judge who handles juvenile matters on a rotating basis may not serve as a mentor to a juvenile who has been diverted out of the court system into an alternative program. *Wisconsin Advisory Opinion 02-1*.

✦ A judge and court employees may volunteer to cook, serve meals, and clean up at a community soup kitchen sponsored by a local church and open to the public. *Kansas Advisory Opinion 112 (2003)*.

✦ A judge may use the judicial title when writing letters of support about a teen traffic school to members of the city council and making recommendations to funding agencies. *Washington Advisory Opinion 03-3*.

✦ A judge may not serve as a member of the group that establishes the policies and supervises the direction and management of the bar association. *Massachusetts Advisory Opinion 03-5*.

✦ Where the governor has proposed to the legislature that certain courts be closed as a cost-saving measure, a judge may marshal information relating to a court's case load and budget and discuss the information with legislators and the governor's legal counsel. *Massachusetts Advisory Opinion 03-6*.

✦ A judge may not preside over mock trials at a law firm's retreat held at a local resort. *Florida Advisory Opinion 03-3*.

✦ A judge may serve on a screening panel that interviews candidates and forwards names to the governor for consideration to fill a judicial vacancy. *Kansas Advisory Opinion 111 (2003)*.

✦ A judge may not write a letter or place a telephone call on behalf of a candidate for judicial office to a screening committee appointed by a legislator when the request is made by the candidate but may do so if the request is made by or on behalf of the legislator. *Virginia Advisory Opinion 03-1*.

✦ A judge may visit correctional and other types of institutions but may not engage in ex parte communications with inmates, patients, or staff who may be involved in any pending or impending litigation that may come before that judge. *Washington Advisory Opinion 03-7*.

✦ If, after independently analyzing a policy adopted by the presiding judge about continuances in criminal cases, a judge determines that the policy does not comply with the law, the judge is not required to follow the policy. *Washington Advisory Opinion 03-9*.

✦ A judge must comply with a decision from an appellate court in another division even if the judge disagrees with the ruling. *Washington Advisory Opinion 03-2*.

✦ A judge may serve as a judge advocate general while on active duty in the United States National Guard and Reserve. *Alabama Advisory Opinion 03-820*.

The Center for Judicial Ethics has links on its web-site (www.ajs.org/ethics) to the web-sites of judicial ethics advisory committees.

Judicial Campaign Speech: Recent Decisions

When it overturned a prohibition on judicial candidates announcing their views on disputed legal or political issues, the United States Supreme Court noted that it was not expressing a view on the constitutionality of other restrictions on judicial campaign speech. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). Those restrictions have survived First Amendment challenges in two state court decisions issued following the *White* decision.

The pledges or promises provision states that a judicial candidate shall not “make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.” The New York Court of Appeals held that the pledges or promises clause not only was “sufficiently narrow to withstand strict scrutiny analysis but also effectively and appropriately balanced the interests of litigants

and the rights of judicial candidates and voters.” *In the Matter of Watson*, 794 N.E.2d 1 (2003).

The court noted that the pledges or promises prohibition is not a blanket ban because “a judicial candidate may promise future conduct that is not inconsistent with the faithful and impartial performance of judicial duties” and “most statements identifying a point of view will not implicate the ‘pledges or promises’ prohibition.” The court stated that the rule “precludes only those statements of intention that single out a party or class of litigants for special treatment, be it favorable or unfavorable, or convey that the candidate will behave in a manner inconsistent with the faithful and impartial performance of judicial duties if elected.” The court held that the pledges or promises provision “furthers the State’s interest in preventing party

bias and promoting openmindedness, and the appearance of either.”

Such promises, even if they are not kept once the candidate is elected, damage the judicial system because the newly elected judge will have created a perception that will be difficult to dispel in the public mind. With all the uncertainties inherent in litigation, litigants and the bar are entitled to be free of the additional burden of wondering whether the judge to whom their case is assigned will adjudicate it without bias or prejudice and with a mind that is open enough to allow reasonable consideration of the legal and factual issues presented.

A campaign pledge to favor one group over another if elected has the additional deleterious effect of miseducating voters about the role of the judiciary at a time when their attention is focused on filling judicial vacancies. Judges must apply the law faithfully and impartially — they are not elected to aid particular groups, be it the police, the prosecution or the defense bar.

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Fines and Public Sanctions

Fines

In at least nine states, a fine may be imposed in judicial discipline proceedings. Those states are Florida, Indiana, Maine, Minnesota, Mississippi, Nevada, New Mexico, Ohio, and West Virginia. In Ohio, fines may be imposed only in cases in which a judge or judicial candidate is sanctioned for a violation committed during an election campaign. In recent memory, no fine has been imposed in Indiana or New Mexico. In Maine, Minnesota, and Mississippi, the fine is paid to the state’s general fund. In Florida, it is paid to the state supreme court. In Nevada, by rule, the fine is paid to the local library in the judge’s jurisdiction. In West Virginia, the fine is paid to the

clerk of the Supreme Court of Appeals. In Ohio, the fines imposed in campaign conduct cases are deposited into the Attorney Registration Fund, which funds disciplinary proceedings against judges and attorneys. In both Nevada and West Virginia, the fine may not exceed \$5,000; the other states do not have limits. Fines are usually imposed in conjunction with another sanction such as a reprimand or suspension.

In several decisions, judicial conduct commissions have described the calculation they used to ensure that the fine being imposed fit the misconduct being sanctioned. For example, in ticket-fixing cases, the Mississippi Commission on Judicial Performance

recommends that the fine for the judge correspond to the amount of traffic fines that would have been collected from the defendants if the judge had not dismissed the cases. Thus, in *Commission on Judicial Performance v. Boykin*, 763 So. 2d 872 (Mississippi 2000), the Mississippi Supreme Court adopted the Commission’s recommendation, pursuant to an agreed statement of facts, that a judge be publicly reprimanded and fined \$861.50 for dismissing 11 tickets based upon her ex parte communications with the defendants or other persons without notice to the officer, a hearing, or a trial. (The court also assessed costs

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Acting as a Character Witness *(continued from page 1)*

money-laundering and tax evasion. *Inquiry Concerning Abel*, 632 So. 2d 600 (1994); *Inquiry Concerning Stafford*, 643 So. 2d 1067 (1994); *Inquiry Concerning Fogan*, 646 So. 2d 191 (1994); *Inquiry Concerning Ward*, 654 So. 2d 549 (1995). See also *In re Decuir*, 654 So. 2d 687 (Louisiana 1995) (censure for, among other misconduct, writing a letter on personal judicial stationery to a federal judge recommending leniency for a friend who was awaiting sentencing).

Judicial ethics opinions have also advised that a judge may not voluntarily communicate with another judge as a character witness in a sentencing proceeding. See *Alabama Advisory Opinion 00-744*; *Arkansas Advisory Opinion 2000-3*; *Florida Advisory Opinion 75-18*; *Illinois Advisory Opinion 95-12*; *Indiana Advisory Opinion 5-91*; *Massachusetts Advisory Opinion 97-2*; *Nebraska Advisory Opinion 89-2*; *New York Advisory Opinion 89-4*; *New York Advisory Opinion 89-73*; *New York Advisory Opinion 91-46*; *Pennsylvania Informal Advisory Opinion 99-1-13a*; *Washington Advisory Opinion 92-17*; *West Virginia Advisory Opinion* (November 5, 1990).

Advisory opinions also state that a judge should not make a recommendation to a pardon and parole board even if the judge has some personal basis for the recommendation. *Alabama Advisory Opinion 78-44*; *Florida Advisory Opinion 84-14* (former client); *Florida Advisory Opinion 82-15*; *Florida Advisory Opinion 77-17*; *Georgia Advisory Opinion 30* (1981) (acquaintance); *South Carolina Advisory Opinion 6-1994* (former college classmate); *Texas Advisory Opinion 146* (1992); *U.S. Advisory Opinion 65* (1998). See also *Florida Advisory Opinion 97-7* (judge may not submit a letter of refer-

ence and support for a former client's use in an application for clemency); *Texas Advisory Opinion 207* (1997) (judge may not file a character affidavit on behalf of a person seeking pardon from the President of the United States). But see *Louisiana Advisory Opinion 48* (1979) (judge may write letter of recommendation to a pardon board in a personal capacity on behalf of a former client).

A judge may, however, respond to an official request for information from another judge or a parole or probation officer. *Alabama Advisory Opinion 00-744*; *Florida Advisory Opinion 75-22*; *Illinois Advisory Opinion 95-12*; *New York Advisory Opinion 91-46*; *New York Advisory Opinion 89-73*; *Texas Advisory Opinion 222* (1998). However, a letter extolling a defendant's virtues and recommending a particular sentence is not "information" within the meaning of that exception, but is a prohibited character reference. *Inquiry Concerning Ward*, 654 So. 2d 549 (Florida 1995). Commentary to Canon 2B of the 1990 model code provides: "[A] judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons information for the record in response to a formal request."

The restriction on testifying as a character witness has been interpreted to extend to attorney or judicial discipline proceedings. Thus, a judge may not voluntarily testify before the state bar association as a witness to an attorney's character (*Alabama Advisory Opinion 96-618*); or provide a character reference letter to a bar grievance committee or the supreme court in a disciplinary matter (*Florida Advisory Opinion 92-1*; *Florida Advisory Opinion 95-18*); a letter on behalf of a disbarred attorney seeking re-ad-

mission to the bar (*Florida Advisory Opinion 88-19*; *Missouri Advisory Opinion 137* (1988); *New York Advisory Opinion 95-75*; *Tennessee Advisory Opinion 97-4*); a letter giving character references on behalf of a lawyer seeking reconsideration of disbarment (*New York Advisory Opinion 89-73*); a letter of support for a lawyer in a proceeding involving either discipline or reinstatement (*North Dakota Advisory Opinion 91-1*); an affidavit attesting to an attorney's character to a referee in attorney discipline proceedings (*Nebraska Advisory Opinion 02-2*); an affidavit attesting to the competency of an attorney who practices before the judge to be used in a grievance proceeding against the attorney (*Texas Advisory Opinion 277* (2001)); or a letter about the judge's impressions of another judge to be submitted to the supreme court with the response to ethics charges (*West Virginia Advisory Opinion* (September 4, 1997)). See also *Woodruff v. Tomlin*, 593 F.2d 33 (6th Cir. 1979) (judge may not testify in person or by deposition or affidavit as a character witness in a disciplinary proceeding); *In the Matter of Thomason*, 304 S.E.2d 821 (South Carolina 1983) (the Board of Commissioners on Grievances and Discipline shall not issue subpoenas for judges as character witnesses). But see *Washington Amended Advisory Opinion 88-5* (judge may write a character letter to the bar association concerning the reinstatement of a disbarred attorney). Cf., *In the Matter of Waddick*, 605 N.W.2d 861 (Wisconsin 2000) (code of judicial conduct does not absolutely prohibit a judge from serving as a reference in judicial discipline proceedings or providing letters of recommendation based on personal knowledge, but the writing of such letters is, at the least, inadvisable unless the judge was properly summoned).

Responding to subpoena

Commentary to Canon 2B does allow a judge to testify “when properly summoned,” but states that a judge “should discourage a party from requiring the judge to testify as a character witness,” “except in unusual circumstances where the demands of justice require.” The federal advisory committee has stated that Canon 2B “does not afford the judge a privilege to testifying in response to an official summons,” requiring a judge to testify as a character witness when subpoenaed. *U.S. Advisory Opinion 9* (1998). *Accord Wisconsin Advisory Opinion 97-3* (judge is under same obligation as any other subpoenaed witness to respond); *Inquiry Concerning Fogan*, 646 So. 2d 191 (Florida 1994) (“When a judge is summoned to testify, a judge is obligated, like everyone else, to comply”).

See also *Maryland Advisory Opinion 31* (1975) (judge may testify as a character witness in response to a subpoena at the trial of another judge on a charge of traffic violation); *Nebraska Advisory Opinion 02-2* (judge may send an affidavit or testify about an attorney’s character in attorney discipline proceedings if subpoenaed but should discourage the attorney from using the judge); *New York Advisory Opinion 87-5* (judge may appear under subpoena as a character witness in a federal court action in which the judge has no interest and discuss with the defense attorney his probable testimony). But see *Louisiana Advisory Opinion 82* (1990) (judge does not have an ethical duty to honor a subpoena to appear as a character witness in a criminal matter). The rule also allows a judge to submit an affidavit or letter in lieu of testimony pursuant to a subpoena. See *New York Advisory*

Opinion 95-135 (judge subpoenaed to testify as a character witness in a domestic relations matter in another state may submit a letter or affidavit in lieu of personal appearance at the suggestion of and with the consent of the attorneys); *West Virginia Advisory Opinion* (June 30, 2000) (judge who has been subpoenaed to appear as a witness in a case may submit a letter as substitution for a personal appearance); *U.S. Compendium of Selected Opinions § 2.13(f)* (2001) (judge may

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give character testimony, either in person or by affidavit, in response to a valid subpoena). But see *Arkansas Advisory Opinion 00-7* (judge who has been subpoenaed to testify as a character witness may not submit an affidavit in lieu of live testimony).

The advisory committee for federal judges suggests that when a judge is required to testify pursuant to a subpoena, “some of the otherwise unfortunate effects from the giving of such testimony would be dissipated if the trial judge made certain that, either on direct or cross-examination, it was made clear that the judge witness was testifying in response to a subpoena.” *U.S. Advisory Opinion 9* (1998). The committee also advised that “to the extent that the trial court has discretion to limit character evidence generally the trial judge should consider limiting the number of judges appearing in such a role.”

Moreover, if a judge knows a party or lawyer is contemplating subpoenaing the judge, the judge should discourage that strategy or, if the subpoena has been issued, should encourage the party or lawyer to withdraw it or move the court to quash it unless the ends of justice require the judge’s testimony. *Indiana Advisory Opinion 3-98*. Thus, a judge should try to dissuade a friend from subpoenaing the judge as a character witness if testimony is being sought primarily because of the judge’s office and potential influence. *U.S. Compendium of Selected Opinions § 2.13(c)* (2001). If a judge’s effort to discourage a subpoena fail and the judge is required to ask a court to quash the subpoena, the judge may solicit the assistance of the attorney general. *U.S. Compendium of Selected Opinions §*

2.13 (2001).

Justice would “demand” the judge’s testimony and the judge need not try to prevent a subpoena if the judge “has information or insight that cannot be obtained from any other source” (*Florida Advisory Opinion 97-22*), “is in a unique position to offer meaningful testimony” (*Indiana Advisory Opinion 3-98*), or if the judge’s testimony would be “uniquely material” (*U.S. Compendium of Selected Opinions § 2.13(c)* (2001)). Cf., *People v. Morley*, 725 P.2d 510 (1986) (attorney disciplinary board did not err in refusing the defendant-attorney’s request to subpoena a judge to testify as to his good character and abilities as an attorney because nothing “indicated that the judge’s testimony would have differed significantly in content from the testimony of the other two character witnesses”). 

Judicial Campaign Speech: Recent Decisions *(continued from page 3)*

Similarly, the Florida Supreme Court rejected a judge's argument that her campaign speech was protected by the First Amendment. *Inquiry Concerning Kinsey*, 842 So. 2d 77 (Florida 2003). The case involved both the pledges or promises clause and the commitments clause, which prohibits a judicial candidate from 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."

A judicial candidate should not be encouraged to believe that the candidate can be elected to office by promising to act in a partisan manner by favoring a discrete group or class of citizens. Likewise, it would be inconsistent with our system of government if a judicial candidate could campaign on a platform that he or she would automatically give more credence to the testimony of certain witnesses or rule in a predetermined manner in a case which was heading to court.

The court held that the restraints were narrowly tailored and did not unnecessarily prohibit protected speech, noting that "a candidate may state his or her personal views, even on disputed issues" but that "to ensure that the voters understand a judge's duty to uphold the constitution and laws of the state where the law differs from his or her personal belief, the commentary encourages candidates to stress that as judges, they will uphold the law." The judge has filed a petition for writ of certiorari.

In both *Watson* and *Kinsey*, the courts disciplined judges for prosecutorial statements made during their campaigns.

In *Watson*, the New York court noted that "candidates need not pref-

ace campaign statements with the phrase 'I promise' before their remarks may reasonably be interpreted by the public as a pledge to act or rule in a particular way if elected." The court found that the judge's comments, "when viewed as a whole, . . . effectively promised that, if elected, he would aid law enforcement rather than apply the law neutrally and impartially in criminal cases."

Petitioner explicitly and repeatedly indicated that he intended to "work with"

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and "assist" police and other law enforcement personnel if elected to judicial office. These statements were not related to administrative concerns, such as holding court in the evening or on weekends, but were directly associated with helping the police carry out their law enforcement functions. Petitioner buttressed his statements with arrest statistics, indicating that if elected he would take action the incumbents had failed to take to deter crime.

Petitioner's statements not only expressed a bias in favor of the police and against those accused of crimes, but also amounted to a pledge to engage in conduct antithetical to the judicial role because judges do not "assist" other branches of government — they are charged to apply the law impartially to every party appearing in court. Petitioner also singled out for biased treatment a particular class of defendants — those charged with drug offenses who reside outside the City of Lockport — claiming that, if elected, he would use bail and sentencing to deter these individuals from operating in Lockport.

Emphasizing that the judge's prosecutorial campaign statements had not been isolated or spontaneous, the court censured the judge for those statements and other misconduct.

Similarly, in *Kinsey*, the Florida Supreme Court concluded that the judge's statements while a candidate demonstrated a commitment to the prosecution side of criminal cases. For example, one brochure showed a full-page picture of the judge standing with ten heavily armed police officers and was captioned "Who do these guys count on to back them up?" Within the flyer, she stated, "[Y]our police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals where they

belong . . . *behind bars!*" The court found:

Through these statements, Judge Kinsey fostered the distinct impression that she harbored a prosecutor's bias and police officers could expect more favorable treatment from her as she promised to support police officers and help them put criminals behind bars. She also made pledges to victims of crime, promising to bend over backward for them and stressing the point that she identified with them "above all else," thus giving the appearance that she was already committed to according them more favorable treatment than other parties appearing before her.

The court also found that during the campaign, the judge had knowingly misrepresented that her opponent, the incumbent, had not revoked a defendant's bond at an emergency bond hearing when, in fact, he had revoked the defendant's bond. Further, the court found that the judge had knowingly given the false and mis-

leading impression that a defendant to whom her opponent had granted bond had been charged with attempted murder and burglary when, in fact, no such charges were pending at the time of his appearance for bond consideration. The court publicly reprimanded the judge and fined her \$50,000.

Other states have also continued to sanction judicial candidates for making misrepresentations during their campaigns. *See Inquiry Concerning McGraw, Decision and Order* (California Commission on Judicial Performance April 3, 2003) (cjp.ca.gov/pubdisc.htm) (former judge censured for, among other misconduct, denying during his re-election campaign that he had used his court computer to surf the Internet for pornographic material when he had been privately admonished him for doing so); *In re Unfair Election Practice, 03-1* (Nevada Standing Committee on Judicial Ethics and Campaign Practices May 27, 2003) (www.judicial.state.nv.us/ethics/Decision03-1.htm) (finding that a candidate should not have represented during his campaign that he had 22 years judicial experience when he had worked as a judge for only 14 years and the additional eight years were as a bailiff and a caretaker at a juvenile facility); *In re Judicial Campaign Complaint Against Per Due, Opinion* (Commission of Five Judges Appointed by Ohio Supreme Court April 24, 2003) (public reprimand for, among other misconduct, erroneously implying that a defendant had murdered a police officer while on probation from his incumbent opponent). 

The Center for Judicial Ethics tracks developments following White, as well as other decisions regarding judicial conduct, in the Judicial Ethics News portion of its web-site, a weekly feature at www.ajs.org/ethics/index.asp.

Amendments to ABA Model Code

At its August meeting, the House of Delegates of the American Bar Association amended portions of the ABA *Model Code of Judicial Conduct* in light of recent First Amendment challenges to judicial campaign speech restrictions.

One of the amendments adds the following definition of “impartiality” to the terminology section: “‘Impartiality’ denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.” An amendment also adds as commentary to Canon 1: “A judiciary of integrity is one in which judges are known for their probity, fairness, honesty, uprightness, and soundness of character. An independent judiciary is one free of inappropriate outside influences.”

A new section 10 added to Canon 3B provides: “A judge shall not, with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office,” with commentary that explains that the restrictions on judicial speech in Sections 3B(9) (prohibiting most public comment on pending cases) and 3B(10) “are essential to the maintenance of the integrity, impartiality, and independence of the judiciary. A pending proceeding is one that has begun but not yet reached final disposition. An impending proceeding is one that is anticipated but not yet begun.” After the statement in commentary to Canon 2A that a judge must “accept restrictions on the judge’s conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly,” the amendments add: “Examples are the restrictions on judicial speech imposed by Sections 3(B)(9) and (10) that are indispensable to the maintenance of the integrity, impartiality, and independence of the judiciary.”

The model code was amended to require disqualification if the “judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to (i) an issue in the proceeding; or (ii) the controversy in the proceeding.”

Finally, the model code restriction on campaign speech now prohibits a judicial candidate from making “with respect to cases, controversies, or issues that are likely to come before the court . . . pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.” The amendment eliminates the prohibition on judicial candidates making statements that “appear to commit” the candidate. The prohibition on making misrepresentations was not changed.

Fines and Public Sanctions *(continued from page 3)*

against the judge.) The court noted with approval the Commission's belief that having to pay the fines will deter judges from improperly dismissing the tickets.

In *Inquiry Concerning Rodriguez*, 828 So. 2d 1060 (Florida 2002), the Florida Supreme Court publicly reprimanded a judge, suspended her for four months without pay, and imposed a \$40,000 fine for misleading statements made in campaign finance reports and for a violation of state campaign laws. (The court ordered that the judge begin to pay the fine upon her return to the bench after her suspension and make equal monthly payments until the end of her present term.) \$40,000 represents approximately half of the salary she had received during the eight-month suspension she had voluntarily taken while she was under investigation for potential criminal violations of the election laws. (All charges related to that investigation were eventually dismissed.) The Judicial Qualifications Commission had explained that it recommended the \$40,000 fine to reimburse the public for payments made to the judge during that suspension. Noting that when a judge is suspended or on leave, a senior judge is appointed in her place and the senior judge's salary is paid out of a special fund, the court stated that the fine and the unpaid four-month suspension will not necessarily make the state whole and instructed the Commission in the future to "also take into consideration, when determining the amount of any fine, the potential financial burden a given circuit incurs when it has to appoint a senior judge in the event of a

suspension. Any fine that is intended to make the circuit whole should include that component."

In *Inquiry Concerning Kinsey*, 842 So. 2d 77 (Florida 2003), the Florida Supreme Court reprimanded a judge and fined her \$50,000 for prosecutorial statements and misrepresentations about her opponent's judicial action during her election campaign. (For more on this case, see story on page 3.) The amount of the fine represented approximately 50%

**In several states, the
sanction is administered to
the judge in person in
a public court proceeding.**

of her yearly salary or, in other words, a six-month suspension without pay, which was the other option that the Commission hearing panel had considered. The court found that a substantial fine was warranted to warn any future judicial candidates that it would not tolerate campaign statements that imply that, if elected, the judicial candidate will favor one group of citizens over another or will make rulings based upon the sway of popular sentiment in the community. *See also In re Judicial Campaign Complaint Against Hildebrandt*, 675 N.E.2d 889 (Commission of Five Judges Appointed by the Ohio Supreme Court 1997) (discipline for a judge's misleading statements about his opponent in his re-election campaign; finding that the recommendation of a fine of \$750 and costs was

woefully inadequate given the gravity of the misconduct and the need to deter judicial candidates from engaging in similar misconduct in the future, the commission ordered that the judge pay a fine of \$15,000 plus costs).

Concurring in part and dissenting in part, one justice would have removed Judge Kinsey (who has filed a petition for writ of certiorari), stating that the conduct "along with a \$50,000 fine, soils the judicial position to the extent that removal is the only reasonable alternative."

Selecting an enormous fine as discipline only sends the message that "anything goes" in judicial elections if a candidate has the financial ability to pay the monetary consequences. Indeed, in this era in which many judicial candidates in Florida are able to produce significant campaign funds from dona-

tions or personal assets, there may come a day when candidates simply maintain monetary reserves to pay fines following the election and then only the economically powerful can successfully compete in the election process.

Public sanctions

All states provide for a public sanction in judicial discipline proceedings such as an admonition, reprimand, warning, or censure; many have more than one option. These sanctions may be made public through press releases, on commission or court web-sites, and in the reported cases of the state supreme court. In addition, in several states, the sanction is administered to the judge in person in a public court proceeding.

For example, the rules of the Georgia Judicial Qualifications Commission provide:

In the case of a recommendation of censure, the same, if approved by the Supreme Court, shall be administered in open Court. If the Commission recommends a reprimand and such recommendation is approved by the Court, the same shall be administered by the Court at such place and in such manner as the Court may consider proper.

Thus, when the Georgia Supreme Court ordered that a judge be reprimanded and suspended for 90 days without pay for his handling of citations issued by state park rangers, it directed that the reprimand be delivered in open court by the chief judge of the sanctioned judge's judicial cir-

cuit. *Inquiry Concerning Cannon*, 440 S.E.2d 169 (Georgia 1994).

The Mississippi Supreme Court's judicial discipline decisions reflect a policy requiring a public reading of a public reprimand. For example, in *Commission on Judicial Performance v. Brown*, 761 So. 182 (Mississippi 2000), the court reprimanded a judge and fined him \$500 for contacting the officer who had arrested the judge's son for DUI and asking the judge assigned to his son's case for help getting the case dismissed. The court ordered that the reprimand be read in open court on the first day of the next court term by the presiding cir-

cuit court judge with Judge Brown present.

The Florida Supreme Court has announced that when the conduct of a jurist requires a public reprimand, the reprimand should be issued in person, and the judge must appear before the supreme court for administration of the reprimand. The court explained that it had "come to conclude that when the conduct of a jurist is so egregious as to require a public reprimand, such reprimand should be issued in person with the defaulting jurist appearing before this Court." *Inquiry Concerning Frank*, 753 So. 2d 1228 (Florida 2000). 

Part-Time Judge Presiding in Cases in Which He Had Represented Defendant: Recent Case

Agreeing with the recommendation of the State Commission on Judicial Conduct, the Washington Supreme Court censured a part-time judge and suspended him from office without pay for 120 days for (1) presiding as judge in numerous criminal cases in which he also appeared on behalf of the defendant as a lawyer; and (2) accepting guilty pleas without obtaining proper written plea

statements from the defendants. *In the Matter of Michels* (September 4, 2003). The judge admitted his misconduct but argued that the Commission's recommendation was excessive.

Soon after his 1986 appointment as part-time municipal court judge for the town of Sunnyside, the judge and Judge Ramon Reid, the judge for the Toppenish Municipal Court, agreed to

substitute as judge pro tempore for one another at no charge to Sunnyside or Toppenish when either judge was unavailable to preside. In 1991, Judge Michels won the contract to become the Toppenish public defender. At the Commission hearing, documentary evidence showed 12 cases in Toppenish Municipal Court in which the judge served as defense counsel and judge for the same defendant, and 8 cases in which he failed to ensure a defendant submitting a guilty plea was informed of the elements of the crimes for which they were being charged.

In determining the appropriate sanction, the court emphasized that "no shortcuts exist and any judicial officer, be he or she part-time, pro tem., or full-time must adhere to these principles in order that individuals who are charged with crimes are afforded the constitutional protections they are entitled to." 

Judicial Conduct Reporter Summer 2003

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Published quarterly,
\$32 per year; single copy \$9

© 2003
American Judicature Society
ISSN: 0193-7367

To subscribe or if you have a change of address or questions about your subscription, contact 515-271-2285 or wbowers@ajs.org

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Recent Cases *(continued from page 1)*

to the victim was an incorrect basis for a non-curatorial sentence.

The Committee found that the judge's statements expressed stereotypical views about the sexual nature of young boys, noting that the views were "problematic and suspect" and "fundamentally inconsistent with the meaning and policy of the law" Although recognizing that a judge "may comment on the law and even express disapproval of the law, as long as his or her fairness and impartiality are not compromised," the Committee concluded that the "reasonable interpretation, public perception and common understanding of those remarks" would indicate a bias and lack of impartiality.

The remarks of Respondent denote more than an honest mistake or inadvertent legal error. They suggest that, as a judge, Respondent was not simply mistaken about the law of sexual assault involving a minor boy. Respondent's remarks imply a bias, that is, a preconception or predetermined point of view about the sexuality of minors that could impugn the impartiality and open-mindedness necessary to make correct and sound determinations in the application of the law.

However, the Committee found that the judge's remarks did not reflect any underlying bias and that he was fully capable of avoiding any repetition of his conduct. The judge had described his remarks as a poor choice of words occasioned by the fact that he was delivering his decision extemporaneously and was concerned that a prison sentence would cause the defendant to try to commit suicide again. Finding that the judge's statements were "isolated, situational and aberrational," the Committee stated:

Respondent made it clear to the Committee that he sought only to reach a just sentence in view of the character and condition of the defendant, and not that he felt

young boys were impervious or immune to harm from sexual encounters with adults or that they did not require the full protection of the criminal law.

The Committee noted, however, that "a judge who makes such remarks, even out of inadvertence or by speaking carelessly or loosely, creates in the context in which they were spoken the perception that he or she is biased and harbors prejudices that will lead to prejudgment, lack of objectivity and unfairness."

In a 1996 case, the Michigan Supreme Court rejected the recommendation of the Commission on Judicial Tenure that a judge be suspended for improper remarks made during a sentencing for rape. *In the Matter of Hocking*, 546 N.W.2d 234 (Michigan 1996). (The court did suspend the judge for three days without pay for intemperate and abusive conduct toward an attorney.) The defendant in the case, an attorney, had orally and digitally penetrated a female client he was representing in divorce proceedings. During sentencing, the judge had stated that had the case been tried without a jury, "I would have acquitted the Defendant." Sentencing guidelines required the judge to impose a prison term of 10 to 25 years or to provide adequate justification for deviating downward; the judge imposed three concurrent sentences of 18 months to 10 years.

The court noted that two of the 12 reasons the judge gave to justify the downward deviation became the focus of national media attention. The judge had said, "A mitigating factor, although minor, is evidence that the Defendant helped the victim up off the floor after the occurrence. Another mitigating factor — that the victim told a spouse-abuse agency the sex was not forced but her resistance was

worn down by the Defendant's persistent requests." The court noted that the judge also used language that had been interpreted to mean that a lesser sentence was appropriate because the victim asked for it.

The court noted that "the justification for departure — the act of judicial discretion — is not at issue in this case." The court did state that a judge is not immune from discipline for the manner in which a decision is articulated but continued, "every graceless, distasteful, or bungled attempt to communicate the reason for a judge's decision cannot serve as the basis for judicial discipline." Affirming that it was committed to eradicating sexual stereotypes, the court stated it could not "ignore the cost of censoring inept expressions of opinion."

Noting that the rationale for a severe sentence would inevitably have a negative effect on those that disagree with the verdict, and sympathetic remarks would have a negative effect on those who believed the verdict was correct, the court concluded that judges would be discouraged from giving honest explanations of the rationale for tailoring sentences to the offender and the offense if misconduct were defined from the perspective of the person most sensitive to the remarks. If a judge's comments during sentencing were based on knowledge acquired during a proceeding, the court held, the comments are misconduct only when, from an objective perspective, they display "an unfavorable predisposition indicating an inability to impartially determine the facts or when in combination with other conduct [they are] clearly prejudicial to the fair administration of justice."

Using the objective standard, the court found that the judge's attempt to explain his view of the defendant's

lack of malevolent purpose did not constitute misconduct. The court emphasized that the judge did not inject extraneous matters into the proceedings, make explicitly demeaning remarks, nor use abusive language or an abusive manner. *See also In re Lichtenstein*, 685 P.2d 204 (Colorado 1984) (rejecting recommendation that a judge be publicly reprimanded for his comments in the sentencing of a man who had pled guilty to murdering his wife).

Involvement with charitable organizations

Adopting the findings and conclusions of the Judicial Tenure Commission to which the judge had consented, the Michigan Supreme Court censured a judge for (1) failing to take sufficient care to ensure that her name was not used in an improper manner in an invitation to a fund-raising event for a non-profit organization and other materials related to the event and to ensure that the tax exempt status of the organization was correctly identified; (2) failing to ensure that the annual reports for a non-profit organization of which she was the chair were filed as required by statute; and (3) flipping a coin to decide where children involved in a custody dispute should spend Christmas. *In re Brown*, 662 N.W.2d 733 (Michigan 2003).

The judge is the founder and chair of the board of trustees of the Coalition for Family Preservation, a Michigan non-profit corporation. A law firm held a golf outing that was a fundraiser for the organization. The law firm had presented invitations for the event to the judge by delivering them to her staff. The invitations stated that the judge was sponsoring the event and identified the Coalition as a “501(c)(3) non-profit organization,” although it did not yet have that status under the Internal Revenue Code. The program, a sign posted at the event

recognizing donors, and a handout identifying the prizes prominently identified the judge as the “Coalition Founder” and also erroneously stated that the Coalition had received 501(c)(3) status.

The Commission found that the judge had failed to take sufficient care to review all materials distributed in connection with the golf outing to ensure that her name was not used in an improper manner and that the tax exempt status of the Coalition was correctly identified and had failed to take action to revise the invitation.

The Commission also found that, as of October 1, 2002, the Coalition had not filed annual reports for 2000, 2001, and 2002 with the state as required by statute. As a consequence, the Coalition had been dissolved on October 1, 2002.

By consenting to the recommendation, the judge agreed not to reactivate the Coalition or to incorporate or be an officer or board member of any other charitable organizations, participating in any charitable fund-raising, and lending her name to assist in the solicitation of funds for any charitable organizations. The recommendation stated that the judge was not precluded from contributing her time or money to a charitable organization. Noting that the judge had volunteered to refrain from participating in charitable activities that would otherwise be well within those allowed by the code of judicial conduct, the court stated its adoption of the Commission’s findings and conclusions “should not be interpreted in any way as discouraging members of the judiciary from participating in civic and charitable activities in conformance with Canon 5B of the Code of Judicial Conduct, such as forming a civic or charitable organization, serving on the board of directors of such an organization, or attending a charity fundraiser.”

Flipping a coin

The judge had been assigned to a divorce case in which one of the issues was the custody of two minor children. After the mother moved out of the state, custody was temporarily awarded to the maternal grandparents, as the father could not provide a suitable residence for the children and was working a midnight shift. On December 14, 2001, the maternal grandparents and the father, both with counsel, appeared before the judge for an evidentiary hearing to determine if the house purchased by the father was a suitable residence for the children and to confirm that the father had begun working a day shift. During the hearing, the attorney for the grandparents raised the issue of where the children would spend the Christmas holidays. Counsel for the parties noted that there were conflicts in the judgment of divorce and a subsequent order, that clouded the issue.

The judge encouraged the parties to resolve the matter themselves, but when they were unable to agree and each side had equally compelling arguments, she told the parties it was nothing more than a coin flip. Although the grandparents’ attorney and the father protested, the judge produced a coin, allowed the father to call heads or tails, and flipped it. The father called heads, which is what appeared on the coin, and the judge ordered that the children would spend Christmas Eve with the father. 

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