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Providing Recommendations Regarding Judicial Appointments

by Cynthia Gray

A judge may provide a recommendation for a person being considered for appointment to judicial office.

- A judge may write a letter of support regarding a potential judicial nominee to a nominating commission and may respond either orally or in writing to inquiries from members of the commission or from the governor (*Arizona Advisory Opinion 87-1*).
- A judge may act as a reference and furnish a letter of recommendation for a person seeking a federal judgeship (*Illinois Advisory*

Opinion 93-9).

- A judge may respond to any inquiry from an appointing official or committee as to the character and fitness of a candidate for the judiciary (*South Carolina Advisory Opinion 9-1989*).

But see Maryland Advisory Opinion 120 (1989) (judges of a circuit court, acting in concert, may not submit to a judicial nominating commission their evaluations of whether applicants were “qualified,” “highly qualified,” or “unqualified”).

In some jurisdictions, a judge can provide a recommendation only upon

the request of the nominating or appointing authority.

- A judge may submit a letter of reference or recommendation for a candidate for appointment to judicial office only if the judge is formally requested to do so by the appointing authority (*Nevada Advisory Opinion 98-6*).
- A judge may respond to inquiries from the executive or legislative branches about attorneys being considered for judicial posts if the inquirer has official responsibilities in the matter (*New Jersey*

(continued on page 4)

Setback to Fair Judicial Campaigns in Michigan

by Cynthia Gray

Reviewing a recommendation of the Judicial Tenure Commission that a judge be suspended 90 days without pay for misleading ads used during his election campaign, the Michigan Supreme Court held that a code provision prohibiting misleading judicial campaign ads was facially unconstitutional and narrowed the canon to prohibit candidates only from knowingly or reck-

lessly using forms of public communication that are false. *In re Chmura*, 608 N.W.2d 31 (Michigan 2000).

The Commission recommendation

Stating that it “would not be inclined to find misconduct on the basis of an insignificant isolated campaign statement or understandable inadvertence,” the Commission had found that the judge’s “campaign literature, indi-

vidually and as a whole, reveals beyond any reasonable doubt a conscious effort to use false, fraudulent, misleading and deceptive statements as part and parcel of his campaign strategy.” *Complaint against Chmura*, No. 56, Decision and recommendation for order and discipline (Michigan Judicial Tenure Commission August 2, 1999). Noting that the

(continued on page 2)

Setback to Fair Judicial Campaigns in Michigan *(continued from page 1)*

materials covered a broad spectrum of issues and were consistently untruthful, the Commission found that the judge's campaign "doubtless had a negative impact on his opponent, the other court employees, and the . . . court environment." The Commission noted that the judge's campaign drew criticism from the president of the county bar association about "sleazy politics" and the "racial overtones" of the judge's ads and that both the county and state bar associations had set up programs to monitor judicial campaigns and prevent the recurrence of activities characterized by the judge's campaign.

With respect to ads criticizing his opponent, the Commission stated that the judge "was obligated to verify the correctness of information" and "any failure or willful refusal to do so was no excuse." The Commission found that the judge "deliberately chose to withhold clarifying information from the public which would have made the information given not false or misleading." Rejecting the judge's claim that his campaign ads were a justified reply to his opponent's campaign, the Commission stated that even if his opponent's ads were improper, "misconduct by another judicial candidate would not justify improper campaign conduct."

One of the ads condemned by the Commission depicted former Detroit Mayor Coleman Young as a Robin Hood-like character carrying a sack of money and stated "Coleman Young and the Lansing crowd cooked up a plan" to steal the tax dollars of Warren and Center Line property owners and spend them on the Detroit school system. However, the Commission found there was no credible evidence that Coleman Young planned, drafted, or even actively supported the property tax base sharing legislation.

Moreover, the Commission noted that, under the legislation, tax dollars from Warren and Center Line property owners would not go to Detroit but to other districts in their region. The Commission also concluded that the judge's "use of 'buzz words' such as 'stole' had no purpose other than to mislead the public in a prejudicial manner," that there was no justifiable explanation for the caricature of Mayor Young as Robin Hood carrying a sack of money, and that the judge used the caricature to appeal to racist attitudes.

The ad also described the judge as "standing up" to Young before becoming a judge and taking the state to court, "arguing one appeal after another until the state backed down and allowed your kids to benefit from your hard earned tax dollars." The Commission noted that the judge was not a party but merely acted as counsel for the plaintiffs in the challenge brought to the legislation and that the judge's activities as an attorney were in the trial court, not on appeal. Further, the Commission found that neither Young nor the Detroit school district were parties to the suit, the state intervened in the suit brought by the judge, and the legislation was repealed.

The court's decisions

At the time of the judge's campaign, Canon 7B(1)(d) of the Michigan code of judicial conduct provided that a judicial candidate:

should not use or participate in the use of any form of public communication that the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading, or which is likely to create an unjustified expectation about results the candidate can achieve.

The court claimed that it was one of the few state high courts to adopt broad restrictions on campaign speech by candidates for judicial office. The court acknowledged that the canon serves the compelling state interests of preventing fraud and libel, preserving the integrity of the election process from distortions caused by false statements, preserving the integrity of the judiciary, and preserving public confidence in the judiciary.

However, finding that the canon "greatly chills debate regarding the qualifications of candidates for judicial office," the court noted it applied to all misleading statements and factual omissions, not merely those that bear on the impartiality of the judiciary or are false.

Concluding that to avoid the risk of discipline, "a judicial candidate will merely state academic credentials, professional experience, and endorsements received," the court stated that the canon precludes meaningful debate "concerning the overall direction of the courts and the role of individual judges in contributing to that direction," impeding "the public's ability to influence the direction of the courts through the electoral process." The court concluded that "the preferred First Amendment remedy for misstatements and misrepresentations during the campaign is to encourage speech, not stifle it."

However, rejecting as inappropriate the subjective "actual malice" standard employed in defamation cases, the court held that the determination whether a candidate recklessly disregarded the truth or falsity of a public communication is an objective one. The court remanded the case to the Commission for a determination whether the judge violated the narrowed canon and, if so, for a new recommendation regarding the level of discipline.

Analysis

The Michigan Supreme Court's decision in *Chmura* incorrectly applied the law and policy considerations, as described in an op ed written by the American Judicature Society and published in the *Detroit Free Press*, on April 27, 2000. The analysis from the op ed is reproduced below:

The court's decision that candidates have a right to knowingly make misleading statements during their election campaigns is a disservice to the citizens of the state, both as voters and as users of the court system. Contrary to the court's analysis, the rule the court overturned did not prohibit judicial candidates from candidly debating their ideas about judicial organization, administration, and reform. By definition, ideas and opinions cannot be misleading, and, therefore, by its terms, the rule did not apply to such debate. Moreover, the rule allowed discipline only if a candidate knew or reasonably should have known a statement was misleading and, therefore, did not punish inadvertent mistakes. Before the court's decision, a scrupulous candidate intent on proving his or her integrity to the voters had nothing to fear from the rule and could accurately and fairly discuss character, background, and experience. The

court's rejection of the rule eliminates the protection voters in judicial campaigns had against distortions that would mislead them when making their decisions at the polls and against candidates who would knowingly use that tactic to gain votes.

The court puts its trust in corrective speech as the preferred First Amendment remedy for misstatements during a campaign. However, a favorite strategy in political campaigns is to save the most negative advertising for the last few days before voting takes place when the short time remaining before voters decide makes an adequate response impossible. The court's remedy, therefore, leaves opposing candidates and voters vulnerable to last minute attacks and misinformation. Moreover, the court's corrective speech cure means the attacked candidate will have to respond to dishonest advertising with more advertising, particularly television advertising, adding to the already skyrocketing cost of campaigns and the pressures on judicial candidates to raise more money from more lawyers and special interests.

The court was wrong when it stated that the prohibition in the Michigan code was broader than that adopted in most states. Courts and judicial disci-

pline commissions in other states have applied the term "misrepresentations" to prohibit and punish misleading statements and statements that omit material facts in judicial campaigns.

The Michigan Supreme Court lost an opportunity to affirm, as other states have, that, whatever the standards for honesty and candor in campaigns for other offices, the judiciary will impose higher standards on itself both in campaigns for office and on the bench. As the American Judicature Society wrote in its amicus brief to the court, "It is not inconsistent with the First Amendment for the code of judicial conduct to assume that a candidate for judicial office is a reasonably intelligent person capable of communicating with voters in a way that is not false, fraudulent, misleading, or deceptive, particularly as he or she will be required to interpret laws with similar wording when holding that office." By declaring the rule unconstitutional, the court sent a message to the public that judges do not need to have a commitment to the truth that begins with their campaigns for office. If a judicial candidate knowingly misleads voters with half truths, distortions, and unjustified expectations, what kind of judge will he or she be? 

Court Upholds Prohibition on Misrepresentations in Campaigns, Overturns Provision on Maintaining Dignity

In a case challenging the Nevada Code of Judicial Conduct, the United States District Court for the District of Nevada held that the provision of the code prohibiting a candidate from "knowingly misrepresent[ing] the identity, qualifications, present position or other fact concerning the candidate or an opponent" was not overly broad or vague and did not chill political debate. *Mahan v. Judicial Ethics and Election Practices Commission*,

CV-S-98-01663-DAE (March 23, 2000). The court held that the prohibition on knowing misrepresentations gave clear notice to candidates of what speech was prohibited and did not chill political speech because false statements are not protected speech and sanctions were imposed after publication. However, the court held that the provision requiring a candidate to "maintain the dignity appropriate to the judicial office and act in a manner con-

sistent with the integrity and independence of the judiciary" was unconstitutional. The court stated that the requirement that candidates maintain the dignity appropriate to the judicial office imposed imprecise standards that had not been narrowed by opinions of the state supreme court or the agency charged with enforcing them through published decisions, definitions of integrity or dignity, or advisory opinions. 

Providing Recommendations Regarding Judicial Appointments *(continued from page 1)*

Memorandum (June 8, 1982)).

- Unless specifically requested to do so, a judge may not write a reference letter concerning a judicial candidate to the judicial nominating committee or to the appointing authority (*North Dakota Advisory Opinion 92-1*).
- A judge may communicate evaluations of candidates when requested to do so by the appointing authority, which includes the President, Senators, and their selection committees or commissions (*U.S. Advisory Opinion 59* (1979, revised 1998)).

However, in other jurisdictions, a judge can provide a recommendation even if the judge's opinion has not been solicited by the commission.

- A judge may, at the request of an attorney, write a letter to a judicial panel recommending such attorney for appointment to judicial office (*Alabama Advisory Opinion 98-689*).
- A judge may write a letter to the Judicial Council concerning the qualities and abilities of an applicant for a judicial position even if the letter was not solicited by the Council (*Alaska Advisory Opinion 97-1*).
- A judge may initiate correspondence with a judicial nominating commission regarding the qualifications of applicants (*Florida Advisory Opinion 95-24*).
- A judge may send recommendation letters to a screening committee for judicial appointments upon the request of an attorney applying for the position (*Georgia Advisory Opinion 63* (1984)).
- A judge may make a recommendation regarding a candidate for appointment to a judgeship whether the judge's views were asked for or not (*Maryland Advisory Opin-*

ion 83 (1980, revised 1997)).

However, the Maryland advisory committee warned that a "prudent judge would deem it inadvisable" to regularly "give unsolicited advice to those operating the other branches of government" because such conduct "would not entirely comport with the spirit of separation of powers."

The Arizona judicial ethics committee concluded that the proscription in Canon 2B against lending the prestige of judicial office did not prohibit recommendations because the "private interests of others" does not directly or indirectly refer to the judicial selection process. *Arizona Advisory Opinion 87-1* (noting that the rules of the judicial nominating commissions approve comments by judges about applicants). The California advisory committee, however, considered such a recommendation as clearly intended to advance the private interests of the candidate, but concluded that a recommendation was appropriate under the permission Canon 4 gives judges to participate in the improvement of the administration of justice. *California Advisory Opinion 40* (1988). The committee stated, where a judge's letter would offer specific knowledge of the personal and professional qualities pertinent to performance as a judge, a judge is "uniquely able to contribute insight to the judicial selection process and thereby to the administration of justice." The committee also noted that writing such a letter would not cast doubt on the judge's impartiality in hearing any issue. The U.S. judicial ethics committee reasoned that:

[T]he cautions] against lending the prestige of office to advance private interests [in Canon 2B] are consistent with judges providing their evaluations and recommendations, when asked, based on their insight and experience to the end that the public interest in a judiciary of quality and integrity be realized.

U.S. Advisory Opinion 59 (1979, revised 1998). A recommendation submitted in the judicial selection process does not violate the code of judicial conduct's limits on a judge engaging in political activity because the judicial appointments process is designed to be as "nonpolitical" as possible and a letter of recommendation cannot be "analogized" to active political activity. *Maryland Advisory Opinion 83* (1980).

Commentary added in 1990 to Canon 2B of the model code provides that a judge may cooperate with appointing authorities by:

- responding to official inquiries concerning a person being considered for a judgeship, and
- providing names of potential candidates to appointing authorities and screening committees seeking names for consideration.

The California code specifically allows judges to "respond to judicial selection inquiries, provide recommendations, including a general character reference, relating to the evaluation of persons being considered for a judgeship, and otherwise participate in the process of judicial selection."

Several opinions supply guidance regarding the way in which a judge should communicate any recommendation or evaluation in the judicial selection process. As in all recommendations, the judge must have personal knowledge of the person being recommended. Further advice restricts the type of opinion a judge may convey; the judge's recommendation:

- "should be and should appear to be directed only to factors relevant to performance of the judicial office" (*U.S. Advisory Opinion 59* (1979, revised 1998));
- must address those qualities that relate to the criteria used by the nominating commission in evalu-



The 17th National College on Judicial Conduct and Ethics

The 17th National College on Judicial Conduct and Ethics will be held October 26-28, 2000, in Chicago, Illinois, at the Wyndham Chicago. The College, sponsored by the American Judicature Society's Center for Judicial Conduct Organizations, provides a forum for members and staff of judicial conduct commissions, judges, judicial educators, and others interested in judicial ethics to exchange experiences and discuss solutions to their common problems.

The 17th National College will begin with a reception on Thursday, October 26, from 5:30 to 6:30. It will end at noon on Saturday, October 28. Conference materials will be available at registration from 2:00 p.m. to 6:00 p.m. on Thursday.

In six one-and-a-half hour sessions on Friday and on a Saturday morning, 12 topics will be addressed in concurrent workshops directed by a faculty of experts. Topics include: **The Appearance of Impropriety, Bifurcated Judicial Discipline Systems, Conditions as Part of a Sanction, Confi-**

dentiality, Current Issues in Community Activities, Disqualification, Issues for New Commission Members, Judicial Campaign Oversight, Judicial Ethics Advisory Opinion Procedures, Judicial Independence and Judicial Discipline, The Role of Public Members, and Sanctions.

The \$250 registration fee includes one set of conference resource materials, the reception (with a cash bar) on Thursday, Friday luncheon, and two continental breakfasts. A confirmation will be sent to registrants, and a certificate of attendance will be provided at the College.

The Wyndham Chicago has reserved a block of rooms for College participants at \$169 a night, plus 14.9% occupancy tax. Reservations at the hotel must be made by **September 25, 2000.**

If you have any questions, contact Clara Wells at 312-558-6900 ext. 103 or cwells@ajs.org.

Concurrent Workshop Topics

The Appearance of Impropriety

This session will analyze cases in which judges have been disciplined for creating an appearance of impropriety and develop an analysis that will try to solve what the Alaska Supreme Court has characterized as the "special problems" that the standard can raise for judicial discipline.

Cynthia Gray, Director, Center for Judicial Conduct Organizations

Steven Scheckman, Special Counsel, Judiciary Commission of Louisiana

Bifurcated Judicial Discipline Systems

Describing the variations on bifurcated judicial discipline proceedings established in 12 states, this session will examine the rationale for and benefits and disadvantages of each system.

Margaret Childers, Executive Secretary, Alabama Judicial Inquiry Commission

Judge Frank Kaney, Member, Florida, Judicial Qualifications Commission

Kathy D. Twine, Executive Director & General Counsel, Illinois Judicial Inquiry Board

Conditions as Part of a Sanction

This session will explore options for remedial and corrective actions in judicial discipline proceedings such as requiring that a judge take diversity or anger management training, write a letter of apology, or get a mentor. The circumstances under which such conditions would be helpful, problems that may arise in monitoring or enforcing those conditions, and other issues will be discussed.

Reiko Callner, Investigator, Washington Commission on Judicial Conduct

Linzy Waters, Executive Director, Waters & Associates

Confidentiality

Paying particular attention to recent changes, this session will compare the current state rules on confidentiality in judicial discipline proceedings. Participants will examine the cases challenging confidentiality rules and the evidence supporting the justifications given for confidentiality at each step in the process.

James C. Alexander, Executive Director, Wisconsin Judicial Commission

Cynthia Gray, Director, Center for Judicial Conduct Organizations



COLLEGE REGISTRATION FORM

October 26-28, 2000

17th National College on Judicial Conduct and Ethics
Wyndham Chicago

Name: _____

Title: _____

Address: _____

City _____ State _____ Zip _____

Organization you represent _____

Telephone _____ Fax _____

Check if you are a new member of a conduct commission.

Check if you are a public member of a conduct commission.

Registration fee is not refundable unless cancellation is received prior to **October 13, 2000**. Fee includes one set of conference resource materials, a certificate of attendance, the reception, luncheon on Friday, and two continental breakfasts.

Registration Fee: \$250 per person

\$ _____

Please check the appropriate box(es)

I plan to attend the reception Thursday, Oct. 26

I will be bringing a guest to the reception

I plan to attend the luncheon Friday, Oct. 27

I will be bringing a guest to the luncheon Friday, Oct. 27

(Guest tickets \$40 each)

\$ _____

TOTAL Enclosed:

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Please make check or money order payable to: American Judicature Society

Charge my Visa MasterCard

Card Number _____ Exp. date _____

Signature _____

Return College registration form with your payment to:
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180 N. Michigan Avenue, Suite 600,
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Attention: Clara Wells 312-558-6900 x103; fax 312-558-9175

**Hotel registration form
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Name of Group: American Judicature Society
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October 26-28, 2000

Name: _____

Title: _____

Address: _____

City _____ State _____ Zip _____

Organization you represent _____

Sharing hotel room with _____

Type of Room Required	<i>Check-in 3:00 p.m.</i> Arrival	<i>Check-out 12:00 noon</i> Departure
<input type="checkbox"/> 1 person \$169 + 14.9% tax	Month _____	Month _____
<input type="checkbox"/> 2 persons, 1 bed \$169 + 14.9% tax	Day _____	Day _____
<input type="checkbox"/> Please check if you request a non-smoking room.		
<input type="checkbox"/> Please check if you require special facilities in accordance with the American with Disabilities Act.		

Reservations must be guaranteed by a credit card or a deposit of first night's room and tax. Reservations must be cancelled 24 hours prior to arrival date or the first night's stay will be charged.

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Number _____ Exp. Date: _____

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Deposit check enclosed.

Space is limited. Please make reservation as soon as possible. **After September 25, 2000**, reservations will be accepted on a space available basis only.

To: Wyndham Chicago,
633 North St. Clair Street
Chicago, IL 60611
(800) Wyndham or (312) 573-0300
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Current Issues in Community Activities

May a judge write a letter asking attorneys to perform pro bono work? May a judge be a member of a fund-raising committee? May a judge participate in a police ride-along? These and similar issues relating to a judge's involvement in the community will be discussed in this session. Participants will also consider whether the code should be amended to change or clarify what is and is not allowed.

Judge Michael E. Keasler, Court of Criminal Appeals, Austin, Texas

Judge Scott J. Silverman, Circuit Court, Miami, Florida

Disqualification

Looking at case law and advisory opinions, this session will apply the standard requiring disqualification "when a judge's impartiality might reasonably be questioned" and consider whether additional specific grounds for recusal should be added to the code of judicial conduct. When disclosure is required or appropriate will also be examined.

Leslie W. Abramson, Professor of Law, Louis D. Brandeis School of Law, University of Louisville

Marla N. Greenstein, Executive Director, Alaska Commission on Judicial Conduct

Judge Michael J. Malone, Administrative Judge and District Court Judge, Lawrence, Kansas

Issues for New Commission Members

This session will give new members of judicial conduct organizations an opportunity to gain useful information that will help them develop confidence in carrying out their duties. Topics will include an overview of judicial ethics, a discussion of the judicial discipline process, and guidelines for determining what constitutes misconduct.

James Badami, Executive Director, Arkansas Judicial Discipline & Disability Commission

Luther T. Brantley, III, Executive Director, Mississippi Commission on Judicial Performance

Judicial Campaign Oversight

This session will describe the programs that have been established to prevent unfair judicial election campaign tactics and the experience of those states that have adopted procedures to respond expeditiously to complaints. Ideas for planning and implementing such programs will be discussed.

Thomas K. Byerley, Regulation Counsel, State Bar of Michigan

Cheryl Fisher Custer, Director, Georgia Judicial Qualifications Commission

Judicial Ethics Advisory Opinion Procedures

What are effective formats for judicial ethics advisory opinions? How should opinions be distributed and published? Participants will share how they have solved these and similar issues in their states.

Judge Scott J. Silverman, Circuit Court, Miami, Florida

Judicial Independence and Judicial Discipline

Using several recent cases as background, participants will discuss the argument that judicial discipline proceedings can be a threat to judicial independence. As examples, the session will examine the charges brought against an appellate judge who filed a dissent refusing to follow binding precedent and the removal of a judge following a complaint filed by a prosecutor who disagreed with the judge's decisions in cases unrelated to the charges.

Judge David M. Rothman (retired), Los Angeles, California

Jeffrey M. Shaman, Professor, DePaul University College of Law

Gerald Stern, Administrator, New York State Commission on Judicial Conduct

The Role of Public Members

Participants will share their experiences as public members of judicial conduct commissions and discuss what impact their perspective has on commission deliberations, commissioner training and qualifications, and the perception of the commission by the public and judges.

L. Scott Mann, Member, Texas State Commission on Judicial Conduct

Michael M. Robinson, Member, Pennsylvania Judicial Conduct Board

Margarett E. Steele, Member, Mississippi Commission on Judicial Performance

Sanctions

In the context of recent judicial discipline cases, sanctions criteria will be discussed and how to ensure consistency in sanction decisions will be debated. Everyone will be encouraged to participate.

Judge J. Patrick Brazil, Member, Kansas Commission on Judicial Qualifications

Victoria B. Henley, Director-Chief Counsel, California Commission on Judicial Performance

ating applicants (*Alaska Advisory Opinion 97-1*);

- must be “objective and informative” (*U.S. Advisory Opinion 59* (1979, revised 1998)); and
- must be “factual, evenhanded, succinct and discreet” (*Florida Advisory Opinion 88-1*).

In addition:

- the judge’s letter of support must remain “private” (*Arizona Advisory Opinion 87-1*), and
- the judge should not lend his or her name to any publicity campaign for any candidate (*U.S. Advisory Opinion 59* (1979, revised 1998)).

To avoid crossing the “fine line between recommending a person for candidacy in order to insure the quality and integrity of the judiciary and using a judicial position to advance the private interests of others” (*South Carolina Advisory Opinion 9-1989*), a judge “should avoid pleading for a

candidate of the judge’s choosing in opposition to others under consideration.” *U.S. Advisory Opinion 59* (1979, revised 1998). See also *Florida Advisory Opinion 95-24*. Some advisory committees distinguish between recommendations made to nominating commissions and those made to appointing authorities. The Kansas judicial ethics committee, for example, stated that a judge may write a letter addressed to the supreme court nominating commission stating that he or she believes a potential nominee is qualified to fill a vacancy (*Kansas Advisory Opinion JE-40*) but may not write a letter addressed to the governor, who is the appointing authority, endorsing one of three candidates recommended for a judicial vacancy (*Kansas Advisory Opinion JE-27*) or to the President or members of Congress supporting or endorsing the appointment of a potential nominee to the federal judiciary (*Kansas Advisory*

Opinion JE-45). Similarly, the Alaska advisory committee stated that sending an unsolicited letter to the governor is improper because the “Governor’s role in the selection process is political and any written unsolicited comments regarding the selection could be viewed as political.” *Alaska Advisory Opinion 97-1*. Other states, however, do not draw that distinction. See *Florida Advisory Opinion 98-1* (a judge may communicate a statement in support of, or in opposition to, a person whose appointment is pending before the governor); *Maryland Advisory Opinion 83* (1980, revised 1997) (a judge may give his or her views concerning applicants for a judgeship to those who may be in a position to recommend appointments to the governor). 

*AJS has links on its web-site (www.ajs.org/ethics11.html) to judicial ethics advisory opinions from Alabama, Alaska, Arizona, Delaware, Florida, Georgia, Illinois, Indiana, Michigan, Nevada, Tennessee, Texas, Utah, Virginia, and Washington.

Judge Sanctioned for Unauthorized Letter and Hearing after Observing Reckless Driving

The Ohio Supreme Court suspended from the practice of law for six months a judge who, after observing a car being operated erratically, had written the owner a letter on court stationery telling her to contact the court and held an inquisitory hearing without legal authority. *Office of Disciplinary Counsel v. Hoague*, 725 N.E.2d 1108 (2000). The court stayed the entire six months suspension provided the judge engages in no further violations.

The judge was driving his car with his wife and mother-in-law as passengers when he observed an automobile being operated recklessly. The judge contacted the state highway patrol and the local police by his cell phone and noted the car’s license plate number. The next day, after ascertaining that the car was registered in

the name of Jenny Panescu, the judge sent a letter to Panescu on court letterhead that stated that a complaint had been made and informed her that if she failed to contact the court, the judge would “authorize the filing of any appropriate criminal and/or traffic charges, the seizure and impoundment of your motor vehicle and the issuance of a warrant for your arrest.” When Panescu and Russ Brown, who had been driving the vehicle, appeared in the judge’s court, the judge threatened criminal prosecution and stated: “You can say whatever you want, but at this point in time you had probably best shut your mouth until I’m finished talking, okay?” The judge also said he would make sure the sheriff’s office has “a fuller picture of what actually happened” and would have a discussion with their employer about their driving habits. Later that afternoon,

the judge placed a telephone call to Panescu and Brown’s employer but was unable to contact him.

The court held that the judge misused the authority of his office in an attempt to achieve his personal goal of reprimanding persons he believed were guilty of reckless driving. Noting that a judge who observes a crime outside the courtroom has only the power of an ordinary citizen, the court stated that the judge’s proper course would have been to file charges against Panescu and Brown. The court also found that the judge’s official-sounding jargon in the letter and the threat of impounding Panescu’s automobile constituted intimidating language. The court found that neither writing the letter nor holding the hearing was within the bounds of his legal authority. 

Evaluating Attorneys

Most opinions on the issue have advised that a judge may express a professional evaluation or opinion of a practicing attorney for use by Martindale-Hubbell or a similar legal rating periodical even where the attorney appears before the judge on a frequent basis, provided the evaluation will remain confidential and will not be used to create the impression that a judge endorses a particular lawyer. *Alabama Advisory Opinion 92-448*; *Alabama Advisory Opinion 83-180*; *Florida Advisory Opinion 73-15*; *Maryland Advisory Opinion 56* (1977); *Nebraska Advisory Opinion 91-1*; *New York Advisory Opinion 89-119*; *Pennsylvania Advisory Opinion 21* (1976). Noting that the Martindale-Hubbell directory prominently explains that the ratings are based upon confidential recommendations from lawyers and judges in the city or area where the lawyer practices, the Maryland advisory committee concluded a judge responding to a request to rate an attorney would “be one of many unnamed judges from unnamed courts

playing a role in rating lawyers, which role will never be fully disclosed.”

However, in New Jersey, such evaluations are not permitted. There, a 1982 memorandum, noting a directive of many years’ standing, stated that a judge may not make a confidential rating for Martindale-Hubbell as to the legal capabilities and professional integrity of practicing attorneys. *New Jersey Memorandum* (June 8, 1982).

Advisory committees have also stated that a judge may provide a reference for an attorney in connection with proceedings to certify the attorney as a specialist in an area of law, as long as the reference is confidential.

- A judge may give a confidential certificate of reference to members of the bar applying for certification under the Florida Bar Designation Plan (*Florida Advisory Opinion 78-24*).
- A judge may act as reference in the process of an attorney’s certification by a professional board where the evaluation will remain

confidential (*Nebraska Advisory Opinion 94-2*).

- A judge may be listed as a reference by an attorney seeking state trial certification or National Board of Trial Advocates certification and may respond on the form provided (*New Jersey Memorandum* (June 8, 1982)).
- A judge may make a confidential written statement of recommendation for an applicant seeking certification as an attorney specialist when requested to do so by a certifying agency even if the applicant appears before the judge or hearing officer (*Ohio Advisory Opinion 98-4*).

But see U.S. Compendium of Selected Opinions §2.1(h) (1995) (a judge should not submit a letter of recommendation for an attorney applying for certification by a bankruptcy board where recommendation by a bankruptcy judge is a *sine qua non* for certification). 

Judge Reprimanded for Accepting Baseball Tickets From Attorneys

Approving a stipulation between the Judicial Qualifications Commission and a judge, the Florida Supreme Court publicly reprimanded the judge for accepting free tickets to Florida Marlins baseball games from two members of a law firm whose lawyers appeared before him in at least two

cases. *Inquiry Concerning Luzzo*, No. SC00-197 (May 4, 2000). The court commanded the judge to appear before the court for administration of the reprimand. On approximately 15 to 17 occasions from 1994 through 1997, the judge had accepted free tickets to the Florida Marlins’ baseball games from two members of a

law firm. The face value of the baseball tickets were \$16 to \$18 apiece. The Commission found that during the period that the judge received the tickets, lawyers from the law firm were not only likely to appear before the judge, but actually were before him in at least two cases. 

Judge Removed for Ethnic Slurs, Attempts to Influence Dispositions

Accepting the determination of the Commission on Judicial Conduct, the New York Court of Appeals removed a judge from office for (1) making derogatory racial remarks about a crime victim in an attempt to induce a plea offer, (2) displaying intemperate behavior and pressing a prosecutor to offer a plea for the judge's own personal convenience, (3) making disparaging remarks about Italian-Americans, and (4) testifying at a proceeding with reckless disregard for the truth. *In the Matter of Mulroy* (New York Court of Appeals April 6, 2000). Rejecting the judge's contention that the sanction of removal was excessive in light of his "12-year unblemished" record, the court noted the cumulative, serious judicial misconduct and concluded that the judge's record could not excuse racial epithets and ethnic slurs in official and quasi-official contexts, attempts to influence dispositions, intemperate behavior, and false testimony.

The night before the judge was scheduled to preside at a pre-trial conference in the cases of four defendants charged with murder and robbery of a 67-year-old African-American woman in her home, the judge attended a dinner at a country club. At the dinner, the judge told the pros-

ecutor in the case that the district attorney's office should be "reasonable" in its plea offers to two of the defendants because the judge did not want all four cases to go to trial. The judge told the prosecutor not to worry that, if it made reasonable offers to two of the defendants, it would appear to be "giving away" the cases, because no one cared what happened to "some old nigger bitch."

The court found that those "words, as well as the context in which they were uttered, are indefensible" and that the judge's "racially-charged assessment of the case not only devalued the victim's life but also cast doubt on the integrity and impartiality of the judiciary and, by itself, puts into question [the judge's] fitness to hold judicial office." The court rejected the judge's "rationalized version of the remarks," which was that he was attempting to alleviate the prosecutor's concerns about having to offer a plea to a co-defendant in exchange for his cooperation.

Concluding that the judge's disparaging remarks were not isolated, the court noted that while at a charity dinner, the judge stated "You know how you Italian types are with your Mafia connections" to the county district attorney, an Italian-American. The district attorney, in response to the

judge's complaints about having to run against an opponent, had stated, "some of us have to run for office and others get it handed to them on a silver platter." The judge also admitted to having made similar ethnically-charged comments to his opponent during an election campaign. The court rejected the judge's excuse that the district attorney had provoked the attack and that the attack was nothing more than private banter, noting that such language, "whether provoked or in jest, manifested an impermissible bias that threatens public confidence in the judiciary."

Fearing protracted jury deliberations in a rape case held in Utica, the judge declared that he detested Utica and wished to return to Syracuse because it was "men's night out." He accused the prosecutor of "overcharg[ing]" the case and pressed her to offer a plea to a misdemeanor charge so that he could "get out of this fucking black hole of Utica," threatening to declare a mistrial if she refused. The judge conceded that he failed to act in a dignified and courteous manner, but denied any attempt to coerce a plea offer and maintained that his "banter" reflected his concern over a possible error at trial. The court rejected those arguments. The court also stated, the harm inured when the judge indicated he would use his judicial powers to satisfy a personal interest, "a classic instance in which 'an appearance of such impropriety is no less to be condemned than is the impropriety itself.'"

The court also held that the evidence demonstrated that the judge had testified during criminal proceedings that he had discussed the defendant with two named attorneys when, in fact, he had not. 

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17th National College on Judicial Conduct and Ethics

**Chicago, Illinois
October 26-28, 2000**

The Center for Judicial Conduct Organizations will hold its 17th National College on Judicial Conduct and Ethics on October 26-28, 2000, at the Wyndham Chicago, 633 St. Clair, Chicago, Illinois. The hotel is on Chicago's Magnificent Mile, just one block east of Michigan Avenue. Registration for the College will be \$250. The rate for rooms will be \$169 a night, plus tax.

For further information, see inside this issue of the *Judicial Conduct Reporter*.

Inside this Issue:

- Providing Recommendations Regarding Judicial Appointments
- Evaluating Attorneys
- Setback to Fair Judicial Campaigns in Michigan
- Court Upholds Prohibition on Misrepresentations in Campaigns, Overturns Provision on Maintaining Dignity
- Judge Removed for Ethnic Slurs, Attempts to Influence Dispositions
- Judge Sanctioned for Unauthorized Letter and Hearing after Observing Reckless Driving