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The Resign-to-Run Rule *by Cynthia Gray*

Canon 5C(2) of the American Bar Association Model Code of Judicial Conduct provides that “a judge shall resign from judicial office upon becoming a candidate for a nonjudicial office either in a primary or in a general election . . .” All states except California and Georgia have adopted a similar resign-to-run requirement.

The rationale for the rule was described in a federal case upholding the Louisiana canon against a 1st Amendment challenge by a judge who

wanted to run for mayor. The United States Court of Appeals for the 5th Circuit acknowledged that “relegating one’s robes to the closet is a heavy price to pay for tossing one’s hat in the ring.” *Morial v. Judiciary Commission of Louisiana*, 565 F.2d 295 (5th Circuit 1977). However, the court concluded:

By requiring a judge to resign at the moment that he becomes a candidate, the state insures that the judge will not be in a position to abuse his office during the campaign by using it to promote his candidacy. The appearance of abuse which might

enshroud even an upright judge’s decisions during the course of a hard-fought election campaign is also dissipated by requiring the judge to resign. He who does not hold the powers of the office cannot abuse them or even be thought to abuse them.

Moreover, the court agreed that the resignation requirement is necessary to prevent post-campaign abuse or its appearance. The court concluded that a leave of absence for the duration of the campaign would not effectively pre-

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Equal Treatment of Pro Se Litigants *by Cynthia Gray*

Judges are required to treat self-represented litigants fairly and are prohibited from placing self-represented litigants at a disadvantage other than whatever disadvantage arises from proceeding without the assistance of counsel. Unfortunately, there are many judicial discipline cases that indicate some judges have used the absence of an attorney to take advantage of self-represented litigants in blatantly unfair proceedings.

For example, in *In the Matter of Walsh*, 587 S.E.2d 356 (South Carolina 2003), the judge established two special procedures for unrepresented litigants in criminal cases. In one procedure, the judge required

unrepresented defendants who requested jury trials to appear and answer a “jury trial roll call” once a week, even when no jury trials were scheduled, until their cases were disposed of or they got an attorney. Some defendants had to travel long distances and be absent from their jobs to attend the weekly roll calls; at least three defendants who did not appear were tried and convicted in their absence. The judge maintained that the purpose of the roll calls was to “keep track” of defendants, noting that, while awaiting roll call, many defendants determined that the judge was fair and withdrew their requests for a jury trial. During the disciplinary proceedings, the judge

recognized that the procedure deterred persons from exercising their right to a jury trial and that it was inappropriate to treat defendants without attorneys different from those with attorneys.

In the second procedure, prior to a jury trial, unrepresented defendants were served with subpoenas requiring that they attend pre-trial conferences to enter into plea discussions with the prosecutor. The court noted that the judge came to recognize that this arrangement suggested a bias toward the state.

In a recent case from South Carolina, the judge acknowledged in

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Recent Judicial Ethics Advisory Opinions

 Pursuant to an administrative order, information obtained by court personnel may be communicated ex parte to a judge at meetings of the drug court treatment team or during court appearances, but the defendant's attorney should be informed of the content and nature of those communications. *New York Opinion 04-88*.

 A judge may serve as a director of a non-profit corporation formed to solicit funds from the community to provide incentives for drug court participants as long as the judge's participation does not involve active or passive fund-raising activity. *Maryland Opinion 05-11*.

 At a press conference announcing the creation of a drug court, a judge may provide relevant information about the existence of the drug court and introduce the members of the drug court as long as the judge does not offer other comments or answer questions. *South Carolina Opinion 14-05*.

 Where all parties have consented, a judge may attend a joint federal-state product litigation coordination conference to discuss administrative issues associated with over 200 products liability cases involving the same product. *Oklahoma Opinion 02-8*.

 A judge should not access a national crime information center program to run criminal histories on parties who may appear before the judge. *South Carolina Opinion 1-05*.

 A judge who was the victim of a crime may not contact the judge presiding over the case to convey information about other criminal acts allegedly committed by the defendant. *New York Opinion 05-71*.

 A judge may not establish a legal defense fund to pay legal

expenses incurred in connection with a determination by the State Commission on Judicial Conduct and the review of that determination by the Court of Appeals. *New York Opinion 03-12*.

 Whether a judge may sit on the board of directors of a homeowners association should be determined on a case-by-case basis depending on the size of the association and whether the duties are routine and primarily internal or entail substantial business-type contacts with outside enterprises. *Colorado Opinion 05-3*.

 A judge may appear and speak at a zoning board or other governmental meeting and take appropriate action in opposition to a developer's request to change the zoning of a large tract of land approximately one block from the judge's home. *Kansas Opinion JE-125 (2005)*.

 A judge, in preparation for retirement, may seek future employment with law firms, governmental agencies, or educational institutions, but must refrain from using official stationery or resources. Any communication to prospective employers may mention the judge's current position and experience, but the judge should recuse from matters in which an employer to which the judge has applied or intends to apply appears as either counsel or a party. *New York Opinion 05-35*.

 A judge should not permit the judge's statement praising a not-for-profit organization to be used in an informational brochure if the judge would be identified as a judge. *New York Opinion 05-56*.

 A judge may not write a letter to a judge who is sentencing a life-long friend at the request of the

friend's attorney. *Arkansas Opinion 05-1*.

 A judge may write a letter urging members of the bar to donate time to pro bono work but may not refer to a particular pro bono organization. *Kentucky Opinion JE-107 (2005)*.

 A judge may write a reference letter for an attorney seeking admission to a law guardian panel without first being solicited by the appointing authority; address the letter directly to the supervising judge of the panel; express an opinion as to whether the applicant will be a competent law guardian based on the judge's personal knowledge of the requirements of the position and the applicant's qualifications; and use judicial letterhead provided the words "Personal and Unofficial" are noted clearly on the stationery. *New York Opinion 05-29*.

 A judge may write a letter of endorsement for a judge who has applied to a judicial nominating commission for appointment to a judicial vacancy. *New Mexico Opinion 05-3*.

 A judge may attend open houses sponsored by law firms at which there will be hors d'oeuvres and beverages if the open houses are open to practicing attorneys and friends of the firm but may not accept an invitation from a law firm to a complimentary round of golf, including poker, food, refreshments, and prizes. *Kansas Opinion JE-131 (2005)*.

The Center for Judicial Ethics website has links to judicial ethics advisory committees at www.ajs.org/ethics/eth_advis_comm_links.asp.

The Appearance of Favoritism in Appointments

by Cynthia Gray

Canon 3C(4) of the American Bar Association Model Code of Judicial Conduct prohibits favoritism in appointments, requiring a judge to “exercise the power of appointment impartially and on the basis of merit,” and states have adopted similar provisions. While few judicial discipline cases find proof of actual favoritism, several hold that a combination of factors produced the appearance that a judge exercised the power of appointment based on something other than the appointee’s qualifications. An appearance of favoritism “is no less to be condemned than is the impropriety itself.” *In the Matter of Spector*, 392 N.E.2d 552 (New York 1979).

For example, in a case from Alaska, Judge Johnstone appointed as coroner an individual he knew was the friend of the chief justice since the chief justice had suggested him for the position. *In the Matter of Johnstone*, 2 P.3d 1226 (Alaska 2000). Because of the candidate’s connection to the chief justice, the Alaska Supreme Court noted, the judge should have known he had to take special precautions to avoid the appearance of favoritism. (Because the case involved the chief justice, review was by a special supreme court comprised of members of the court of appeals.) Instead, Judge Johnstone went outside the merit selection process he had initiated to

appoint the chief justice’s friend even though the individual had not applied during the application period. Moreover, Judge Johnstone made the appointment based on criterion (legal training and experience) that were not part of the stated qualifications and on terms (a temporary basis) that were significantly different from those advertised to the general public. Noting that the judge initially had no duty to use a merit selection process, the court stated that once he initiated that process, it should have been obvious to him that he could not select an individual from outside the process without

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Political Activity on Behalf of Measures to Improve the Administration of Justice

Under Canon 5C of the American Bar Association Model Code of Judicial Conduct, judges are prohibited from engaging in political activity except as authorized by the code and other laws or “on behalf of measures to improve the law, the legal system or the administration of justice.” Most jurisdictions have a similar provision.

According to the Ohio judicial ethics advisory committee, under this canon, judges may support or oppose a proposed constitutional amendment regarding drug treatment in lieu of incarceration. *Ohio Advisory Opinion 02-3*. They can take a public stand on the amendment in newspaper editorials, appear on radio and television talk shows, make presentations to civic, charitable, and professional organizations, take part in panel discussions

with other elected and non-elected officials at public meetings, and meet with executive or legislative bodies or officials. In those forums, the committee advised, judges may explain the proposed amendment, compare it to current law, and describe its potential impact on the constitution, the law, and the operation of the courts. Further, the committee stated that judges may contribute personal funds to a local or state coalition to support or oppose the proposed amendment.

The Washington judicial ethics committee stated that judges may make a presentation in a public setting about the impact on the court of ballot measures increasing or reducing taxes. *Washington Advisory Opinion 04-4*. However, the committee warned judges against addressing the effect of tax cuts on any governmental services other

than the courts. *See also Washington Advisory Opinion 00-16* (judge may support only portions of security legislation that pertain only to judges).

Other opinions have drawn a similar line on bond measures. Those opinions allow judges to take a public stand in favor of or opposed to a ballot issue in which voters will decide whether to pay to build a new courthouse and jail (*Arkansas Advisory Opinion 94-1*), to build a criminal justice center (*Texas Advisory Opinion 163* (1993)), to fund seismic retrofitting of a courthouse (*Washington Advisory Opinion 00-3*), to construct a new juvenile court facility (*Washington Advisory Opinion 93-32*), or to construct a new county jail (*Oklahoma Advisory Opinion 02-4*). In contrast, other opinions prohibit judicial support of bond issues to funds

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The Resign-to-Run Rule *(continued from page 1)*

vent post-campaign abuse and the standard of reasonable necessity does not require the state to rely entirely on post-campaign measures such as disciplinary proceedings against judges who used their office improperly or strict rules of recusal. The court held that “a requirement that a state judge resign his office prior to becoming a candidate for non-judicial office bears a reasonably necessary relation to the achievement of the state’s interest in preventing the actuality or appearance of judicial impropriety,” without offending either the 1st Amendment’s guarantees of free expression and association or the 14th Amendment’s guarantee of equal protection of the laws.

Similarly, the Maine Supreme Judicial Court concluded that the resign-to-run rule:

rests on a rational predicate and does not violate the guarantees of equal protection, freedom of speech, or freedom of association in either the Maine or United States Constitutions. It rationally seeks to separate a judge’s political, legislative, or executive branch ambitions from the judge’s judicial decision-making to further the objective of maintaining a judiciary that is independent and impartial both in fact and in the public’s perception.

In re Dunleavy, 838 A.2d 338 (Maine 2003). *Accord Matter of Buckson*, 610 A.2d 203 (Delaware 1992). Moreover, the Maine court rejected the judge’s argument that a state statute authorizing a probate judge to run for another elected office without resigning superseded the code of judicial conduct. Thus, the court held that a probate judge had violated the code of judicial conduct by running for the state senate without resigning his judicial position

and rejected the judge’s arguments that the code restrictions were unconstitutional. However, the court imposed no discipline.

The resignation requirement cannot be circumvented by taking a leave of absence from a judicial office to run for a non-judicial office. *New York Advisory Opinion 89-126* (town justice may not take a leave of absence in order to campaign for town supervisor); *South Carolina Advisory Opinion*

The court agreed that the resignation requirement is necessary to prevent post-campaign abuse or its appearance

7-1992 (magistrate cannot simply take a leave of absence, without pay, to become a candidate for a non-judicial office). However, in California, where there is no resign-to-run rule, the state constitution allows a trial judge to “become eligible for election to other public office by taking a leave of absence without pay prior to filing a declaration of candidacy. Acceptance of the public office is a resignation from the office of judge.”

Timing

The resignation requirement is not triggered simply by an intent to run for office (*Florida Advisory Opinion 94-20*), and a judge does not have to resign merely to learn whether he or she has a realistic chance of election to a non-judicial office (*Matter of Buckson*, 610 A.2d 203 (Delaware 1992)). Thus, before resigning, a judge may make preliminary surveys of financial and voter support (*Kentucky Formal Opinion JE-23* (1981); *Louisiana Advisory Opinion 35*) and discuss the possibility of

becoming a candidate with political party members and leaders (*New York Advisory Opinion 91-44*; *New York Advisory Opinion 97-65*; *New York Advisory Opinion 93-55*).

However, a judge must resign when the judge announces the intention to run for a non-judicial office by filing with the county clerk, issuing a press release, or any other method of making a candidacy become generally known. *Kentucky Formal Opinion JE-23* (1981). A judge may not accept campaign funds prior to the start of the campaign for a non-judicial office. *Louisiana Advisory Opinion 35*.

The Delaware Court on the Judiciary found that a judge’s political activity went beyond that of a prospective candidate and censured and removed him for seeking the endorsement of his party convention for the nomination for the office of the governor without first resigning his judicial office. *Matter of Buckson*, 610 A.2d 203 (Delaware 1992). The judge had publicly announced in a press release that he intended to have his “name placed before the Republican Convention to be the gubernatorial nominee for Governor of Delaware.”

The party deserves a choice. This is not partisan politics and, therefore, not in violation of any rules pertaining to the judiciary. When I am the nominee, I will resign my present position and ask the Governor to promptly name a successor acceptable to the Senate.

Based upon the contacts by many people since my November announcement, I have statewide support. My plan is to attend functions of many of the Republican Party organizations to gain delegates to the convention by presenting my qualifications, . . .

* * * * *

Based upon my experience in state government, I am eminently qualified to be Governor of Delaware . . . certainly more so than any person mentioned for the office to date.

So . . . on to the convention! Thanks.

He also attended regional party caucuses and other meetings to gain support. Rejecting the judge's "testing the waters" defense, the court held that the record was clear that he had publicly announced his candidacy and was actively engaged in political activity to secure the nomination.

The Florida advisory committee stated that when a person becomes a candidate may vary from situation to situation depending on the nature of the community. *Florida Advisory Opinion 94-20*. In a large community, the committee advised, telling a few friends should not qualify the judge as a candidate for a non-judicial office, but in a small community, the situation may be perceived differently.

Which offices

The rule does not require a judge to resign before running for a different judicial office. *Kansas Advisory Opinion JE-117* (2004); *Tennessee Advisory Opinion 03-4*; *South Carolina Advisory Opinion 4-1984*; *Oklahoma Advisory Opinion 98-3*.

Moreover, a judge is not required to resign when seeking appointment to a public office and may announce his or her intention to be a candidate for appointment and seek support or endorsement from individuals or organizations. *Ohio Advisory Opinion 98-6*. While seeking the appointment, however, the judge may not personally participate in fund-raising activities or activities that interfere with the diligent and impartial performance of judicial duties and should resign from judicial office before accepting the position if it is offered. *Ohio Advisory Opinion 98-6*.

A judge must resign before seeking election as:

- circuit clerk (*Commission on Judicial Performance v. Ishee*, 627 So. 2d 283 (Mississippi 1993));
- an elected board member of a sanitation district (*Arizona Advisory Opinion 82-1*);
- sheriff (*Florida Advisory Opinion 96-5*);
- the office of county attorney (*Kentucky Informal Opinion JE-18*) or district attorney general (*Tennessee Advisory Opinion 90-5*);
- legislator on the county board (*New York Advisory Opinion 05-14*); or
- a non-partisan regent or trustee of a state university (*South Carolina*

Advisory Opinion 3-1982; Nevada Advisory Opinion 98-1).

The New York State Commission on Judicial Conduct found that a judge should not have run for or served on a school board even if he was unopposed and even if the post was non-partisan. *In the Matter of Vosburgh*, Determination (New York State Commission on Judicial Conduct September 24, 1991) (www.scjc.state.ny.us/). The Commission noted that school board members are often required to take positions on controversial issues other than those related to the law, the legal system, or the administration of justice. The Commission explained:

School board members may be at the center of such controversies and the object of public criticism.

Although the judge states that the school board district is a small part of the jurisdiction of the court, local attention focused on the school board could spread to the rest of the judicial area and to surrounding towns as well. Thus, the judge could be highly visible in educational controversies, which could be inconsistent with judicial duties.

Thus, the Commission admonished a town court justice who served on the local school board and ran for re-election even after he had received an advisory opinion that such service was prohibited. *Cf., Washington Advisory Opinion 85-8* (part-time judge may not become a candidate for an uncompensated non-partisan school board position in a school district outside the municipality in which the judge sits), *with Michigan Advisory Opinion JI-19* (1990) (juvenile court referee may run for election to the public school board if it is located outside the district in which the referee serves). 

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Equal Treatment of Pro Se Litigants *(continued from page 1)*

discipline proceedings that a practice in his court was depriving pro se defendants of the constitutionally guaranteed right to confront their accusers. *In the Matter of Beckham*, 620 S.E.2d 69 (South Carolina 2005). The standard practice in the judge's court allowed a representative of the sheriff's department to appear at bench trials in criminal cases in lieu of the arresting officer and/or complaining witness. If the defendant was not represented by counsel, the sheriff's department representative (who had no first-hand knowledge of the case) testified for the state by reading the information from the incident report. If the defendant was represented by an attorney, the case would be continued until the arresting officer and/or the complaining witness could be present. (The judge was suspended for 60 days without pay for this and other misconduct.)

Failure to respect the rights of unrepresented litigants

Pursuant to the judge's agreement, the California Commission on Judicial Performance publicly censured a judge for nine incidents in which he failed to respect the rights of unrepresented individuals. *Inquiry Concerning Henne*, Decision and Order (California Commission on Judicial Performance October 13, 1999) (cjp.ca.gov). For example, the judge did not allow an unrepresented defendant to cross-examine the police officer in a trial on a speeding ticket, resulting in reversal of the conviction.

The Florida Supreme Court sanctioned a judge who had required employees of a domestic abuse shelter

to submit affidavits swearing that they had not furnished any assistance to pro se petitioners with domestic violence complaints, which chilled the willingness of victims and staff to come forward with legitimate claims and limited the rights of the petitioners. *Inquiry Concerning Shea*, 759 So. 2d 631 (Florida), *cert. denied*, 531 U.S. 826

Abuses of authority in civil cases involving self-represented litigants have also been condemned by judicial discipline authorities.

(2000) (removal for this and other misconduct). *See also, e.g., Inquiry Concerning Graham*, 620 So. 2d 1273 (Florida 1993), *cert. denied*, 510 U.S. 1163 (1994) (removal for, among other misconduct, ordering unrepresented defendants to assist law enforcement officials catch drug dealers as a condition of their sentences); *In the Matter of Winegard*, Determination (New York State Commission on Judicial Conduct September 26, 1991) (www.scjc.state.ny.us) (removal for, among other misconduct, coercing guilty pleas in two cases involving an unrepresented, 19-year-old defendant); *In the Matter of Hise*, Determination (New York State Commission on Judicial Conduct May 17, 2002) (www.scjc.state.ny.us) (admonition pursuant to agreement for convicting an unrepresented defendant and imposing a jail sentence without a trial or guilty plea, relying on the defendant's incriminating statements at arraignment).

Unequal treatment in civil cases

Abuses of authority in civil cases involving self-represented litigants have

also been condemned by judicial discipline authorities. For example, the New York State Commission on Judicial Conduct found that a non-lawyer judge's handling of a small claims case filed by an unrepresented plaintiff "was fraught with errors as to basic procedures and conveyed the appearance that he prejudged the case based upon inappropriate, ex parte contacts." *In the Matter of Gori*, Determination (New York State Commission on Judicial Conduct March 29, 2001) (www.scjc.state.ny.us). Among other errors, on the scheduled trial date, the judge failed to administer an oath to

the self-represented plaintiff before hearing his testimony about the substance of his claim. When the plaintiff objected that no one was present on behalf of the defendant, the judge read him a memorandum from the village attorney without providing a copy. At the conclusion of the proceeding, the judge told the plaintiff that he could submit additional information in support of his claim before March 19, 1999. The plaintiff agreed to furnish the additional material by March 15, but on March 14, the judge sent his decision to the village attorney dismissing the claim, and on March 15, sent a similar decision to the plaintiff.

The New York Commission also concluded that a second judge (himself a non-lawyer) failed to comply with the law when he signed a judgment against pro se tenants on a landlord's petition without according the tenants a full opportunity to be heard. *In the Matter of Williams*, Determination (New York State Commission on Judicial Conduct November 19, 2001) (www.scjc.state.ny.us). After a discussion at the bench, in which the tenants

agreed to leave the premises but argued that the past due rents should be abated due to inadequate heat, the judge awarded the landlord possession and back rent in the full amount of the claim without holding a hearing on the issue of abatement.

The New York Commission found that another judge's handling of a case repeatedly violated a third-party defendant's rights, constituted an abuse of his judicial power, and suggested that he was biased against the unrepresented litigant. *In the Matter of Teresi, Determination* (New York State Commission on Judicial Conduct February 8, 2001) (www.scjc.state.ny.us). The judge had granted a default judgment against the third-party defendant, Ronald Loeber, a self-represented litigant, and ordered him to execute a deed to real property even though his time to answer the third-party complaint had not expired and he was not in default, he had appeared in court and expressed in writing and orally his intention to defend the

action on the merits, and as the third party defendant, he would be held liable only if the defendant were ultimately found liable on the claim, and no such finding had been made. The judge found Loeber in contempt for refusing to sign and sentenced him to six months in jail. At sentencing, Loeber objected to the terms of the corrective deed but was not able to enunciate his position to the judge's satisfaction. The judge did not explain how Loeber could purge himself of the contempt, which was required by statute. Loeber remained in the county jail for 45 days until another court acted on an application brought by his newly retained attorney.

An Ohio judge was sanctioned for implementing an improper procedure in debt collection cases in small claims court that reflected "a predisposition in favor of plaintiff-creditors." (The procedure was not confined to cases with self-represented defendants but presumably had a substantial effect on those without

lawyers.) Under the procedure, the action to collect a small-claims judgment was taken upon the court's initiative, without requiring the request of the judgment creditor, and circumvented the protections afforded by law to small claims court judgment debtors by making freedom from incarceration dependent upon payment in full of a small claims judgment. The Ohio Supreme Court stated, "a judge may not blatantly disregard procedural rules simply to accomplish what he or she may unilaterally consider to be a speedier or more efficient administration of justice." *Disciplinary Counsel v. Medley*, 819 N.E.2d 273 (Ohio 2004). 

This article is adapted from "Reaching Out or Overreaching: Judicial Ethics and Unrepresented Litigants," a recent publication of the American Judicature Society Center for Judicial Ethics funded by the State Justice Institute. See ad below.



REACHING OUT OR OVERREACHING Judicial Ethics and Self-Represented Litigants

This new publication argues that no reasonable question is raised about a judge's impartiality when the judge makes procedural accommodations to provide self-represented litigants the opportunity to have their cases fairly heard. Written by Cynthia Gray, *Reaching Out* also includes proposed best practices for cases involving pro se litigants and educational materials for use at judicial conferences.

For more information, visit the AJS store at www.ajs.org.



The Appearance of Favoritism in Appointments *(continued from page 3)*

upsetting the reasonable expectations of the individuals who had followed established procedures.

The court concluded that the events “would leave an objectively reasonable person with the indelible impression” that the coroner’s hiring involved favoritism. The court noted that the judge’s explanation that he thought the man he hired was the most qualified applicant did not eliminate the appearance arising from the objective record. The court emphasized that the question was not whether the judge’s “individual actions viewed in isolation would give rise to an appearance of impropriety” but the “cumulative effect of the actions.” (The judge was publicly reprimanded.)

Similarly, the Louisiana Supreme Court found an appearance of impropriety when a judge hired his girlfriend to review and summarize medical records in 19 cases, paying her with taxpayer funds and using taxpayer money to pay for her training to become a certified legal nurse consultant. *In re Granier*, 906 So. 2d 417 (Louisiana 2005). No actual favoritism was found because the judge’s girlfriend was qualified to do the work for which she was hired, she did indeed perform the work, and her involvement did not effect the judge’s adjudicatory function. (The judge was censured pursuant to the Judiciary Commission’s recommendation, to which the judge had consented.)

The taint of favoritism

In *In the Matter of Feinberg*, 833 N.E.2d 1204 (New York 2005), the New York Court of Appeals found an appearance of favoritism when a judge appointed a friend as counsel to the public administrator and then, over more than five years in 475 proceedings, awarded several million dollars in fees to that friend without applying statutory standards and without requir-

ing substantiation. (The public administrator administers the estates of decedents who die without a will or where there is no qualified individual who has petitioned to administer the estate. The duties of counsel for the public administrator include petitioning for letters of the administration, marshaling the estate assets, searching for heirs, conducting kinship hearings, disposing of real property, filing tax returns, and generally representing the interests of the public administrator in all aspects of the administration of estates. Counsel fees are paid from the assets of the estate and approved by the surrogate.)

After his election as surrogate, Judge Feinberg formed a committee to conduct a public search for a new public administrator. However, without any search or interview process, he appointed as counsel to the public administrator his friend and law school classmate Louis Rosenthal, replacing the firm that had served in that capacity for several decades. Rosenthal had helped to raise funds for the judge’s election campaign. He had limited experience in surrogate’s court.

The court found that the judge had a pro forma practice of awarding Rosenthal 8% of an estate’s value without attention to the actual work done. The judge did not individually review the case files, he never rejected or reduced a fee request, and he never questioned a request or sought additional information. The judge never insisted that Rosenthal submit an affidavit of legal services as required by the Surrogate’s Court Procedure Act and never considered the statutory factors identified in the Act. Between January 1997 and December 2002, the judge awarded Rosenthal \$8,613,009.35 in legal fees.

The court stated, “while appointment of a friend does not itself convey an appearance of impropriety, when, as here, that appointment is coupled

with the unsubstantiated award of several million dollars in fees from estates that, by definition, lack adversarial parties to challenge the practice, the taint of favoritism is strong.” The court found that the judge’s “repeated explanation that he ‘just read through sections’ or ‘skimmed’ the SCPA, and that his failure over a period of more than five years to know of and adhere to the single paragraph requirement of affidavits of legal services and individualized consideration of fee requests was an ‘oversight,’ demonstrate a shocking disregard for the very law that imbued him with judicial authority.” (The judge was removed from office.)

The timing of a judge’s appointments of her accountant as a fiduciary was found to have created an appearance of *quid pro quo* in *In the Matter of Lebedeff*, Determination (New York State Commission on Judicial Conduct November 5, 2003) (www.scjc.state.ny.us). Alice Krause had been a friend of Judge Lebedeff since 1978 and had prepared the judge’s tax returns since approximately 1980, contemporaneously billing the judge for her annual tax services.

Once in 1993, once in 1996, and once in 1997, the judge appointed Krause as a fiduciary or guardian of the personal needs of allegedly incapacitated persons. The judge advised the parties that Krause was her personal accountant, and there were no objections. In 1997, the judge twice approved compensation to Krause for her services, \$16,500 in one case and \$5,393 in a second. (Although Krause had not, as of January 2003, submitted a request for payment in the third case, she had indicated that she intended to do so.) Krause prepared the judge’s 1996, 1997, and 1998 federal and state income tax returns but did not bill the judge for those services until July 2001 after she was questioned about her relationship with the

judge by the court system's Special Inspector General for Fiduciary Appointments.

Thus, during the four years when Judge Lebedeff was appointing her personal accountant as a fiduciary in three instances and approving more than \$21,000 in compensation, the judge was not paying the accountant for preparing her taxes (a \$1,200 benefit) because the accountant was not billing her. The Commission concluded that, even though it was not alleged that the judge had agreed to appoint the accountant in exchange for free tax preparation services, the judge "had a duty to avoid even the appearance of receiving any financial benefits from her appointee." (The judge was censured pursuant to an agreement.)

Combination of factors

Also in New York, Judge Ray appointed two attorneys as guardians in a disproportionate number of cases, bypassing the rotation system through which law guardians were usually assigned by the court clerk. *In the Matter of Ray, Determination* (New York Commission on Judicial Conduct April 26, 1999) (www.scjc.state.ny.us). There were approximately 90 attorneys on the panel of law guardians. In 1993, the judge gave William Maney 18 % of the law guardian appointments, awarding him \$58,177 in fees, and gave Edward Boncek 6.4 % of the cases, awarding him \$20,253 in fees. In 1994, the judge gave Maney 17 % of the appointments and awarded him \$30,660 and gave Boncek 5.4 % of the appointments and awarded him \$13,800. In 1993, the average fee for all law guardians assigned by the judge was \$4,434; in 1994, the average fee was \$3,354. The chief clerk and the deputy chief clerk

spoke to the judge about departing from the rotation, advising him that other attorneys were complaining that he was appointing certain attorneys, particularly Maney and Boncek, to a disproportionately high number of cases. The judge received quarterly statements from the law guardian program that indicated that Maney and Boncek were receiving a disproportionately high number of assignments and a dispropor-

A combination of factors produced the appearance that a judge exercised the power of appointment based on something other than the appointee's qualifications.

tionately high income from their work as law guardians.

The judge also routinely certified payments to the two attorneys without examining the vouchers they had submitted; had the judge reviewed the vouchers, it would have been apparent to him that the attorneys were over-billing. An audit by the Office of Court Administration revealed that Maney and Boncek had submitted vouchers that grossly overstated the number of hours that they had spent on cases and billed for proceedings that they did not attend or for cases to which they were not assigned. Some of the vouchers double-billed for work. On a number of occasions, the two attorneys submitted vouchers in which they billed for more in-court hours than the court was in session.

The judge's decision to make so many appointments to those two attorneys was particularly puzzling because Maney had run against the judge in 1985, while Boncek was Maney's partner. Then, in January 1995, Maney informed the judge that

he would not oppose the judge for a new 10-year term, and both attorneys offered to help the judge obtain the endorsement of the Democratic party. The judge accepted their offer.

The New York Commission found that "the combination of these factors created the appearance that the lawyers were getting favored treatment from the judge. . . . [S]uch laxity, in view of the political relationship of respondent and [the attorney], creates the appearance that his serious lack of oversight may have been politically motivated." (The judge was censured pursuant to an agreement.)

In *In the Matter of Spector*, 392 N.E.2d 552 (New York 1979), the New York Court of

Appeals considered the conduct of a judge who had appointed the sons of two other judges as guardians ad litem, receivers, and referees while those other judges were appointing his son to similar positions. Judge Spector had appointed Judge Fine's son two times, while Justice Fine appointed Judge Spector's son eight times; Judge Spector appointed Judge Postel's son ten times, while Justice Postel appointed Judge Spector's son five times. The New York Commission found that the judge was aware the other judges were appointing his son although there was no "*quid pro quo*" understanding.

The New York Court of Appeals stated, "notwithstanding the absence of proof of any actual or intended impropriety there was thereby inescapably created a circumstantial appearance of impropriety." The court emphasized that "nepotism is to be condemned, and disguised nepotism imports an additional component of evil because, implicitly conceding

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The Appearance of Favoritism in Appointments *(continued from page 9)*

that evident nepotism would be unacceptable, the actor seeks to conceal what he is really accomplishing.” The court concluded that “participation in the pattern of cross appointments gave an appearance of impropriety, in effect permitting the inference that each of the Judges involved was by this means securing appointments for his own son.”

Reluctance to impose a sanction in this case would be taken as reflecting an attitude of tolerance of judicial misconduct

which is all too often popularly attributed to the judiciary. To characterize the canonical injunction against the appearance of impropriety as involving a concern with what could be a very subjective and often faulty public perception would be to fail to comprehend the principle. The community, and surely the Judges themselves, are entitled to insist on a more demanding standard. . . . It would ill befit the courts and the members of the judiciary to suggest that Judges are to be measured against no higher norm of conduct than may at

times and in some places unhappily have been perceived as reflecting the mores of a judicial marketplace.

(The judge was admonished.)

This article is an excerpt from an article prepared for a symposium on judicial independence in honor of the late Judge Richard Sheppard Arnold that will be published in the fall 2005 University of Arkansas at Little Rock Law Review. 

Political Activity on Behalf of Measures to Improve the Administration of Justice

(continued from page 3)

libraries (*New Mexico Advisory Opinion 05-2*; *New York Advisory Opinion 03-38*) or schools (*Florida Advisory Opinion 02-14*; *Washington Advisory Opinion 95-3*; *West Virginia Advisory Opinion* (August 25, 1998); *West Virginia Advisory Opinion* (September 18, 1995)) or even a criminal justice center if the bond issue is submitted with issues not related to the law, the legal system, and the administration of justice (*Texas Advisory Opinion 163* (1993)). *But see Vermont Advisory Opinion 2827-9* (2004) (judge may publicly endorse a non-partisan bond issue in the judge’s home town).

Measures to improve the administration of justice

How judges are selected is an issue obviously related to improvement of the legal system and the administration of justice, and judges are allowed to take a public stand on proposed changes to selection methods. For example, the Florida judicial ethics committee concluded that judges may organize a non-profit organization to promote merit selection and retention of trial court

judges or join such an organization created independently. *Florida Advisory Opinion 99-24*. *See also Arkansas Advisory Opinion 94-4* (judge may take a public stand on a proposed constitutional amendment that would make judicial elections non-partisan and would impose limits on judicial terms). The Kansas advisory committee stated that, in connection with a proposition relating to the method of selection of district judges that will appear on the ballot, judges may:

- speak in favor of the proposition before civic groups,
- support the proposition in response to media or voter inquiries,
- serve on a citizens’ committee supporting the proposition,
- make a monetary contribution to the citizens committee,
- allow their names to appear on advertisements that support the proposition, and
- solicit support of citizens (not before the court) for the proposition.

Kansas Advisory Opinion JE-5 (1984).
Proposals regarding salaries for

judges and judicial employees also fall within the exception. Thus, judges may engage in political activity regarding retirement benefits and the compensation of judges and court personnel (*Alabama Advisory Opinion 91-436*), to increase salaries for judicial employees (*Florida Advisory Opinion 99-2*), and in support of legislation creating a judicial compensation commission (*Texas Advisory Opinion 254* (1999)). The Washington advisory committee stated that judges may speak in support of or against a referendum to stop salary increases for judges but warned that judges may not sign a referendum to stop all salary increases including increases for members of the executive and legislative branches as well as judges (*Washington Advisory Opinion 91-20*).

Interpreting the canon’s exception “on behalf of measures to improve the law, the legal system or the administration of justice,” other judicial ethics committees have advised that judges may engage in political activity on behalf of (or in opposition to):

- creation of a new judicial circuit

(*Missouri Advisory Opinion 158* (1991)),

- a family courts amendment to the state constitution (*Kentucky Advisory Opinion JE-97* (2002)),
- a constitutional amendment to restructure limited jurisdiction courts (*Arkansas Advisory Opinion 01-3*),
- whether the judge's court should have jurisdiction over a newly proposed proceeding (*New York Advisory Opinion 92-50*),
- pending legislation dealing with how fault is apportioned in civil negligence suits involving named and un-named defendants (*Florida Advisory Opinion 94-14*),
- proposed legislation that would increase the maximum sentences for those convicted in domestic violence cases (*Florida Advisory Opinion 98-13*),
- increased funding for mental health and substance abuse treatment (*Florida Advisory Opinion 99-21*),
- implementation of a bar association committee recommendations for changes to the criminal justice system (*New York Advisory Opinion 96-79*),
- proposed legislation affecting non-judicial court employees (*New York Advisory Opinion 96-41*),
- an upgrade in the civil service classification of probation officers (*New York Advisory Opinion 99-37*), and
- proposed legislation that would grant peace officer status to a court officer (*New York Advisory Opinion 02-10*).

But see Florida Advisory Opinion 94-5 (judge, as private citizen, may not sign a petition to put on the ballot a proposed constitutional amendment banning gill netting in state waters).

Permitted political activity

Assuming an issue falls within the exception, judges may take a public stand by:

- belonging to an organization or committee that is formed to promote the measure or lobby the legislature (*Arkansas Advisory Opinion 94-1*; *Florida Advisory Opinion 98-31*; *Florida Advisory Opinion 99-21*; *Kansas Advisory Opinion JE-5* (1984); *Washington Advisory Opinion 93-32*);
- actively campaigning for voter approval by speaking at civic clubs and other public non-partisan forums (*Florida Advisory Opinion 98-14*; *Kansas Advisory Opinion JE-5* (1984); *Texas Advisory Opinion 163* (1993));
- appearing in advertisements that support the proposition (*Kansas Advisory Opinion JE-5* (1984));
- writing newspaper editorials and appearing on radio and television talk shows (*Ohio Advisory Opinion 02-3*);
- contacting, orally or in writing, members of the supreme court, bar association, general assembly, and local governmental agencies and officials (*Arkansas Advisory Opinion 01-3*; *New York Advisory Opinion 99-37*; *New York Advisory Opinion 02-10*; *Texas Advisory Opinion 163* (1993); *West Virginia Advisory Opinion* (March 10, 1997); and
- appearing at public hearings before legislative or executive committees (*Florida Advisory Opinion 94-14*; *Missouri Advisory Opinion 158* (1991); *New York Advisory Opinion 96-79*; *Ohio Advisory Opinion 02-3*; *West Virginia Advisory Opinion* (March 10, 1997)).

Moreover, judges may help plan fund-raising for efforts to support or oppose a measure relating to the

administration of justice, attend a fund-raising event, or make a financial contribution to a committee involved in the measure. *Florida Advisory Opinion 98-31*; *Kansas Advisory Opinion JE-5* (1984); *Kentucky Advisory Opinion JE-97* (2002); *Ohio Advisory Opinion 02-3*; *Washington Advisory Opinion 93-32*. However, judges may not solicit contributions from others (*Kansas Advisory Opinion JE-5* (1984)) or be listed on an invitation to a fund-raising event as a sponsor or as a person requesting the presence of the invitee. *Washington Advisory Opinion 93-32*.

Moreover, if a legal action with regard to the proposed measure is pending on the docket in any court, judges must not comment on substantive matters relating to the case or make comments that might reasonably be expected to affect its outcome, impair its fairness, or substantially interfere with a fair trial or hearing. "Unfettered expression of personal views by a judge is improper," the Ohio committee noted, and a judge should not make comments that would lead to his or her disqualification. *Ohio Advisory Opinion 02-3*. Similarly, the Washington committee stated that judges should not take positions on issues that would indicate pre-judgment of or bias towards issues that might come before the judge's court. The committee also warned judges not to speak about a law-related ballot measure at a political organization function, or participate in a partisan panel discussing the merits of a ballot measure. *Washington Advisory Opinion 04-4*. See also *Florida Advisory Opinion 98-14* (judge may not address partisan groups regardless of the subject).





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JUDICIAL CONDUCT REPORTER



The 20th National College on Judicial Conduct and Ethics

Chicago, Illinois * * October 19–21, 2006

The Center for Judicial Ethics will hold its 20th National College on Judicial Ethics on October 19–21, 2006 at the Embassy Suites Downtown Lakefront, 511 N. Columbus, Chicago, Illinois.

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

sions with three concurrent workshops offered during each session. Topics under consideration include: revisions to the ABA model code of judicial conduct; ethical standards for commission members; ethical issues for judges and their families; judges as administrators; disqualification; charitable activities; use of court resources; sanctions; disability; issues for new members of conduct commissions; and issues for public members.

More information will be provided in subsequent issues of the *Judicial Conduct Reporter*.