



To secure and promote
an independent and
qualified judiciary and
a fair system of justice

JUDICIAL CONDUCT REPORTER

A publication of the American Judicature Society Center for Judicial Ethics
Volume 30, No. 3 Fall 2008

Discipline of State Supreme Court Justices *by Cynthia Gray*

In eight cases in the last five years, a member of a state supreme court has been disciplined for misconduct. In four of the cases, the misconduct related to the justices' work on the court.

The Connecticut Judicial Review Council suspended Senior Justice William Sullivan for 15 days without pay for delaying the release of a controversial decision to prevent the legislature from asking the colleague who had been nominated to be Chief Justice questions about the decision. *In re Sullivan*, Memorandum of Decision (Connecticut Judicial Review Council December 1, 2006). The justice asked the Connecticut Supreme Court to review the decision, but later dropped his appeal.

Justice Sullivan wrote the majority opinion for the Connecticut Supreme Court holding that court records created carrying out adjudicatory functions were exempt from the state's Freedom of Information Act. Justice Zarella joined the

opinion, which was decided while his nomination to succeed Justice Sullivan as Chief Justice was pending. At a court conference on March 14, 2006, the justices deemed the decision ready to be released. Shortly thereafter, Justice Sullivan told the reporter of decisions to hold publication of the decision until further notice without giving any reason or advising the other justices. On April 17, after several justices asked why the decision had not been released, Justice Sullivan instructed the reporter to publish the decision, which was released on April 21. On April 24, Justice Zarella asked the governor to withdraw his nomination for Chief Justice.

Following extensive discussions, the justices determined that the court would not as an institution refer Justice Sullivan's conduct to the Council, but that individual justices were free to refer the matter at their discretion. On

(continued on page 4)

New Judges: Winding-up a Law Practice

Because a full-time judge is prohibited from practicing law, a newly-selected judge must immediately begin taking steps to responsibly wrap up his or her representation of clients and to wind down his or her law practice.

A lawyer may continue to actively practice law after being elected or appointed but before being sworn in as a judge. In that interim period, a newly chosen judge may:

- practice before all courts including the court to which he or she has been chosen;
- handle both criminal and civil cases;
- work on cases that are almost ready for trial;
- appear as trial counsel in both jury and bench trials; and
- be compensated according to a partnership or employment agreement.

See Arkansas Advisory Opinion 96-9; Florida Advisory Opinion 00-39; Georgia Advisory Opinion 217 (1996); New York Advisory Opinion 98-92. See also Delaware Advisory Opinion 92-5 (attorney may continue to practice in court after his name has been submitted to the senate for confirmation as judge but should promptly wind up cases); South Carolina Advisory Opinion 5-2006 (master-in-equity may not practice law after taking the oath of office even if she does not immediately begin duties).

The Arkansas judicial ethics committee advised that a deputy prosecuting attorney who is running unopposed for a judicial seat may continue to prosecute cases until she takes office. *Arkansas Advisory Opinion 96-5*. However, the Florida committee advised that a chief assistant state's attorney

(continued on page 8)

Recent Judicial Ethics Advisory Opinions

 A judge is not required to disclose to all parties a letter from an indigent party or minor complaining about assigned counsel if the letter addresses only the lawyer's conduct and relationship with the client, but must disclose the letter, after redacting privileged information, if it includes information about disputed facts or addresses the merits of the case. The judge is not required to investigate the client's complaint about the lawyer but must take appropriate action if there is a substantial likelihood that the lawyer has committed a substantial violation of the code of professional responsibility. *New York Opinion 07-82.*

 A judge is not required to disclose a telephone call from a political candidate running against a member of the assembly engaged in a matter before the judge if the judge immediately terminated the conversation before anything of substance was said. *New York Opinion 08-97.*

 A judge is not obligated to report to the appropriate authorities that a litigant testified to violating the terms of a prior criminal conviction/probation and receiving social security disability benefits, but the judge may choose to do so. *New York Opinion 08-155.*

 A judge should not review a transcript from an unrelated proceeding to determine if a witness committed perjury. *South Carolina Opinion 2-2008.*

 A judge is required to disclose possible juror misconduct to the parties while a motion for a new trial is pending. Knowledge of the possible juror misconduct does not disqualify the judge from deciding the effect of the misconduct if, after disclosure, the parties choose to raise the issue. *Alabama Opinion 07-875.*

 A judge is not required to report possible misconduct by the chief of police but may in the exercise of discretion choose to do so. *New York Opinion 06-150.*

 A judge is not required to report a positive drug test administered to a medical doctor who is a party to a divorce action in the judge's court but may do so depending on circumstances including the likelihood of injury if the conduct is not reported. *New York Opinion 06-13.*

 A judge must report evidence that court personnel may have engaged in misconduct to the administrative judge and may, but is not obliged to, report the misconduct to the district attorney, other municipal officials, or the police. *New York Opinion 08-99.*

 A judge who has found that an attorney filed false affidavits and observed conduct that caused the judge to question the attorney's fitness is required to report the attorney to the board of bar overseers and may do so while the attorney has matters pending before the judge. *Massachusetts Opinion 2008-6.*

 When a memorandum in support of a litigant's request for attorney's fees indicates that another judge has found that an attorney filed false affidavits and engaged in other inappropriate conduct in a suit in which the attorney is a party, the judge must report the attorney to bar counsel but is not required to report the other judge. *Massachusetts Opinion 07-8.*

 A judge should report to the attorney disciplinary committee when, during a hearing on a petition to dissolve a professional corporation, an attorney has admitted under oath that he committed perjury when executing tax documents. *New York Opinion 07-129.*

 When a lawyer whom a judge knows has been suspended from the practice of law for five years enters an appearance in a matter, the judge should report the lawyer to the disciplinary board. *Pennsylvania Informal Opinion 4/11/06.*

 A judge may report a lawyer for a non-substantial violation of the code of professional responsibility to the disciplinary committee but is not required to do so and instead may counsel, reprimand, or otherwise sanction the lawyer. If the judge reports the lawyer, the judge is disqualified from the lawyer's cases, subject to remittal. In deciding whether to report a lawyer for a non-substantial violation, a judge must consider the nature of the proceeding, the context, and potential impact of the conduct, the clarity of the law related to lawyer's conduct, whether the alleged violation was knowingly committed, the lawyer's intent, the extent to which the conduct involves the lawyer's honesty and fitness to practice law, and the lawyer's experience as a practitioner in general and in the context of the conduct. *New York Opinion 08-8.*

 A judge who realizes that a sentence she imposed was legally incorrect and excessive should notify the defendant's attorney and the prosecutor of the error. *New York Opinion 08-86.*

The Center for Judicial Ethics has links to the web-sites of judicial advisory committees at www.ajs.org/ethics/

Judicial Conduct Commission Membership

The state judicial conduct commissions are established by a provision in the state constitution in 28 states, by a statute in 15 states and the District of Columbia, and by court rule in seven states. Judicial conduct commission membership ranges from 28 members (Ohio) to five (Montana), although most commissions have between seven and 11 members.

Most commissions have some members who are judges, some who are lawyers, and some—called public members, lay members, or citizen members—who are neither judges nor attorneys. In eight states, lay individuals are a majority of the membership (California, Hawaii, Iowa, New Jersey, New Mexico, North Dakota, Washington, Wisconsin). Five states have a majority of judge members (Arizona, Michigan, Mississippi, Tennessee, West Virginia).

In many states, the public members are appointed by the governor, the attorney members by the state bar, and the judge members by the supreme court; in some states, the legislature must approve appointments. Judges' associations and legislators make some appointments in some states. All members are chosen by the supreme court in six states (Kansas, New Jersey, Ohio, South Carolina, Vermont, West Virginia.) For more information on commission composition and membership, see the commission web-sites (there are links at www.ajs.org/ethics/eth_conduct-orgs.asp) or the table at www.ajs.org/ethics/pdfs/Commission%20membership.pdf.

Diversity

A few states have provisions that address the diversity of commission members. Maryland has a unique provision that states: "The composition of the Commission [on Judicial Disabilities] should reflect the race, gender, and geographic diversity of the population of the State."

At least 26 states have a provision that specifies the type of court from which the judge-members should be appointed. For example, the Arizona Constitution specifies that the Judicial Conduct Commission shall include "two judges of the court of appeals, two judges of the superior court, one justice of the peace and one municipal court judge" (in addition to two attorneys and three citizen members). Similarly, four of the nine members of the Michigan Judicial Tenure Commission "are judges elected by the judges of the courts in which they serve; one shall be a court of appeals judge, one a circuit judge, one a probate judge and one a judge of a court of limited jurisdiction" (in addition to two attorneys and two public members). The Washington State Commission on Judicial Conduct consists "of a judge selected by and from the court of appeals judges, a judge selected by and from the superior court judges, a judge

selected by and from the district court judges" (in addition to two attorney and six persons who are not attorneys). In Nevada, in formal, public proceedings against a justice of the peace or a municipal judge, the state supreme court appoints two justices of the peace or two municipal judges to sit on the Commission, respectively, in place of the two judges who sit as regular members of the Commission (in addition to two lawyer members and three public members).

Geographic diversity is required in several states. Appointments to the Idaho Judicial Council, for example, are required to be "made with due consideration for area representation." No two judges of the three judges appointed to the Massachusetts Commission on Judicial Conduct "shall be from the same department of the trial court," and the two district court judge members of the Montana Judicial Standards Commission must be "from different judicial districts." The two attorney members appointed to the Utah Judicial Conduct Commission cannot reside in the same judicial district. The two lay persons of the Mississippi Commission on Judicial Performance may not be residents of the same supreme court district. In Nevada, an appointing authority may not appoint more than one resident of any county.

Finally, in several states, there are membership restrictions based on political party. For example, the rules for the Idaho Judicial Council state that "not more than three (3) of the [six] permanent appointed members shall be from one (1) political party." In Nevada, the governor, who appoints the three lay members, is prohibited from appointing "more than two members of the same political party." In Iowa, the seven-member Commission on Judicial Qualifications "consists of one district judge and two members who are practicing attorneys in Iowa and who do not belong to the same political party, to be appointed by the chief justice; and four electors of the state who are not attorneys, no more than two of whom belong to the same political party, to be appointed by the governor, subject to confirmation by the senate."

Alternates

In at least eight states, the commissions have alternate members that serve when regular members cannot. For example, the rules for the Arkansas Judicial Discipline & Disability Commission provide:

The appointing authority for each category of commission membership shall also appoint an alternate member for each regular member appointed. . . .

(continued on page 11)

Discipline of State Supreme Court Justices *(continued from page 1)*

April 27, one of the other justices filed a complaint.

Noting that the legislature was a co-equal branch of government vested with judicial appointment authority, the Council found that Justice Sullivan was trying to protect Justice Zarella from questions by the legislature and concluded that holding up release of the decision served no legitimate judicial purpose and constituted an improper exercise of judicial authority and discretion. The Council held that Justice Sullivan had failed to meet high standards of conduct, degraded the integrity and independence of the judiciary, and allowed his relationship with Justice Zarella to influence his judicial conduct. Justice Sullivan acknowledged that he had made a mistake, that what he had done was “stupid,” and that he would not do it again because he had hurt the court.

Communications with legislators

A hearing panel of the Commission on Judicial Qualifications admonished Kansas Supreme Court Justice Lawton Nuss for a conversation with two state senators about a pending school-funding case. *Inquiry Concerning Nuss*, Findings of Fact, Conclusions of Law, and Disposition (Kansas Commission on Judicial Qualifications August 18, 2006). Justice Nuss did not ask the Kansas Supreme Court to review the decision.

The court had rendered a decision regarding school funding, retaining jurisdiction to determine whether the legislature complied with the decision. Based on media reports, the justice had compiled for his own use a chart comparing pending school finance bills. In a spur-of-the-moment deci-

sion, he took the chart with him when leaving his office to have lunch with State Senator Peter Brungardt, a long-time friend. During lunch at a restaurant, the justice asked Senator Brungardt whether the numbers on the chart were accurate. When Senator Brungardt said he did not know, conversation turned to other topics. When Senator Stephen Morris joined them, the subject of the chart was raised again. Senator Morris explained the cumulative effect of the numbers, which would have been apparent from the newspaper article. The total combined time devoted to the chart was less than five minutes.

Some weeks later, when questions were raised about these conversations, Justice Nuss recused himself from further participation in the school-funding case and self-reported a potential ethical violation to the Commission. The Chief Justice also filed a complaint with the Commission and publicly called for an investigation.

Before the hearing panel, the justice admitted that he had made a mistake, apologized, and assured the panel that he would not repeat the conduct. The panel found that the justice’s conversation was a communication about an issue in a pending case without the presence of the parties, constituted an independent investigation of the facts, and resulted in an appearance of impropriety that undermined public confidence in the judiciary and fell below the high standards required by the code of judicial conduct.

Communications with inmates

A pro tempore Washington Supreme Court upheld the deci-

Special courts

As noted, the appeals of the supreme court justices in Alabama, Ohio, and Washington were not heard by the justices’ colleagues. Approximately 12 states provide for creation of a substitute court when a supreme court justice is the subject of a discipline case.

In some states, the substitute supreme court is comprised of the chief judge of the intermediate court of appeals and other members of that court chosen by seniority (Massachusetts and North Carolina) or at random (Minnesota and Washington). In Ohio, the special court consists of the chief justice of the courts of appeals and the presiding judge of each of the 12 appellate districts. In California, seven substitute justices are chosen by lot from all of the judges of the court of appeals.

In other states, the substitute court is drawn from general jurisdiction trial judges. In Florida, the seven circuit chief judges who are most senior in tenure sit on the supreme court pro tempore, and in Georgia, it is the current chair and the six immediate past chairs of the Council of Superior Court Judges. Seven circuit and chancery judges in Mississippi and seven judges, other than senior judges, of the superior court and commonwealth court in Pennsylvania are selected by lot to hear the appeal of a supreme court justice in a judicial discipline case.

In Indiana, when there is a charge against a member of the supreme court, all justices but the Chief Justice are required to recuse, and the Chief Justice is joined by four court of appeals judges from a pool of six selected ran-

sion of the State Commission on Judicial Conduct to admonish Justice Richard Sanders for his conduct while visiting a facility for sexual predators. *In the Matter of Sanders*, 145 P.3d 1208 (Washington 2006). Noting the visit itself was not inappropriate, the court stated “by asking questions of inmates who were litigants or should have been recognized as potential litigants on issues currently pending before the court,” Justice Sanders “created an appearance of partiality as a result of ex parte contact.”

Residents of the facility for sexual predators had invited all of the supreme court justices to visit. The residents’ letters indicated that they wanted “something more than just a tour” and suggested “others (opposing counsel and defense attorneys) should be asked to attend to avoid ‘the appearance of partiality.’” The court stated that “additional warning flags were also raised by three justices who expressed concerns about the visit and potential problems.”

During his visit, although Justice Sander warned the residents that he could not hear their particular case issues, he asked specific questions when he met with them in small groups “about their confinement and what they thought of volitional control.” At the time of his visit, a seminal case was pending before the court raising the issue whether a “fact finder must determine that the person facing commitment as a sexually violent predator . . . has serious difficulty controlling behavior and, if so, whether this determination must be a separate finding based upon a jury instruction.” Drafts of both a majority opinion and a dissent by Justice Sanders were circulating at the time of his visit. Justice Sanders met at least one of the petitioners in that case during his visit. After a motion to recuse was filed based on his visit, Justice Sander recused himself from the case.

The court concluded:

The Commission justifiably found that Justice Sanders, with full awareness of the potential for situations that could conflict with the Code of Judicial Conduct, embarked on the tour and met with litigants who had pending cases before the court. Further, by raising such critical issues as volitional control with these litigants, Justice Sanders created a situation that clearly violated both the letter and the spirit of the canons and created serious concern for both counsel and fellow jurists about the appearance of partiality.

Failure to comply with federal court order

A special Alabama Supreme Court affirmed the judgment of the Court of the Judiciary removing Chief Justice Roy Moore for failing to comply with a federal court order that he remove a monument displaying the Ten Commandments from the rotunda of the State Judicial Building. *Moore v. Judicial Inquiry Commission*, 891 So. 2d 848 (Alabama 2004). A federal district court had held that the monument violated the First Amendment; that decision was affirmed by the U.S. Court of Appeal for the 11th Circuit. The Chief Justice stated publicly that he would not remove the monument as directed by the federal court, but the eight associate justices ordered that the monument be removed.

The court noted that, contrary to the Chief Justice’s arguments, he was not being sanctioned “for his refusal to cease his acknowledgment of God.” The court quoted with approval from the opinion of the 11th Circuit:

The clear implication of Chief Justice Moore’s argument

(continued on page 6)

domly by the supreme court clerk. (If the Chief Justice is unable to participate, the most senior member of the court, not otherwise disqualified, continues to serve.)

The Wyoming Supreme Court “designates five district judges who are not members of the commission [on judicial conduct] to act in the place of the supreme court” to hear an appeal by a supreme court justice. In Vermont, a five-judge special supreme court is appointed by the Administrative Judge for Trial Courts “under the same process established for the appointment of pro tempore judges to the Supreme Court in cases where a justice is disqualified.” The Arkansas constitution provides that, in any hearing involving a supreme court justice, all other justices are disqualified from participation.

In Alaska, when the Commission on Judicial Conduct recommends a sanction for a supreme court justice, the

chief justice appoints a panel from among the court of appeals and superior court judges as justices pro tempore to review the proceedings. (If the proceedings involve the chief justice, the justice having the longest tenure on the supreme court appoints the panel.)

Although there is no specific rule in Alabama, when then-Chief Justice Moore appealed a decision of the Court of the Judiciary, the other members of the court recused and authorized the acting Chief Justice to “participate with the Governor in a random drawing” of 20 names from a pool of retired justices and judges, the first seven of whom would constitute a special supreme court. (If any of the first seven judges had been unwilling or unable to serve, that judge’s place would have been filled by the next judge in order of selection.)

Discipline of State Supreme Court Justices *(continued from page 5)*

is that no government official who heads one of the three branches of any state or of the federal government, and takes an oath of office to defend the Constitution, as all of them do, is subject to the order of any court, at least not of any federal court below the Supreme Court. In the regime he champions, each high government official can decide whether the Constitution requires or permits a federal court order and can act accordingly. That, of course, is the same position taken by those southern governors who attempted to defy federal court orders during an earlier era. Any notion of high government officials being above the law did not save those governors from having to obey federal court orders, and it will not save this chief justice from having to comply with the court order in this case.

Glassroth v. Moore, 335 F.3d 1282 (11th Circuit 2003).

The Court of the Judiciary had concluded “regrettably” that it must remove Chief Justice Moore because, “despite his special responsibility as the highest judicial officer of our state,” he had “placed himself above the law, by refusing to abide by a final injunction entered against him, and by urging the public through the news media to support him, and because he is totally unrepentant.” The special supreme court agreed that “the Court of the Judiciary could hardly have done otherwise.”

Prior conduct as a judge

Based on a stipulation and joint recommendation, the Wisconsin Supreme Court reprimanded Justice Annette Ziegler for presiding, while she was a circuit judge, over 11 cases in which a bank was a party while her husband was a paid director of the bank, without disclosing the relationship and obtaining a waiver. *In the Matter of Ziegler*, 750 N.W.2d 710 (Wisconsin 2008).

Noting that if a judge complies with the “bright-line” rule requiring disqualification when the judge’s spouse is a director of a party “no question will ever arise about a judge’s favoritism,” the court explained: “The harm caused by a violation of this Code provision exists even though the judge reaches the correct decision in the particular case and the judge does not receive any personal benefit from the decision in the case.” The court concluded that the judge’s violations were willful because she was chargeable with the knowledge of the provisions of the code of judicial conduct, but that the violations were not “knowing violations made in brazen contempt for the authority of the Code.” The court emphasized that “willful, though inadvertent, lapses violate the Code” but that inadvertence is a mitigating factor, affecting the discipline to be imposed.

The court rejected the justice’s argument that the allega-

tions should be discounted because they were raised by political opponents during her campaign for the supreme court. As a mitigating factor, the court stated that the judge “in all likelihood, will not repeat her conduct” and that “all judges in Wisconsin are, because of the extensive publicity of the present case, alert to their responsibilities under the Judicial Code of Conduct, the dangers of conflicts of interest, and the requirements of recusal.”

The court concluded:

Some may believe that the sanction imposed today is too severe. . . . Others may believe the sanction imposed today is too lenient. The misconduct is, however, both serious and significant. And a sanction of a public reprimand is both serious and significant. Never before in the history of the Wisconsin Supreme Court has a sitting justice received a public disciplinary sanction from the members of the Court. . . .

The Judge’s conduct at issue here is . . . troubling. Nevertheless, we are confident that Judge Ziegler can and will perform creditable service as a member of this Court.

Use of prestige of office

Adopting the recommendation of the Advisory Committee on Judicial Conduct, to which the justice did not object, the New Jersey Supreme Court censured Justice Roberto Rivera-Soto for his communications with the police, prosecutors, and other judges that created an unacceptable risk that his judicial office could influence the handling of a private matter relating to his son. *In the Matter of Rivera-Soto*, 927 A.2d 112 (New Jersey 2007).

After a head-butting incident between the justice’s son, who was a high school sophomore, and another student during football practice, the justice called the chief of police on the chief’s cell phone. The justice also gave his business card to a detective when the detective arrived at his home and to a court employee. In a call, the justice informed the county prosecutor that he had filed a juvenile delinquency complaint and inquired as to the prosecutor’s typical procedures for such complaints. The judge also called the assignment judge to apprise him that he had signed a complaint. When the hearing was postponed, the justice called the assignment judge to complain and wrote a letter to the presiding judge expressing in strong terms his anger that he had not received timely notice of the postponement, expressing his “skepticism” about the other family’s professed reason for requesting a postponement, and noting his certainty that “in the exercise of your obligations, both of these matters will be addressed in a satisfactory manner.”

The Committee concluded that the justice “should have known that because of his official position — the reason he had been given the cell phone number — his call to [the police chief] would be interpreted as one of importance, perhaps some urgency, and deserving of special attention,” adding he “should have proceeded in a manner that could and would be followed by any other parent with a similar interest, i.e. by calling the general number for the police or by going to the police station.” The Committee also concluded that “references to a judge’s office in a private context, in conjunction with advancing or expediting a matter that is wholly private in nature and unrelated to the judge’s official duties, are improper and violate the strictures governing judicial conduct.” Noting that the justice’s identity and judicial position were known to the prosecutor, the Committee stated that the justice “should have realized that his call was highly unusual as most parents would not have access to the County Prosecutor, even to ask an informational or procedural question.” The Committee also stated that, in expressing his “agitation” to the assignment judge and the presiding judge, instead of the judge responsible for the case, the justice “escalated the risk that his judicial position could become a factor in the handling of his private juvenile delinquency complaint,” noting the tenor of the letter was authoritarian and his accusations against the other family were improper.

Driving while intoxicated

Two supreme court justices were sanctioned for driving while intoxicated. Based on a stipulation and agreement, a temporary supreme court publicly reprimanded Ohio Supreme Court Justice Alice Resnick for driving while under the influence of alcohol. *In re Complaint Against Resnick*, 842 N.E.2d 31 (Ohio 2005).

Pursuant to a stipulation and agreement, the Washington State Commission on Judicial Conduct ordered Justice Bobbe Bridge to appear before it to be publicly reprimanded for driving while intoxicated and hit and run of an unattended vehicle. *In re Bridge*, Stipulation, Agreement and Order (Washington State Commission on Judicial Conduct August 15, 2003) (www.cjc.state.wa.us). The justice also agreed to participate as a speaker on matters related to her misconduct at three public appearances and two judicial education programs. The justice had self-reported the incident.

In the criminal proceedings, the justice entered into a deferred prosecution on the charge of driving under the influence of alcohol; the charge of hit and run of an unattended vehicle was dismissed pursuant to the agreement. She was ordered to complete a two-year treatment plan to address mental health and alcohol issues. The justice accepted responsibility for the accident and reimbursed the

owner of the damaged vehicle.

The stipulation noted that there had been “heavy media coverage” of the incident and “a high volume of unsolicited input to the Commission by members of the public from many walks of life, reflecting an unusually high level of public concern.” The Commission also received many statements of support for the justice based on her otherwise exemplary professional and personal career.

In accepting the stipulation, the Commission emphasized that “a State Supreme Court Justice is expected by the public to be a model citizen.”

Driving under the influence of alcohol, and hit and run of an unattended vehicle, regardless of whether or not they constitute or are charged as a crime, are perceived by many as self-indulgent, callous to the safety of the person and property of others and to the law, and irresponsible. That such conduct could be engaged in by any citizen, and that citizens are regularly warned and exhorted through a variety of means to avoid such conduct, adds to the sense of disappointment that a member of Washington’s highest court engaged in such conduct. The widespread expressions of disillusionment and anger from the public emphasize the extent to which respect for the judiciary has been damaged.

The Commission noted that there was no indication that alcohol had been an issue in the justice’s professional life and that the justice had “been promptly and consistently forthright” and complied with all court orders since the day of her arrest.

In previous cases not involving a supreme court justice, the Commission had publicly admonished judges for driving while intoxicated. For Justice Bridge, the Commission increased the sanction to a reprimand “given the deep public concern that a justice of Washington’s highest court, sworn to uphold the law, would engage in such misconduct.” Noting that some members of the public had called for the justice’s suspension or removal, the Commission concluded that a higher sanction than reprimand was unsupported by precedent, noting that a sanction should be consistent with sanctions recently imposed on others for similar misconduct.

The justice also agreed that, upon timely request of a party, she would recuse herself from matters involving charges of driving under the influence of alcohol and/or hit and run while she was under the jurisdiction of the municipal court pursuant to the diversion agreement. The Commission acknowledged that the justice’s recusal agreement was not legally compelled, but was an “acknowledgment of the concerns of the public, in sensitivity to suspicions of either a double standard or undue leniency.” 

New Judges: Winding-up a Law Practice *(continued from page 1)*

ney who is a judge-elect should immediately relinquish any administrative or supervisory control over felony attorneys who appear in the court in which he will sit as a judge and should appear only in misdemeanor cases or in felony cases in another geographic area of the circuit. *Florida Advisory Opinion 84-21*. Moreover, the Kentucky advisory committee suggested that a judge-elect should resign as an assistant county attorney to minimize the problems of disqualification. *Kentucky Advisory Opinion JE-32* (1981).

Completing pending cases

There is no exception to the prohibition on practicing law that allows a new judge to wind-up pending cases after taking office. *Arizona Advisory Opinion 00-7*; *Oklahoma Advisory Opinion 99-2*. Not only may a new judge not appear in court or assist in litigation, but she may not prepare pleadings or legal instruments, take part in conveyances, or give legal advice to clients. *Florida Advisory Opinion 05-19*. The prohibition applies immediately after judicial office is assumed even if the representation requires no court appearances, the work could be performed in the evenings or would be primarily ministerial, or opposing counsel has no objection. *Florida Advisory Opinion 83-3* (real estate closing); *New York Advisory Opinion 89-38* (closing out an estate); *Florida Advisory Opinion 77-2* (oral argument). For example, the Texas advisory committee stated that a new judge may not, shortly after taking office, appear in a federal district court in another state even for the limited purpose of representing the defendant in a sentencing hearing and may not represent a client in a mediation of a lawsuit in which liability is not contested and the only remaining issue is the amount of settlement necessary to conclude the case. *Texas Advisory Opinion 293* (2007).

In discipline cases, courts have rejected judges' attempts to rely on a winding-up exception to excuse their continued practice of law. The New York Court of Appeals sanctioned a judge for remaining a fiduciary in several estates, continuing to perform business or legal services for clients, and maintaining a business and financial relationship with his former law firm, which had an active practice before his court. *In the Matter of Moynihan*, 604 N. E. 2d 136 (New York 1992) (removal). The judge had claimed that his actions were necessary to wind-up a busy practice with long-standing responsibilities to clients that could not readily be transferred. The court considered that defense although it did not expressly hold that a new judge was allowed to wind-up cases after taking the bench. However, the court found that two years was an "inexcusably long period" for winding up, noting that the matters came before

the judge's own court (albeit before different judges). The court also held that, to the extent the acts were ministerial, there was no justification for the judge's failure to turn them over to another attorney.

Similarly, rejecting a judge's argument, the Arkansas Supreme Court concluded that the work the judge had performed was more than ministerial or clerical and constituted the active practice of law. *Judicial Discipline and Disability Commission v. Thompson*, 16 S. W. 3d 212 (Arkansas 2000). In one case, the judge had met with clients in his chambers to discuss a settlement, accompanied the clients when they negotiated a settlement check, faxed a letter to co-counsel confirming the fee arrangement, and sent co-counsel a cashier's check with a letter on judicial stationery giving her directions on closing the case. In a second case, the judge had participated in several depositions and exchanged legal correspondence and documents regarding settlement with opposing counsel and the court clerk.

Disposing of an interest in a law practice

Before taking the bench, a judge must divest all financial interest in a professional legal association in a manner that strictly complies with the rules of professional responsibility. The Nebraska ethics advisory committee explained the dangers of a new judge remaining a shareholder in a professional corporation.

- Third parties would be likely to conclude that the new judge "is still engaged in the practice of law, still making strategic decisions concerning the cases which are still pending."
- The judge's impartiality could be questioned "were the judge to preside over cases of a like or similar nature to those residual cases which the professional corporation is still handling."
- "The devotion of the judge to judicial duties and the minimization of the conflict between those judicial duties and extra-judicial activities would be jeopardized."

Nebraska Advisory Opinion 97-2.

A new judge may receive a lump sum payment for his interest in a practice based on its present value. *Florida Advisory Opinion 96-26*. See also *New York Advisory Opinion 00-3* (new judge may be compensated for the equity value of the judge's share in a law partnership that is dissolving as a result of the judge's election, determined in accordance with generally accepted accounting principles).

Moreover, a new judge may receive installment pay-

ments for his interest in a former firm as long as the amount to be paid is fixed at the time the judge leaves the firm, the interest is set at fair market value, and the term of payment is as short as possible. For example, the Massachusetts judicial ethics committee advised that a lawyer about to become a judge may enter into an agreement with her firm pursuant to which the firm will pay a fixed amount at a reasonable rate of interest in installments over 10 years. *Massachusetts Advisory Opinion 00-1*. However, the committee cautioned that, if the judge believes that, in less than 10 years, the payments will become the sole reason for disqualification in cases involving the firm, she should attempt to shorten the pay-out term.

Similarly, the advisory committee for federal judges stated that, "when a partner leaves a law firm to become a federal judge, he or she should, if possible, agree with the partners on an exact amount which the judge will receive for his or her interest in the firm, whether that sum is to be paid within the year or over a period of years." *U.S. Advisory Opinion 24* (revised 1998).

Such agreed-upon payments may continue to be made to the judge provided it is clear (1) that the judge is not sharing in profits of the firm earned after the judge's departure, as distinguished from sharing in an amount representing the fair value of the judge's interest in the firm, including the fair value of the judge's interest in fees to be collected in the future for work done before leaving the firm, and (2) such judge does not participate in any case in which the former firm or any partner or associate thereof is counsel until the full amount which he or she may be entitled to receive under the agreement has been paid.

Accord Maine Advisory Opinion 05-2 (amount due to new judge from former law partners should be determined as of the date that he becomes a judge although the amount may be paid over time).

The Delaware advisory committee approved a new judge's arrangements with his or her former firm where:

- the judge's capital account balance had been paid in full,
- the judge will receive a percentage interest in receivables collected for services performed before his departure for a year and then receive in a lump sum a present value calculation of remaining collectible accounts receivable,
- the judge and the former firm will estimate the value of the judge's interest in any anticipated proceeds from contingent fee cases that remain unresolved after a year and the judge will be paid the amount in a lump sum, and
- the judge's interests in the firm Keogh trust and 401(k) plan have been rolled over into separate accounts and

the firm will pay the judge a present value calculation of the future stream of payments under the firm's retirement plan.

Delaware Advisory Opinion 04-2.

Other judicial ethics advisory committees have approved:

- An agreement under which a new judge would share law partnership profits earned but not paid prior to his assuming the bench for the approximately one year it would take to complete all financial settlements (*Alabama Advisory Opinion 86-248*).
- An agreement under which a judge's former partner would execute a promissory note evidencing deferred compensation to come due in two years (*Alabama Advisory Opinion 89-351*).
- Periodic payments to a new judge from his former law firm for his equity interest in the firm or, in the alternative, a note from the firm to pay the balance owed the judge (*Florida Advisory Opinion 03-2*).
- A termination agreement under which a judge would obtain a secured promissory note and a payment schedule from a former partner (*Nebraska Advisory Opinion 89-1*).
- A buy-sell agreement between a new judge and the remaining shareholders in his former law firm whereby they will purchase his interest in the professional corporation, including existing accounts, and the buy-out is expected to be completed within two months (*Nebraska Advisory Opinion 07-2*).
- A purchase agreement under which a judge would receive intermittent payments from his former law firm for an extended period (*West Virginia Advisory Opinion* (January 16, 2001)).

Solo practitioner

The New York advisory committee has issued several opinions addressing the responsibilities of a new judge who must wrap-up a solo law practice. The committee advised that a new judge is not required to immediately dissolve the professional corporation constituting the judge's law practice and may remain a shareholder, solely for the purpose of winding up its affairs, including collecting fees, sending bills to former clients, maintaining an escrow account to process fees, and submitting final corporate income tax returns. *New York Advisory Opinion 05-130(A)*. The committee warned that, after assuming office, the judge must dissolve the corporation as soon as practicable and may not transact corporate business except as necessary for its dissolution. *Accord New York Advisory Opinion 97-9* (recently appointed judge

(continued on page 10)

New Judges: Winding-up a Law Practice *(continued from page 9)*

may remain a shareholder of the professional corporation through which he practiced law solely to wind-up its affairs, including collection of fees earned and payment of debts accrued prior to his appointment, but must dissolve the corporation as soon as practicable after assuming office). The committee also stated that a new judge may perform ministerial and administrative functions necessary to wrap-up her solo law office, such as filing tax forms and unemployment forms for employees and organizing and storing financial records. *New York Advisory Opinion 07-5*. See also *South Carolina Advisory Opinion 13-1996* (newly elected judge who is the sole shareholder of a professional association that formerly served as his law practice may manage the association, without practicing law, until the end of the year to collect receivables and facilitate the closing of the association).

The Florida judicial ethics committee, however, took a more restrictive approach, advising a recently appointed judge to change the status of his professional corporation or dissolve it before taking the bench even though the association would be required to file an income tax return, issue w-2 forms, and prepare other documents well after the judge takes the bench. *Florida Advisory Opinion 06-1*. The committee stated that the judge may allow his former association's operating account to remain open to receive payments for work done before taking the bench, but the account should reflect the status of the new legal entity established before the judge takes the bench. *Accord Florida Advisory Opinion 06-31*. See also *Florida Advisory Opinion 05-8* (after assuming the bench, judge should close a trust account even though it is used only for the distribution of funds when received).

Fees

A new judge may receive legal fees earned prior to becoming a judge or a proportionate share of fees earned by a professional association prior to her leaving the firm. See *Alabama Advisory Opinion 98-699*; *Arkansas Advisory Opinion 96-9*; *Florida Advisory Opinion 06-1*; *Illinois Advisory Opinion 94-12*; *Maryland Advisory Opinion 23* (1974); *Nebraska Advisory Opinion 89-1*; *New York Advisory Opinion 90-203*; *Ohio Advisory Opinion 07-2*; *West Virginia Advisory Opinion* (December 18, 2000).

For example, the Kentucky committee stated that a judge may receive compensation for work that she did before going on the bench even if the representation was not completed and may share in fees collected in the future as long as the work was done before she left the firm. *Kentucky Advisory Opinion JE-41* (1982). The committee noted that the rule applies "to a solo practitioner, salaried associate of

a firm, and to a partner who receives a given percentage of the firm's fees."

Similarly, after taking office, a judge may receive payment for work done on contingency fee lawsuits that were pending at the time he stopped practicing law. For example, the Arkansas judicial ethics committee advised that a new judge and the firm he is leaving should evaluate contingency fee matters as of the time of departure based on the likelihood of success, the likely recovery, and the amount of work already performed. *Arkansas Advisory Opinion 96-9*. The payment to the departing attorney/new judge, the committee stated, may be in a lump sum or in installment payments that end at the earliest practicable date, ideally within a few months. *Accord Alabama Advisory Opinion 97-659*; *Florida Advisory Opinion 98-20*; *Kansas Advisory Opinion JE-68* (1996); *Michigan Advisory Opinion CI-1079* (1985); *New York Advisory Opinion 93-44*; *South Carolina Advisory Opinion 21-1998*; *South Dakota Advisory Opinion 91-3*; *West Virginia Advisory Opinion* (December 18, 2000).

Advisory committees have attached several conditions to a judge's receipt of fees earned before taking the bench.

- Insofar as possible, the amount or percentage owed to the judge should be settled prior to her assuming the bench.
- The amount the judge receives must reasonably reflect the amount of work he did on the case before becoming a judge.
- The judge must not receive any part of a fee collected in connection with matters that were not pending with the firm at the time she left or generated by clients on matters that arose afterwards.
- The fee must be computed based on traditional standards.
- The fee and arrangement should be in accordance with the rules of professional conduct.
- Full disclosure should be made to the client.

Disassociation from a firm

Except for payment of fees or for the judge's interest in the practice, "upon assuming judicial office, a judge is required to sever all ties with the judge's former firm." *Michigan Advisory Opinion JI-89* (1994). As part of that process, a new judge must ensure that her name is deleted from the firm name and not used in professional notices or brochures sent to the firm's clients and prospective clients. See *Kentucky Advisory Opinion JE-41* (1982); *Massachusetts Advisory Opinion 90-1*; *New York Advisory Opinion 89-136*. 

Judicial Conduct Commission Membership *(continued from page 3)*

Any alternate member may serve in the place of any member of the same category whenever such member is disqualified or unable to serve and upon the call of, or on behalf of, the chairman. . . . Whenever an alternate member is called to serve in the place of a member of the Commission, an announcement with respect thereto shall be made at the commencement of the meeting.

The other states with alternates are Connecticut, Kentucky, Massachusetts, Maine, Mississippi, Nevada, and Washington.

Membership terms

Rules in some states make explicit the common-sense tenet that a person ceases to be a member of the commission if he or she dies (Kansas), moves out of the jurisdiction (Arizona, Maryland, Minnesota, Texas), becomes unable to serve for any reason (Arizona, Georgia, Massachusetts, Michigan), or resigns (Kansas, Massachusetts, Michigan, Minnesota, New Hampshire, Pennsylvania). One of the rules for the Colorado Commission on Judicial Discipline provides that “a member shall be deemed to have resigned if that member is absent from three consecutive” meetings without commission approval.

Many commissions have rules that provide that commission membership ceases when the member ceases to hold the position that qualified him or her for appointment. A rule for the Maryland Commission spells out this principle:

A member’s membership automatically terminates:

- (1) When any member of the Commission appointed from among judges in the State ceases to be a judge;
- (2) When any member appointed from among those admit-

ted to practice law becomes a judge; [or]

- (3) When any member representing the public becomes a judge or is admitted to the practice of law in this State or has a financial relationship with or receives compensation from a judge or a person admitted to practice law in this State.

The rules in New Jersey provide that “membership on the [Advisory Committee on Judicial Conduct] shall terminate if a member is appointed or elected to public office or to any position considered by the Court to be incompatible with such service.”

On most commissions, members serve terms of four or six years. Many commissions have limits on how many terms a member may serve. In a few states, such as Iowa, Maine, Massachusetts, Mississippi, Missouri, North Carolina, and Pennsylvania, the commission members are limited to one term (four years in Pennsylvania, six in the others) and are ineligible for a second term unless he or she originally joined the commission due to an appointment to fill the remainder of an unexpired term. Members of other commissions are limited to two terms of three years (North Dakota, Rhode Island, Vermont, Wisconsin, Wyoming), four years (California, Illinois, Maryland, Minnesota, Tennessee, Washington), five years (Oklahoma), or six years (Arkansas), with an exception for a member appointed to fill a vacancy. For example, a rule for the California Commission on Judicial Performance provides: “No member shall serve more than two four-year terms, or for more than a total of 10 years if appointed to fill a vacancy.” Members in Utah may serve four two-year terms. Members in West Virginia may serve three three-year terms.

At least nine states (Alaska, California, Georgia, New Hampshire, Pennsylvania, South Carolina, Vermont, Washington, West Virginia) have provisions that permit a member to continue to sit after expiration of the member’s term until the vacancy is filled. For example, the rules for the Alaska Commission on Judicial Conduct provide:

To ensure that the commission continuously fulfills its constitutional responsibilities, a commission member continues to serve as an active member after expiration of that member’s term until the vacancy is filled by the appropriate appointing authority.

In Washington, a member of the State Commission on Judicial Conduct “rather than his or her successor, shall continue to participate in any hearing in progress at the end of his or her term, or when the member ceases to hold the position that qualified him or her for appointment.” 

Judicial Conduct Reporter

Fall 2008

Seth S. Andersen
Executive Vice President

Published quarterly,
\$40 per year, single copy \$11

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

© 2008
American Judicature Society
ISSN: 0193-7367

American Judicature Society
The Opperman Center
at Drake University
2700 University Avenue
Des Moines, IA 50311

To subscribe or if you have a
change of address or questions
about your subscription, contact
315-271-2285 or llieurance@ajs.org

An index to the Judicial Conduct Reporter is available on the AJS web-site at www.ajs.org/ethics/.



The Opperman Center
at Drake University
2700 University Ave.
Des Moines, Iowa 50311

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

JUDICIAL CONDUCT REPORTER



Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants

This publication, funded by the State Justice Institute, maintains that, under the code of judicial conduct, no reasonable question is raised about a judge's impartiality when the judge, in an exercise of discretion, makes procedural accommodations that will provide a diligent self-represented litigant acting in good faith the opportunity to have his or her case fairly heard—and, therefore, that a judge should do so. Written by Cynthia Gray, *Reaching Out or Overreaching* also includes proposed best practices for cases involving pro se litigants and a self-test, hypotheticals, small group exercises, a debate, and a panel discussion for use by judicial educators at a session covering the topic at judicial conferences. To purchase, visit <http://ajs.org/cart/storefront.asp>.