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# JUDICIAL CONDUCT REPORTER

A publication of the American Judicature Society Center for Judicial Ethics  
Vol 25, No 1 Spring 2003

## Judicial Road Rage *by Cynthia Gray*

In the judicial version of road rage, a judge uses the power or prestige of the judicial office to take action against another driver who has clashed with the judge on the road.

In one case involving judicial road rage, a New York judge acted as a police officer in eight incidents over two years, stopping motorists and identifying himself as a judge. For example,

while driving one day, the judge followed a car, passed in front of it, and motioned to the driver to pull over. When the driver, Kerry S., stopped, the judge displayed his shield, identified himself as a judge, and complained about the speed at which Kerry S. was driving. He took Kerry S.'s license and told him to report to his court the following week to get the license and a

traffic citation.

In a second incident, the judge approached Steven O., identified himself as a judge, advised Steven O. that he had left his car running and unattended in a fire zone, took his driver's license, and told him to retrieve it the following day in the judge's court. The next day,

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## Issues for New Judges *by Cynthia Gray*

### Gifts and receptions

A new judge may accept gifts to mark the judge's investiture. *See, e.g., U.S. Advisory Opinion 98* (2000). Acceptance of such a gift may necessitate the judge's recusal from matters involving the donor, but, as the advisory committee for federal judges noted, "in many instances, the donors are likely to be persons whose appearance in a case would in any event necessitate the judge's recusal, at least for some period of time." The committee stated that if a group gives a gift and the cost is shared proportionately, recusal may not be required for members of the group if the amount of each

individual contribution is relatively small. Of course, a newly appointed judge may not solicit gifts.

Advisory committees have allowed a new judge to accept:

- a robe from a bar association to which the judge belongs (*Arkansas Advisory Opinion 2000-10*);
- a gavel from a former employer (*Florida Advisory Opinion 76-22*);
- a gavel and a \$500 gift from a former client (*U.S. Compendium of Selected Opinions § 5.4-2(a)* (2001));
- a gavel from a local bar association (*U.S. Compendium of Selected Opinions § 5.4-2(b)* (2001));
- gifts from former colleagues and

friends of \$10 or less toward a robe to be presented at investiture (*U.S. Compendium of Selected Opinions § 5.4-2(e)* (2001)); and

- a judicial robe, clock, chair, gavel, or money from a former law firm or corporate employer, former clients, close friends, colleagues, or a bar association (*U.S. Advisory Opinion 98* (2000)).

Further, a new judge may allow his or her former law firm to sponsor and pay the expenses for a reception to celebrate the judge's investiture. *Florida Advisory Opinion 99-3*; *Ill-*

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# Writing Judicial Discipline Decisions *by Helen A. Anderson*

A judicial conduct commission today writes for a number of readers when it issues a decision. At one time, these decisions were primarily for the parties and their lawyers. Anyone not connected with the case—such as a curious lawyer, judge, or member of the public—would have to go to some effort to get a copy of a particular decision. Now, because of the widespread availability of decisions on the internet, many lawyers, judges, academics, and members of the lay public have access to decisions from commissions in many states. (The Center for Judicial Ethics has links from its website to the web-sites of state judicial conduct commissions, many of which include commission decisions. See [www.ajs.org/ethics/eth\\_jud\\_conduct.asp](http://www.ajs.org/ethics/eth_jud_conduct.asp).) This expanded readership should change the way commissions approach the task of explaining their decisions.

Decisions need to be clear and readable to anyone, not just those steeped in the law of judicial ethics. At the same time, commission members need to remember their most important audience: the judge, the attorney presenting the charges to the commission, and the reviewing court. Thus, the decision should tell a story, explain legal concepts to the lay public, and yet contain enough legal justification for the result.

## The Basic Requirements

The purpose of a written decision on alleged judicial misconduct is to:

- Decide the facts
- Determine whether there was misconduct
- Determine a sanction

- Justify all of the above to all audiences.

The audiences for the decision are:

- The respondent judge, the judge's attorney, and the attorney presenting the charges to the commission
- The state supreme court on review
- Other judges
- The public (including those who

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## Readers will often wonder, why this particular sanction?

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may have been affected by the misconduct)

- The bar
- Future commission members
- Commissions in other states

The appropriate tone is formal, because of the important interests at stake. But the decision should nevertheless be easy to read and free of legal jargon. All readers will want to see a credible story that leads clearly to the result. They will want to see resolution of the arguments and an explanation of the sanctions.

**The decision should tell a clear story.** A reader new to the case needs all the important facts. A decision should not simply refer to another document, for example, stating that "the charges in count 1 of the complaint were proven by clear and convincing evidence," without describing the specific facts found. At the same time, the decision should not be weighed down by excess facts—especially names, dates, and irrelevant procedural steps. The writer should ask

herself, "Is this fact important to the outcome of the decision?" If not, drop it.

**The reasoning should be clear to anyone.** Explain the relevant rules of judicial conduct. Rather than a cryptic reference to "Canon 3B(7)" or "ex parte contacts," for example, explain that judges are not to talk to parties or witnesses outside of the presence of all parties to the litigation. Explain briefly why this prohibition exists: so that all sides are aware of the evidence and have a chance to confront and argue about it, and so that the judge does not appear to be abandoning a position of neutrality.

**The particular sanction should be justified.** Readers will often wonder, why this particular sanction? Here, it may help to put the sanction in context by mentioning the sanctions for comparable behavior in other cases. A reference to the purposes of discipline can also help justify the sanction.

## Writing for the Reviewing Court

One audience for the decision, the reviewing court, needs to be considered carefully. Presumably the commission wants to persuade the court to agree with the decision. How can the decision be explained in a way that will convince this often tough audience?

First, even under a *de novo* standard the court will usually defer to the commission's credibility determinations. This is because the court is usually reviewing a written record of the hearing and cannot view the witnesses' demeanor to determine who is telling the truth. Thus, the decision should clearly resolve credibility conflicts, and state when credibility is a factor.

In determining sanctions, the court may be more likely to agree with the commission's choice if it is justified with reference to the court's prior decisions. (It is a good idea to support all legal points in the decision by reference to any court precedent.) Refer to the court's stated policy concerns, and compare the sanctions for comparable behavior. Comparisons should be to sanctions in disputed cases the court reviewed. (Sanctions imposed as part of an agreed resolution or stipulation are less relevant for comparison—these agreed cases are inevitably compromises.)

It may also help to make explicit policy justifications with reference to the commission's special expertise, especially when the commission has a number of lay members. Most likely these policy justifications will resonate with other readers, too.

### **Making the Decision Readable for Everyone**

With a little effort, the writer can make a decision much more readable. The decision should need no "translation," such as a press release. And the decision should be readable in the many formats in which it may turn up. Here are some suggestions for organization and clarity:

**Summarize the decision at the beginning.** The first few paragraphs should satisfy the reader's curiosity about what happened. They should state the charges, the resolution, and the sanction, if any. A well-crafted summary will also sum up the reasoning. Many readers will read no further. The press may quote it verbatim. And such a summary is very useful to those reading on-line or on paper.

An example of an effective summary is:

The commission concludes, based on Judge Block's stipulation, that Judge Block engaged in a pattern of inappropriate sexual conduct, attempted to intimidate potential witnesses during the investigation of the alleged sexual conduct, and improperly attempted to use his office to intercede in a pending matter on behalf of an acquaintance. The commission hereby publicly censures Judge Block and bars him from receiving an assignment, appointment, or reference of work from any California state court.

*Inquiry Concerning Block, Decision and Order* (California Commission on Judicial Performance December 9, 2002) (cjp.ca.gov/pubdisc.htm).

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## **The first few paragraphs should satisfy the reader's curiosity about what happened.**

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**Follow the expected order.** Legal readers have certain expectations, and it is easier for them to follow a decision that meets those expectations. After the summary, the decision should state the facts, then address the legal arguments, and then discuss sanctions. This order will also make sense to lay readers.

**Use headings, especially for longer decisions.** Headings help organize the argument, and make it easier for readers to skim to the parts they are interested in. Headings also help the *writer* stay organized.

**Pay attention to paragraph organization.** Paragraph organization can do wonders for clarity of argument and story telling. A paragraph should stick to one main point and make that point explicitly, usually in the first sentence. A reader should be able to read just the first sentence of every paragraph and get a clear outline of the decision.

**Avoid footnotes for anything important.** Footnotes are an easy out for the disorganized writer: if you cannot quite work out a transition, just drop a footnote. But footnotes are annoying to readers, many of whom will not read them. To add to their inconvenience, footnotes can wander in electronic format and become endnotes. When that happens, the on-line reader must scroll to the end of the decision to read a footnote and then scroll back to the text to finish the decision. Do not make the reader's job that difficult. If the point is important enough to be in the decision, it should be in the main text.

**Use names or roles of key persons, not terms such as "respondent."**

Terms such as "respondent" or "petitioner" are only helpful for particular procedural issues. Refer to persons by their relevant role in the decision. Most readers will become confused unless the writer uses clear terms such as "judge", "lawyer" or "expert witness." Only use names for key persons—too many names are confusing.

**Be concise.**

Vigorous writing is concise. A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts. This requires not that the writer make all his sentences short, or that he avoid all detail and treat his subjects only in outline, but that every word tell.

—W. Strunk and E. B. White  
*The Elements of Style*



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# Corrective Action in Judicial Discipline Cases *by Cynthia Gray*

In addition to sanctions such as reprimand, admonishment, censure, or suspension, some commissions or courts have required corrective action by judges in disciplinary proceedings. The types of conditions that have been imposed include taking remedial measures, making apologies, and undergoing education, counseling, or mentoring. Often more than one condition is imposed in a single case.

Some remedial measures require a judge to adopt improved procedures that will address the problems that gave rise to the misconduct. For example, an Arkansas judge was not only admonished for a 19-month delay in deciding a case but also directed to keep better records and to inform the Judicial Discipline & Disability Commission of the procedures he would institute to correct this type of irregularity. *Letter to Judge Adams* (Arkansas Judicial Discipline &

Disability Commission February 20, 1991) ([www.state.ar.us/jddc/decisions.html](http://www.state.ar.us/jddc/decisions.html)). Similarly, a Pennsylvania judge who was reprimanded for failing to render timely decisions agreed to implement a tickler system to monitor cases ripe for decision, to arrange for the hiring of a second law clerk, to be transferred to a different division, and to relinquish some administrative duties to his office staff. *In re Fischer*, 657 A.2d 535 (Pennsylvania Court of Judicial Discipline 1995). In a case disciplining a part-time judge for agreeing to represent a litigant in bankruptcy proceedings that affected a case pending before him, the Tennessee Court of the Judiciary stayed a 60-day suspension pending the judge's implementation of a procedure satisfactory to disciplinary counsel for reviewing his docket before accepting employment as an attorney to avoid creating con-

flicts. *In re Jones*, Findings of Fact and Opinion (Tennessee Court of the Judiciary March 28, 2003). The judge was also censured and ordered to arrange a mentoring relationship with an experienced current or former judge, and to complete the general jurisdiction course sponsored by the National Judicial College. The court stated it would dismiss the suspension if the judge successfully completed the conditions within the time limits set.

Another type of remedial action requires a judge to make a payment of money reflecting damage caused by the judge's misconduct. For example, a New Mexico judge who had failed to pay state gross receipts taxes for her private business and who had used court facilities and equipment for her private activities was ordered to pay the outstanding tax liability and photocopying bill. She was also reprimanded.

## Programs to address judicial substance abuse

Commissions and courts have required judges to participate in treatment programs when alcoholism has resulted in judicial misconduct. For example, in a case involving habitual intemperance, abuse of alcohol, and driving while intoxicated, the Idaho Supreme Court suspended the judge for three months without salary and required him to refrain from consuming any alcohol; to submit to weekly blood tests; and to participate in Alcoholics Anonymous, relapse prevention therapy with a counselor, and an after-care program. *Judicial Council v. Becker*, 834 P.2d 290

(Idaho 1992). Violations of the conditions, the court stated, could result in the judge's removal.

Several states have adopted programs or procedures for assisting judges with substance abuse problems. *See, e.g.*, "West Virginia Judicial Panel Reviews Impairment" and "Kansas Committee Assists Impaired Judges," *Judicial Conduct Reporter* (Summer 1994). In 2001, the Texas State Commission on Judicial Conduct established the Amicus Curiae program to identify judges who have impairments that may be affecting their personal lives and performance on the

bench. The program provides a confidential resource for judges to obtain help for treating impairments. If a judge is referred to the program, the judge's actions still remain within the Commission's investigative responsibility. A number of judges participated in the program in 2002 and were referred to counseling or recovery programs suited to their specific needs. The program monitors and maintains contact with those judges to provide motivation and support.

Noting that "the judiciary, like the general population, includes individuals impaired by substance

manded, suspended for two weeks without pay, and placed on supervised probation. *In re Vigil*, No. 99-4 (New Mexico Supreme Court June 13, 2000). A former judge in Washington state agreed to make restitution to a public university for the amount he had received as compensation for teaching a class while serving as a judge, which was inconsistent with a constitutional provision making judges ineligible for other public employment. *In re Moberg*, Stipulation and Agreement (Washington Commission on Judicial Conduct August 6, 1993).

A former South Carolina magistrate whose failure to comply with record-keeping and money-handling requirements had resulted in insufficient funds in his magistrate's accounts was ordered to cooperate in determining the amount and to promptly reimburse the account in the exact amount of the shortage. He was also publicly reprimanded and agreed not to seek judicial office again. *In the Matter of Sanders*, 564 S.E.2d 670

(South Carolina 2002). Similarly, in addition to publicly censuring a judge for allowing his administrative assistant to work at a second job at times that conflicted with the performance of her duties, the Kansas Supreme Court ordered the judge to pay \$1,047.95 to the state representing the salary the employee had collected for her court employment as a result of the judge's approval of her false time sheets. *In the Matter of Groneman*, 38 P.3d 735 (Kansas 2002). The judge was also ordered to apologize in a letter, to be mailed to all state judges, for the mistakes he had made and to urge each judge to pay utmost attention to administrative rules and regulations, particularly personnel rules, as well as the adjudicative duties of the office.

### Counseling, education

Counseling, education, or mentoring, often in combination and usually at the judge's own expense, have been considered an appropriate condition to impose in cases involving judicial

temperament problems. Recently, responding to a pattern of rude and intemperate behavior exhibited by a judge, the Florida Supreme Court ordered the judge to continue to participate in psychological/behavioral therapy "with an emphasis on sensitivity training by a qualified health care professional until such professional has certified, in writing, that such treatment is no longer necessary." The judge had stipulated to the misconduct, which included embarrassing and belittling counsel in court. The court also directed the judge to appear before it for a public reprimand, to issue a public apology to the citizens of the county, and to send personal letters of apology to those individuals identified in the stipulation. *Inquiry Concerning Schapiro*, Per curiam (Florida Supreme Court April 10, 2003).

Continuing psychotherapy was also one of the conditions imposed on

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abuse," the Pennsylvania Judicial Conduct Board has adopted a policy designed to encourage affected judges "to seek help at the earliest possible moment so as to ensure maximum protection to the public against misconduct resulting from their impairment."

The policy states that the Board "regards substance abuse as an illness and will regard misconduct caused by such an illness as mitigated by that fact, provided that the impaired judge obtains appropriate treatment for his/her problem." However, the Board notes that substance abuse problems are not "an excuse for deficiencies in performance or behavior. Judges with substance abuse problems will be

held to the same standards as other similarly situated individuals."

The policy allows a judge being investigated for misconduct involving substance abuse to petition the Board for permission to enter an approved rehabilitative diversion program prior to the filing of formal charges with the Court of Judicial Discipline. The petition must include a release giving the Board access to all information and records bearing on the rehabilitative program, a stipulation of facts relevant to the investigation with an agreement that the stipulation is admissible in any future proceeding, and consent to testing for drug or alcohol consumption during any probationary period. When a judge

satisfactorily completes an approved in-patient rehabilitation program, the Board will continue the matter for a 12-month probation, which may be conditioned on the judge's continued participation in a recovery program. If the Board deems the probation satisfactorily completed, "the Board will refrain from filing charges in the Court of Judicial Discipline and will dismiss the Complaint . . ." However, if the Board determines that the judge "has abandoned the recovery program, or has violated the terms in any substantial way, the Board may direct the filing of charges before the Court of Judicial Discipline, or take such other action as may be appropriate in the circumstances."

## In Brief: Recent Judicial Discipline Cases

 The Florida Supreme Court reprimanded a judge and fined her \$50,000 for statements during her campaign that demonstrated a commitment to the prosecution side of criminal cases and knowingly misrepresented the actions of her opponent, the incumbent, in two criminal cases. *Inquiry Concerning Kinsey*, Per curiam (January 30, 2003).

 The Nebraska Commission on Judicial Qualifications publicly reprimanded a judge who had facilitated a campaign contribution to a candidate for city council by personally communicating the solicitation to her husband and delivering the check written by her husband on their joint account to the campaign. *In the Matter of Prochaska*, Reprimand (October 7, 2002).

 Based on an agreed statement of facts and joint recommendation, the New York State Commission on Judicial Conduct censured a judge for making a public statement on behalf of a candidate for another judicial office in a radio advertisement, sending the statement to a newspaper, and authorizing the candidate to use it in a campaign advertisement. *In the Matter of Crnkovich*, Determination (November 18, 2002) ([www.scjc.state.ny.us/Determination/C/crnkovich.htm](http://www.scjc.state.ny.us/Determination/C/crnkovich.htm)).

 Pursuant to a stipulation for discipline by consent, the California Commission on Judicial Performance censured a former judge for (1) false and misleading statements to a television reporter during his campaign for re-election, (2) threatening to bring a legal action against the television station to prevent broadcast of facts that he knew to be true, and (3) improper campaign activities in and around the courthouse.

The Commission also barred the former judge from receiving an assignment or appointment. *Inquiry Concerning Gibson*, Order (April 3, 2003) ([cjp.ca.gov/pubdisc.htm](http://cjp.ca.gov/pubdisc.htm)).

 The Louisiana Supreme Court suspended a judge for 120 days without pay for a pattern of failing to follow the law; accepting ex parte requests to fix traffic tickets and having a court employee relay the messages to the prosecutor's office; and initiating a worthless checks program that did not meet statutory requirements. *In re Fuselier*, 837 So. 2d. 1257 (Louisiana 2003).

 The Mississippi Supreme Court privately reprimanded a judge who as a member of a county concerned citizens association participated in writing a petition requesting the removal of a deputy sheriff. *Commission on Judicial Performance v. Justice Court Judge S.S.*, 834 So. 2d 31 (Mississippi 2003).

 Pursuant to a stipulation for discipline by consent, the California Commission on Judicial Performance censured a retired judge for (1) inappropriate sexual conduct, (2) attempting to intimidate potential witnesses during the investigation of his sexual conduct, (3) having his bailiff handcuff a court interpreter as a joke when she was late, and (4) attempting to intercede in a matter on behalf of an acquaintance. The Commission also barred the former judge from receiving an assignment or appointment. *Inquiry Concerning Block*, Order (December 9, 2002) ([cjp.ca.gov/pubdisc.htm](http://cjp.ca.gov/pubdisc.htm)).

 The Florida Supreme Court reprimanded a judge and suspended her from office for 30 days without pay for (1) angrily engaging in an ex

parte discussion with another judge; (2) making materially incomplete and misleading statements in her deposition in a case and in an errata sheet; and (3) requesting a scheduling favor for a family member from another judge. *Inquiry Concerning Holloway*, 832 So. 2d 716 (Florida 2002).

 Pursuant to a joint recommendation, the New York State Commission on Judicial Conduct determined that censure was the appropriate sanction for a judge who had widely disseminated a letter to the Commission that contained inaccurate, unsubstantiated allegations denigrating a fellow judge. *In the Matter of Fiechter*, Determination (November 18, 2002) ([www.scjc.state.ny.us/Determination/F/fiechter.htm](http://www.scjc.state.ny.us/Determination/F/fiechter.htm)).

 The Nebraska Commission on Judicial Qualifications publicly reprimanded a judge who, without notice to either counsel, visited a defendant in jail to discuss his mental health as disclosed in the probation report. The judge also gave the defendant a document that discussed depression and anxiety. *In the Matter of Coady*, Reprimand (Nebraska Commission on Judicial Qualifications March 25, 2003).

 Pursuant to his consent, the Indiana Commission on Judicial Qualifications publicly censured a judge for granting an ex parte petition for change of custody without requiring prior notice to the custodial parent or her counsel and without requiring the petitioners to comply with the court rule establishing the prerequisites for a petition for an emergency change in custody. *Public Admonition of Cox* (Indiana Commission on Judicial Qualifications March 21, 2003).

## Judicial Road Rage *(continued from page 1)*

when Steven O. appeared at court, the judge told him to see the police officer who was assigned to prosecute traffic offenses, and the officer issued him a ticket. The judge accepted his guilty plea, fined him \$25, and returned his driver's license. *In the Matter of Rones*, Determination (New York State Commission on Judicial Conduct September 30, 1994) ([www.scjc.state.ny.us/Determination/R/rones.htm](http://www.scjc.state.ny.us/Determination/R/rones.htm)) (public admonishment).

Other judges have also disposed of traffic charges they have initiated. A Florida judge, for example, contrived to be substituted for another judge to hear the first appearance call on the date a driver whom the judge had reported to the police was scheduled to appear. The judge had called law enforcement on his cell phone to arrest a driver he believed was intoxicated based on the way the car was being driven. After law enforcement had arrived, the judge stopped at the scene and signed a witness statement. During the court proceedings, the judge addressed the driver:

I'm the guy that was behind you in the car that called the police and had you arrested. So I am probably not a good person to address the issue of your bond except that you blew over a .30 and quite frankly sir, you almost hit several cars and . . . at one point you made a u-turn and I thought you were going to run head on into me.

Okay, I'm going to set your bond at \$100,000 for now, but I'm going to have it reviewed by another judge later, tomorrow, okay? And make sure I'm not out line. Okay we'll see you tomorrow.

*Inquiry Concerning McMillan*, 797 So. 2d 449 (Florida 2001) (removal

for this and other misconduct).

When a Texas judge learned that the driver of a car with which she had had an accident was not insured, she asked a police officer to issue a citation for failure to maintain financial responsibility and left a message for the driver demanding payment of \$500 to cover the damage to her vehicle. When the driver and her mother were waiting for

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**The court stated that a judge who observes a crime outside the courtroom has only the power of an ordinary citizen, noting that the proper course would have been to file charges.**

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the case to be called in another judge's courtroom, the judge's clerk instructed them to follow her to the judge's courtroom. The judge asked if the driver had the \$500 and said she had the authority to assess a fine of up to \$2,000. The judge did not ask the driver to enter a plea or offer the option of entering a plea of no contest or deferred adjudication but moved directly to the punishment phase. The judge placed the driver on probation and ordered her to pay \$700, of which \$500 constituted restitution to be paid directly to the judge. *Public Reprimand of Robb* (Texas State Commission on Judicial Conduct August 21, 2000).

### Misusing authority

An Ohio judge held an inquisitory hearing without legal authority to chastise a driver he had observed driving erratically. The judge had been

driving with his wife and mother-in-law as passengers when he observed a car being operated recklessly, driving on the shoulder and cutting through a gasoline service station to pass other cars and driving at a speed well in excess of the posted limit. The judge contacted the state highway patrol and the local police by his cell phone and noted the car's appearance, driver, passenger, and license plate number. The next day, after ascertaining that the car was registered in the name of Jenny Panescu, the judge sent a letter to Panescu on court letterhead that stated: "THIS IS A SERIOUS MATTER DESERVING YOUR IMMEDIATE ATTENTION." The letter stated that a complaint had been made

about the involvement of Panescu's car in several near accidents and informed her that if she failed to contact the court, the judge would "authorize the filing of any appropriate criminal and/or traffic charges, the seizure and impoundment of your motor vehicle and the issuance of a warrant for your arrest."

When Panescu and Russ Brown, who had been driving the car, appeared in the judge's court, the judge threatened them with criminal prosecution and stated: "You can say whatever you want, but at this point in time you had probably best shut your mouth until I'm finished talking, okay?" The judge also said he would make sure the sheriff's office has "a fuller picture of what actually happened" and would have a discussion with their employer. Later that

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afternoon, the judge called their employer but was unable to contact him. The judge was subsequently convicted of the misdemeanor of coercion.

The Ohio Supreme Court held that the judge had misused the authority of his office in an attempt to achieve his personal goal of reprimanding persons he believed were guilty of reckless driving. *Office of Disciplinary Counsel v. Hoague*, 725 N.E.2d 1108 (Ohio 2000) (six-month stayed suspension). The court stated that a judge who observes a crime outside the courtroom has only the power of an ordinary citizen, noting that the proper course would have been to file charges. See also *In the Matter of Duncan*, Determination (New York State Commission on Judicial Conduct December 29, 2000) ([www.scjc.state.ny.us/Determinations/D/duncan.htm](http://www.scjc.state.ny.us/Determinations/D/duncan.htm)) (public admonishment for judge who had conveyed the appearance of bias in two cases after learning one of the speeding violations occurred near his home); *In re Bradfield*, 532 N.E.2d 711 (Michigan 1995) (public censure for judge who had accelerated his car and struck a security officer after the officer waved another driver into a parking space at a mall); *In re Meadows*, Stipulation, Agreement, Order (Washington State Commission on Ju-

dicial Conduct December 7, 2001) ([www.cjc.state.wa.us](http://www.cjc.state.wa.us)) (public admonishment for judge who had used court resources to obtain a driver's record and, in a letter to the state patrol, county sheriff, court staff, and the driver, described her experience at a service station with the driver, provided information about the driver, and advised that she would recuse herself on any traffic-related matter involving the driver).

### Using prestige of office

In other examples of judges' reacting inappropriately, judges have used the prestige of office to pressure police officers in their handling of traffic incidents. An Illinois judge, for example, called the police after another driver had failed to allow the judge to pass and otherwise violated the traffic laws. A police officer, who had previously appeared before the judge, was dispatched to the judge's home, and the judge stated that the other driver should be arrested and charged, indicating to the police officer the parts of the vehicle code he believed had been violated. The judge was aware that the police officer knew that he was a judge, although the judge did not refer to his status. Subsequently, the judge called the chief of police, noted he was a judge, and stated

that the other driver should have been cited upon his complaint without additional investigation. A citation was issued to the other driver, but most of the charges were dropped because the judge failed to appear as a witness. *In re Travis*, Order (Illinois Courts Commission February 21, 2003) (one-month suspension, pursuant to joint recommendation and stipulation, for this and other misconduct).

Similarly, after a Michigan judge was involved in an accident, he requested the police officers who responded (one of whom he knew) to run the other driver's name on the Law Enforcement Information Network and ticket him. The Michigan Supreme Court adopted the Judicial Tenure Commission's finding that the judge was "attempting to use the prestige of [his] office to gain a personal advantage." *In re Brown*, 626 N.W.2d 403 (Michigan 2001) (15-day suspension). The court stated that by directing the officer to take two very specific actions, the judge went well beyond merely reporting the underlying facts. The court concluded:

Though a fine line cannot always be drawn in these matters, the respondent's direction to the officer, in our judgment, was not in the nature of a mere call to investigation, it was not simply a spontaneous expression of anger or pique, and it was more than a generalized call to the officer to do something about an unfortunate situation. Rather, when made to an officer who was aware of respondent's judicial status, such direction, in our opinion, invoked respondent's judicial status in an inappropriate manner.

Contrary to the Commission's finding, however, the court concluded that the judge's remark that the other driver was speeding 85 miles an hour was "merely a speculation concerning the rate of speed of the other driver." 

## Judicial Conduct Reporter Spring 2003

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

© 2003  
American Judicature Society  
ISSN: 0193-7367

To subscribe or if you have a change of address or questions about your subscription, contact 515-271-2285 or [mwhorton@ajs.org](mailto:mwhorton@ajs.org)

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## Issues for New Judges *(continued from page 1)*

nois Advisory Opinion 01-11; Washington Advisory Opinion 95-5; U.S. Advisory Opinion 98 (2000). A new judge may also allow other groups, such as a bar association, client, corporation, or chamber of commerce, to sponsor a reception. See Florida Advisory Opinion 99-3 (attorneys in a new judge's community); U.S. Advisory Opinion 98 (2000) (a former law firm, corporate employer, business client, colleagues, or bar association); U.S. Compendium of Selected Opinions § 5.4-2(b) (2001) (contributions from the local bar association toward the cost of a reception).

There are some conditions imposed on a reception held for a new judge. For example, the Illinois committee stated that a judge may be feted at a post-investiture party sponsored by his or her former law firm only if the party is not intended to advance the interests or status of the law firm. Illinois Advisory Opinion 01-11. The committee also warned the judge to be concerned about the magnitude or extravagance of the celebration and the number and nature of those invited. The Washington advisory committee instructed a new judge to report as a gift the expense of reception hosted by the judge's former law firm following the judge's swearing-in ceremony. Washington Advisory Opinion 95-5.

Moreover, the advisory committee for federal judges warned that a judge may not accept either a gift or a reception from a for-profit company that has no pre-existing or long-standing relationship with the judge or from an organization that is publicly identified with controversial legal, social, or po-

litical positions or that regularly engages in adversary proceedings in federal court. U.S. Advisory Opinion 98 (2000).

### Continuing obligations to clients

The prohibition on practicing law precludes a new judge from providing legal advice to a former client in any way or consulting with the client

she would to any other client, to provide information to the new lawyer regarding the case. The judge, however, must be careful not to give current advice to the new attorney as he or she would then be violating [the rule that] precludes a judge from practicing law.

Similarly, the Nevada advisory committee stated that a judge could provide a written verbatim transcription of the judge's otherwise illegible notes about

a case prepared during his or her service as prosecutor as long as the judge did not discuss the notes, transcription, or any other matter with the current prosecutor or otherwise assist or advise a prosecutor in preparing for a new sentencing hearing. Nevada Advisory Opinion 98-3.

The advisory committee

for federal judges also warned that a judge who prosecuted a case before appointment may not actively assist former colleagues in the appeal of the case or render advice, counsel, or opinions about legal issues or the conduct of the appeal. U.S. Compendium of Advisory Opinions § 2.7(g) (2001). However, the committee stated that a judge could respond to questions from successor counsel as to historical facts not readily apparent from the file, the factual details in the judge's peculiar knowledge, and similar matters of clarification. See also Massachusetts Advisory Opinion 98-20 (judge who as assistant district attorney gained information about an attorney's conduct that is relevant to defendant's motion for a new trial in a murder case should divulge the information in a meeting with the prosecuting attorney and defense

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## Advisory committees have allowed a new judge to accept gifts of \$10 or less toward a robe to be presented at investiture.

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about continuing cases and prior work. Advisory opinions, however, indicate that a judge may provide information to a former client as part of the continuing duty, imposed by the Rules of Professional Responsibility, to protect a client's interests upon conclusion of a representation.

For example, the Illinois judicial ethics committee advised that when a case a judge tried as a state's attorney is about to be retried after an appeal, a judge may provide a successor assistant state's attorney with information but not legal advice regarding the case. Illinois Advisory Opinion 94-19. Emphasizing that "providing information is not the same as providing advice on matters such as trial strategy," the committee explained:

Given the circumstances presented, cooperation, in the interest of proper administration of justice, should not be discouraged. A judge has a duty to his former client, in this case the State, just as he or

*(continued on page 10)*

## Issues for New Judges *(continued from page 9)*

counsel); *New York Advisory Opinion 96-128* (judge may provide an affidavit regarding the factual situation surrounding the decision he or she made as district attorney to dismiss criminal charges against a suspect who has now filed a suit for false arrest); *New York Advisory Opinion 95-20* (judge may review file and provide information to the successor prosecutor with respect to the retrial of a case previously handled by the judge as a prosecutor where judge may be called as witness).

Analogous advice has been given to judges with respect to representation of criminal defendants. For example, the Massachusetts advisory committee stated that a judge could sign an affidavit regarding the judge's percipient knowledge of events material to a former client's new trial motion, which was based on an alleged conflict of interest arising out of the judge's former office-sharing arrangement with a lawyer who had represented a police officer who testified against the former client. *Massachusetts Advisory Opinion 01-2*. Similarly, the New York advisory committee stated that a judge may answer inquiries from a former client for factual information that might be useful

to the client's potential motion to vacate a prior conviction based on the prosecutor's alleged failure to make a disclosure. *New York Advisory Opinion 95-116*. The client wanted to learn whether the judge's recollection of events and/or the content of the judge's closed files might support his contention. *But see Florida Advisory Opinion 99-4* (judge may not execute affidavit explaining why he or she took certain steps while representing a former client and commenting on the former client's good character to be submitted to a prosecutor to help resolve criminal charges of workers' compensation fraud against the former client).

Finally, judges have been counseled that they may provide factual information but not advice regarding representation in civil matters. For example, the New York committee stated that a judge who served as the attorney for an estate may furnish an affidavit detailing the services rendered, the dates rendered, and the amount of time expended prior to becoming a judge as requested by the estate's current attorney to comply with an order of the judge presiding over the case. *New York Advisory*

*Opinion 96-128*. Similarly, the committee stated that a judge may issue a declaration about the facts and circumstances involved in an employment agreement that the judge had negotiated more than 25 years earlier while in private practice on behalf of a client to be submitted in a dispute in another state in connection with the agreement. *New York Advisory Opinion 91-137*. 

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

*This article is an excerpt from **Ethical Issues for New Judges**. First published under a grant from the State Justice Institute, an up-date of the paper will be funded by a grant from the Greater New Orleans Foundation and available in July 2003. For information about ordering, see [www.ajs.org/cart/storefront.asp](http://www.ajs.org/cart/storefront.asp) or call 888-287-2513.*

## Corrective Action in Judicial Discipline Cases *(continued from page 5)*

a judge by the Minnesota Supreme Court after he acknowledged his angry and undignified treatment of court staff on multiple occasions over several years. *In re Rice*, 515 N.W.2d 53 (Minnesota 1994). At the request of the Board on Judicial Standards, the judge had submitted to two psychological evaluations. The court also reprimanded him and suspended

him for 60 days without pay. The judge's treating physician had testified that the judge had been diagnosed with a bipolar disorder but that the medical management of his condition posed no risk regarding his responsibilities and that the judge had taken steps to deal with his unacceptable behavior. The conditions imposed required that the judge's con-

duct be monitored; that he continue under psychiatric care and notify the Board if his psychotherapy was terminated; that he authorize those providing him with psychiatric and psychotherapy services to disclose to the Board all information relative to his fitness to perform his duties; and that he be placed on probation, preserving the Board's jurisdiction to seek addi-

tional or different sanctions, including removal from office, if warranted by his future behavior. *See also In re Bradfield*, 638 N.W.2d 107 (Michigan 2002) (judge who was censured and suspended for 30 days without pay for, in addition to other misconduct, yelling at a defendant without provocation agreed, in addition to other conditions, to undergo counseling and/or anger management counseling); *In the Matter of Sullivan*, Order of Censure (Nevada Commission on Judicial Discipline June 21, 1993) (judge agreed to be censured for treating court staff, attorneys, parties, and others rudely and to submit to a psychiatric evaluation to determine what treatment would assist him to control his temper, to participate in a regular counseling program, to send a letter of apology to each person he had mistreated, and to consult with another judge on how to cope with his duties); *In the Matter of Williams*, 777 A.2d 323 (New Jersey 2001) (judge suspended for three months without pay and ordered to continue counseling for publicly confronting a man with whom she had had a romantic relationship and giving false and misleading information to police).

Commissions and courts have also required judges to attend diversity programs to address sexual harassment and other manifestations of bias. For example, in *In the Matter of Seaman*, 627 A.2d 106 (New Jersey 1993), the New Jersey Supreme Court ordered a judge who had been suspended for 60 days without pay for sexual harassment to complete an educational program during his suspension designed to heighten his awareness of what constitutes sexual harassment and to reinforce the behavior expected by the judiciary's sexual harassment policy. *See also Inquiry Concerning Litson*, Order (Kansas Commission on Judicial Qualifi-

cations June 20, 1997) (judge required to cease and desist from touching court employees, making inappropriate comments, and having pictures of nude women displayed on a computer screen in the courthouse and to obtain counseling regarding sexual harassment and boundary violation issues); *Complaint Against Coady*, Order (Nebraska Supreme Court March 27, 1992) (judge, pursuant to his consent, suspended for one month without pay for using a racial epithet in court and ordered to complete a course on sensitivity to racial and cultural bias); *In re Vincent*, Order (New Mexico Supreme Court January 3, 2002) (judge publicly reprimanded, pursuant to agreement, for, in addition to other misconduct, making inappropriate age and/or gender-biased references to female attorneys and referring to another judge in a gender-biased manner and ordered to complete a mentor program and the "Building a Bias-Free Environment in Your Court" course at the National Judicial College); *In re Hutchinson*, Decision (Washington Commission on Judicial Conduct February 3, 1995) (judge censured and ordered to attend cultural diversity program sponsored by the minority and justice commission and to write a letter of apology after the judge humiliated two petitioners in a name change case who were undergoing gender change operations).

If a judge's misconduct reflects a failure to follow the law or maintain professional competence, coaching on legal requirements has been prescribed in some cases to try to avoid such errors in the future. For example, the Texas State Commission on Judicial Conduct ordered a judge to obtain eight hours of instruction with a mentor judge on contempt authority and proper procedures, a criminal defendant's right to due process, and the statute regarding truancy following his public admonishment for fail-

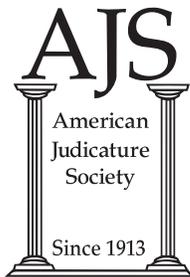
ing to provide contemnors with full and unambiguous notification of when, how, and by what means they had been guilty of contempt and failing to advise them of their right to counsel. *Public Admonition and Order of Additional Education (Dulin)* (Texas State Commission on Judicial Conduct December 17, 2001). Similarly, the Commission ordered a justice of the peace to obtain 10 hours of instruction with a mentor judge after the judge issued an arrest warrant based on a legally defective affidavit, required the defendant to obtain a cash-only bond, failed to conduct an indigency hearing before committing a defendant to jail to pay a fine, failed to offer the options of paying the fine in installments or performing community service, and ordered her confined in jail for her disrespect rather than finding her in contempt of court. *Public Order of Additional Education (Bartie)* (Texas State Commission on Judicial Conduct June 28, 2000). The Commission indicated that the instruction should be about holding an indigency hearing prior to commitment; complaints, arrest warrants, and probable cause; contempt powers of a justice of the peace/magistrate; options available for the payment of fines and costs; and appropriate judicial demeanor. *See also In re Hammermaster*, 985 P.2d 924 (Washington 1999) (judge censured and suspended for six months without pay for making improper threats of life imprisonment and indefinite jail sentences to defendants who had not paid their fines, using a guilty plea form that denied defendants due process, holding trials in absentia, a pattern of undignified and disrespectful conduct toward defendants, and asking Hispanic defendants if they are "legal," and ordered to meet with a judicial mentor and complete judicial education courses in ethics, criminal procedure, and diversity). 



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