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# JUDICIAL CONDUCT REPORTER

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## Grounds for Judicial Discipline *by Cynthia Gray*

The enabling provisions that create judicial conduct commissions specify the grounds on which a judge may be disciplined. These grounds frequently include willful misconduct in office, conduct prejudicial to the administration of justice that brings the judicial office into disrepute, persistent failure to perform judicial duties, habitual intemperance, and conviction of a crime.

In some states, a significant violation of the code of judicial conduct is considered willful misconduct or prejudicial conduct. However, in some

states, a finding of a violation of the code is only the starting point, and whether the violation constitutes willful misconduct or conduct prejudicial to the administration of justice requires additional analysis. Because prejudicial conduct is less serious than willful misconduct, the finding affects the determination of the appropriate sanction.

For example, emphasizing that willful misconduct “involves more than an error of judgment or a mere lack of diligence,” the Mississippi Supreme Court defined the term as the “improp-

er or wrongful use of power of his office by a judge acting intentionally or with gross unconcern for his conduct and generally in bad faith.” *In re Quick*, 553 So.2d 522 (Mississippi 1989). Bad faith, the court stated, “necessarily” includes “moral turpitude, dishonesty, or corruption, and also any knowing misuse of the office, whatever the motive” but also encompasses a “specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew

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## Judicial Campaign Opponents and Impartiality

*by Elena M. Murphy*

Should a judge recuse if the attorney appearing before her is vying for her job in the next judicial election? The majority of state judicial advisory committees addressing the issue agree that the judge should, to avoid even an appearance of partiality, disqualify herself from such a case.

Observing that the question is not directly addressed by the code of judicial conduct, the Arizona advisory committee recognized that answering it requires consideration of more than one canon. *Arizona Advisory Opinion*

04-2. Canon 3E of the 1990 American Bar Association Model Code of Judicial Conduct states:

A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or a party’s lawyer....

Canon 2 states, “A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.” Canon 2A further requires a judge

to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” (Most states have similar provisions, which were substantively unchanged in the 2007 revision of the Model Code.) Combining analogous provisions in their respective state codes, advisory opinions regarding judicial campaign opponents have advised that a judge avoid even the appearance that his ability to remain impartial is impaired even where no actual bias exists.

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# Recent Advisory Opinions – Disqualification

 A judge who leases an office building to a legal aid organization is disqualified from cases in which lawyers from the organization appear and, if the judge is unable to minimize the number of cases in which disqualification is required, must sell the building as soon as possible without serious financial detriment. *Florida Opinion 07-10*.

 For one year after a law clerk leaves the court's employment, a judge should disclose her relationship when the former clerk appears as an attorney before the judge and disqualify upon a party's request. *New York Joint Opinion 07-87 and 07-95*.

 A judge is disqualified from any proceedings encompassing matters with which he had direct involvement while serving as a high-ranking executive branch official but not from other proceedings involving the executive branch unless he doubts his impartiality. *New York Opinion 07-10*.

 A judge must disqualify herself from any matter in which she participated in any way, personally or in a supervisory capacity while serving as an assistant corporation counsel. *New York Opinion 07-30*.

 A judge may not preside over criminal charges filed while the judge was serving as attorney general even if the judge was not personally or substantially involved in the case but may preside over charges that resulted from investigations initiated while the judge was attorney general unless the judge was personally and substantially involved or an

attorney general's subpoena was issued. The judge may preside over a violation of probation hearing or a petition to have a defendant declared a habitual offender where the underlying offense was filed during the judge's tenure as attorney general, or over criminal proceedings against a defendant who was prosecuted on an unrelated criminal matter while the judge served as attorney general. *Delaware Opinion 07-3*.

 If a judge chooses to file a complaint with the attorney grievance committee, the judge should disqualify from all matters where the attorney appears while the complaint is pending but should not state the reasons for disqualifying. *New York Opinion 07-57*.

 A judge is not required to disclose or disqualify when the partners or associates of an attorney whom the judge recently sanctioned and reported to the attorney grievance committee appear before her. *New York Opinion 06-168*.

 A judge must disclose that a person appearing before the judge previously provided a character reference for the judge in a disciplinary matter and should disqualify unless both sides, represented by counsel, consent to the judge presiding over the case. In all ex parte matters or cases involving pro se litigants, the judge must disqualify. *New York Opinion 07-73*.

 Judges are not disqualified from cases in which a party is represented by an attorney from a law firm representing pro bono a judges' association before the legislature in

support of legislation increasing the number of judges within the judges' district. *Nevada Opinion JE-07-1*.

 A judge whose spouse is the chief deputy district attorney may not preside in cases involving the district attorney's office, and that disqualification may not be remitted. If the judge's spouse does not have supervisory responsibility, the court clerk or the district attorney may provide waiver forms to defendants, and the judge may preside if the defendant signs a waiver after being advised of the relationship and considering the question of remittal independently of the judge. *New Mexico Opinion 07-4*.

 A judge should disqualify from any matter in which a law firm with which the judge has negotiated post-judicial employment appears even if the negotiations have been preliminary and through an agent but is not disqualified if a firm approached the judge unilaterally and the judge declined to discuss post-judicial employment. *Illinois Opinion 07-1*.

 A judge is not disqualified from a case when the judge's mutual fund owns stock in a party or when the management or investment advisory company for the judge's mutual fund is a party absent additional circumstances. *U.S. Opinion 106 (2007)*.

\* *The Center for Judicial Ethics web-site has links to judicial ethics advisory committees at [www.ajs.org/ethics/eth\\_advis\\_comm\\_links.asp](http://www.ajs.org/ethics/eth_advis_comm_links.asp).*

# Pro Se Litigants and Judicial Demeanor *by Cynthia Gray*

A judge is required to treat self-represented litigants with the same patience, dignity, and courtesy mandated for everyone with whom the judge deals in an official capacity, and several judges have been sanctioned for failing to do so. “People appearing pro se and without legal training are the ones least able to defend themselves against rude, intimidating, or incompetent judges.” *In the Matter of Hammermaster*, 985 P.2d 924 (Washington 1999).

Judicial intemperance was found in a judge’s treatment of an unrepresented mother in a family court case beginning with his refusal to continue a hearing to allow her to obtain counsel even though she had appeared in court

expecting the matter to be mediated or continued. The judge cut off the mother’s attempt to briefly cross-examine the father and did not give her an opportunity to present testimony or evidence. When the judge intimidated the parties’ daughter during questioning, she began to cry and the mother tried to comfort her, but the judge directed the mother to “just leave her alone and let her listen.” He threatened to transfer custody of the daughter to the father if the parties did not adhere to a visitation schedule, although the father did not request or want custody. After the judge directed the parties to agree to a schedule, the mother felt powerless to object but signed the agreement with the notation that she

was agreeing under duress.

The Vermont Supreme Court publicly reprimanded the judge for this and other misconduct. The court explained:

Judicial intemperance invariably conveys the message of a closed mind. . . . Participants will never accept that a decision rendered by a combatant is fair. We cannot let the judiciary become an impersonal and authoritarian institution, relying for legitimacy solely on its power. We can never tolerate the intemperate use of power; we must go out of our way to understand, explain and persuade.

*In re O’Dea*, 622 A.2d 507 (Vermont

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## Comments Regarding Crimes Against Women

*by Cynthia Gray*

One of the changes made by the American Bar Association when it revised the Model Code of Judicial Conduct in February 2007 was to add a new comment providing examples of prohibited manifestations of bias. Rule 2.3(b) of the revised Model Code states:

A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.

A new comment explains.

Examples of manifestations of bias or prejudice include but are not limited to

epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

During the revision process, the American Judicature Society had proposed that the list of examples also include “insensitive statements about crimes against women,” a proposal that was supported by the National Judicial Education Program and the National Association of Women Judges. The ABA Joint Commission to Evaluate Model Code of Conduct did

not accept that recommendation.

Unfortunately, there is a line of cases that demonstrates the necessity of emphasizing that comments that trivialize crimes such as rape and domestic violence or that disparage the female victims of those crimes violate the code of judicial conduct. For example, at the conclusion of testimony regarding relevant sentencing factors in a case in which a man had been convicted of having sex with a 14-year-old girl, a judge said:

When you get a victim like the victim involved in this case, hell, she doesn’t want to be protected, she wants to be — you know, there’s too many women in this courtroom or I would use the word — she wants to go to bed, she wants to have sex, she wants to screw everybody. That’s what she wants to do. And so I can’t feel any

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or should have known was beyond the legitimate exercise of his authority.” Prejudicial conduct is found when a judge “through negligence or ignorance not amounting to bad faith, behaves in a manner prejudicial to the administration of justice so as to bring the judicial office into disrepute.”

### California case law

*[This section was written by trial counsel for the California Commission on Judicial Performance]*

In California, the most serious constitutional basis for censure or removal is “willful misconduct in office.” Willful misconduct is (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his judicial capacity. *Dodds v. Commission on Judicial Performance*, 906 P.2d 1260 (California 1995). Alleged misconduct must be evaluated in the context of the duties and responsibilities of the judicial office. *Adams v. Commission on Judicial Performance*, 882 P.2d 358 (California 1994). “Unjudicial conduct” may be measured, in part, with

reference to the California Code of Judicial Ethics and its canons.

“Bad faith” is established when any of three conditions exists. A judge acts in bad faith by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge’s lawful power, or (3) performing a judicial act that exceeds the judge’s lawful power with a conscious disregard for the limits of the judge’s authority. *Broadman v. Commission on Judicial Performance*, 959 P.2d 715 (California 1998).

A judge is “acting in his judicial capacity” when he is performing one of his “judicial functions,” *i.e.*, one of the varied functions generally associated with his position as a judge, whether adjudicative or administrative in nature. Due weight is given to the location of the judge’s conduct. Thus, when a judge is on the bench, he is presumptively acting in a judicial capacity. When a judge is in

chambers during normal working hours, he is generally, though not necessarily, acting in a judicial capacity. If a judge uses, or attempts to use, his authority as a judge for improper ends, regardless of location, the judge is considered to be acting in his judicial capacity. *Dodds v. Commission on Judicial Performance*, 906 P.2d 1260 (California 1995).

The second constitutional basis for censure or removal in California is “conduct prejudicial to the administration of justice that brings the judicial office into disrepute,” formerly referred to by the California Supreme Court as “prejudicial conduct,” now referred to by the court as “prejudicial misconduct.” Prejudicial misconduct occurs when a judge, even if acting in good faith and in a non-judicial capacity, engages in conduct that adversely affects public regard for the judiciary. *Geiler v. Commission on Judicial Qualifications*, 515 P.2d 1 (1973); *Adams v. Commission on Judicial Performance*, 897 P.2d 544 (California 1995). The canons are relevant to the

### Examples of governing provisions

Grounds for sanctions imposed by the [Judicial Discipline and Disability] Commission or recommendations made by the Commission shall be violations of the professional and ethical standards governing judicial officers, conviction of a felony, or physical or mental disability that prevents the proper performance of judicial duties. **Arkansas Constitution.**

Upon recommendation by an affirmative vote of at least four members of the commission, [on retirement, removal, and discipline] the supreme court en banc, upon concurring with such recommendation, shall remove, suspend, discipline or reprimand any judge of any court or any member of any judicial commission or of this commission, for the commission of a crime, or for misconduct, habitual drunkenness, willful neglect of duty, corruption in office, incompetency or any offense involving moral turpitude, or oppression in office. **Missouri Constitution.**

Offenses of which the court [of the judiciary] may take cognizance shall include the following: (1) Willful misconduct relating to the official duties of the office; (2) Willful or persistent failure to perform the duties of the office; (3) Violation of the Code of Judicial Conduct as set out in the rules of the supreme court of Tennessee; (4) The commission of any act constituting a violation of so much of the Code of Professional Responsibility as set out in the rules of the supreme court of Tennessee as is applicable to judges; (5) A persistent pattern of intemperate, irresponsible or injudicious conduct; (6) A persistent pattern of discourtesy to litigants, witnesses, jurors, court personnel or lawyers; (7) A persistent pattern of delay in disposing of pending litigation; and (8) Any other conduct calculated to bring the judiciary into public disrepute or to adversely affect the administration of justice. **Tennessee Code.**

determination of whether prejudicial misconduct occurred. *Adams v. Commission on Judicial Performance*, 897 P.2d 544 (California 1995).

Prejudicial misconduct may also involve acts done in bad faith in a non-judicial capacity. *Doan v. Commission on Judicial Performance*, 902 P.2d 272 (California 1995). In that context, bad faith means a culpable mental state beyond mere negligence, consisting of either knowing or not caring that the conduct being undertaken is unjudicial and prejudicial to public esteem. *Broadman v. Commission on Judicial Performance*, 959 P.2d 715 (California 1998).

The “public esteem for the judiciary” aspect of prejudicial misconduct is measured by an “objective observer” standard. Prejudicial misconduct is established when it would appear to an “objective observer” familiar with the facts and the standards of conduct that the conduct in question is prejudicial to public esteem for the judicial office. *Doan v. Commission on Judicial Performance*, 902 P.2d 272 (California 1995). The views of actual observers may be sufficient, but are not necessary to establish prejudicial misconduct under an objective observer standard. Because the public’s esteem for the judiciary is measured by the objective observer standard, the subjective intent or motivation of the judge is not a significant factor in assessing whether the judge has committed prejudicial misconduct. *Adams v. Commission on Judicial Performance*, 897 P.2d 544 (California 1995), citing *Gonzalez v. Commission on Judicial Performance*, 657 P.2d 372 (California 1983).

Neither willful misconduct nor off-bench prejudicial misconduct committed in bad faith can be mitigated or excused. *Adams v. Commission on Judicial Performance*, 897 P.2d 544 (California 1995). This is because “bad faith cannot be excused by extraneous circumstances; there can be no mitiga-

tion for maliciously motivated unjudicial conduct.” *Spruance v. Commission on Judicial Qualifications*, 532 P.2d 1209 (1975). Such mitigating circumstances can be considered, however, in weighing the discipline to be imposed on a judge. *Adams v. Commission on Judicial Performance*, 897 P.2d 544 (California 1995); *Broadman v. Commission on Judicial Performance*, 959 P.2d 715 (California 1998).

### Other states

The Utah Supreme Court defined willful misconduct as (1) one or more acts of unjudicial conduct (2) committed in bad faith, (3) by a judge acting in his judicial capacity. *In re Worthen*, 926 P.2d 853 (Utah 1996). Noting that “conduct prejudicial to the administration of justice which brings a judicial office into disrepute” is less egregious than willful misconduct, the court explained that prejudicial conduct lacks the element of willfulness and covers negligent conduct that may or may not arise in connection with the judicial office or willful misconduct that does not arise in connection with the judicial office even if the conduct was undertaken in subjective good faith. Finally, the court stated that to be prejudicial conduct, the “unjudicial conduct must have the effect of lowering public esteem for a particular judicial office and thus tend to lower public esteem for the entire judiciary so as to reduce its effectiveness.”

Both willful misconduct and prejudicial conduct require a finding of unjudicial conduct. The Utah court defined unjudicial conduct as “behavior that departs from the ethical norms governing judges” as spelled out in the code of judicial conduct. There was “great merit” in defining misconduct by reference to the code of judicial conduct, the court explained, because these canons are specific and provide notice of what conduct and activities are prohibited. The court also noted that the Utah Judicial

Council had established a mechanism for judges to seek advisory opinions as to the meaning of these canons in specific situations.

In contrast, the North Carolina Supreme Court does not refer to the code of judicial conduct in determining whether a judge’s conduct rose to the level of willful misconduct or conduct prejudicial to the administration of justice. The court acknowledged that the terms willful misconduct and prejudicial conduct are “so multiform” as to admit of no precise rules or definition. *In re Cornelius*, 436 S.E.2d 836 (North Carolina 1993). It has defined willful misconduct in office as “the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross unconcern for his conduct, and generally in bad faith.” The court has said conduct prejudicial to the administration of justice is conduct that a judge “undertakes in good faith but that nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office.”

For example, in *In re Brown*, 599 S.E.2d 502 (North Carolina 2004), the court rejected the recommendation of the Judicial Standards Commission that a judge be censured for presiding over a hearing in which a public defender was challenging sanctions the judge had imposed after the judge testified under oath at the hearing, conducted her own voir dire examination of witnesses, and ruled on objections to her examination; the judge failed to announce a decision or enter an order as a result of the hearing. Rather than addressing whether the judge violated the code of judicial conduct, the court concluded that the judge’s conduct did not rise to the level of conduct that it had determined to be prejudicial to the administration of justice in previous judicial discipline cases. 

## Judicial Campaign Opponents and Impartiality *(continued from page 1)*

Advisory opinions recommend that a judge, in evaluating whether the appearance of his campaign opponent will impair his impartiality, should take an objective rather than subjective approach. *Arizona Advisory Opinion 04-2* (“our prior opinions suggest that this inquiry [determining when impartiality is impaired] is based on an objective rather than subjective, standard”). Despite how impartial a judge may feel, if the judge’s impartiality can reasonably be questioned, then recusal “is better for the judge, the opponent and the judicial system.” *Arkansas Advisory Opinion 94-2*. To promote public confidence in the judiciary, it is important that a judge consider whether the public will doubt his ability to remain unbiased. *Arizona Advisory Opinion 04-2*.

The responsibility to eradicate any appearance of impropriety “lies squarely with the judge. Recusal is a decision for the judge and is not [a] decision to be made by the person before the bench.” *Arkansas Advisory Opinion 94-5*. A judge should not wait until a possible bias is noticed or recusal is requested before considering disqualification.

The Arkansas advisory committee found “the weight of the opinions and the preferable view to be that when an attorney is opposing a presiding judge for reelection, the judge should disqualify himself or herself in all cases in which the attorney appears before that judge.” *Arkansas Advisory Opinion 94-2*. Other advisory committees agree:

- A judge may not preside over cases where a party’s attorney will be an opponent in the judge’s campaign for re-election. *Alabama Advisory Opinion 94-520*.

- An incumbent judge should recuse from any case where an

announced opponent will appear. *Arizona Advisory Opinion 04-2*.

- It is a judge’s responsibility to recuse when a candidate for his position appears; it is not the responsibility of the parties to object. *Arkansas Advisory Opinion 94-5*.

- A judge should disqualify himself from any case where the assistant public defender appears after having announced his candidacy in the next judicial election. *Florida Advisory Opinion 93-47*.

Remittal of disqualification following disclosure may be possible. *Arizona Advisory Opinion 04-2*.

Yet some ethics opinions have advised that a judge is not necessarily required to recuse when an attorney in a case is also the judge’s election opponent. See *Georgia Advisory Opinion 204* (1995) (automatic recusal is not necessary); *Nevada Advisory Opinion 06-5* (judge is not required to recuse nor disclose that an attorney in a case is his opponent in a judicial election); *New York Advisory Opinion 92-82* (judge may preside in a case where an attorney is a political opponent); *New York Advisory Opinion 06-12* (judge is not required to recuse when the district attorney is his political opponent). Most of these opinions, however, do contain a caveat that a judge should recuse if she feels she cannot remain impartial when her campaign opponent appears. See *New York Advisory Opinion 92-82*; *New York Advisory Opinion 06-12*. For example, the Georgia advisory committee directs:

if a judge is in fact biased or prejudiced toward a party and/or counsel because such counsel is seeking judicial office then held by such judge...such that the judge’s impartiality might reasonably be questioned, said judge has an affirmative

duty to recuse, and a failure to do so may be challenged in the appropriate forum.

*Georgia Advisory Opinion 204* (1995). See also *West Virginia Advisory Opinion* (February 7, 2000) (when an attorney before the judge is an opposing candidate, the judge must disclose the fact to the parties so that an informed decision regarding disqualification can be made).

The Nevada advisory committee based its conclusion that a judge need not recuse when a campaign opponent appears on state case law requiring an extreme showing of bias against an attorney before requiring that a judge be disqualified. *Nevada Advisory Opinion 06-5*. One member of the committee dissented, however, arguing that it is reasonable to suspect that a judge may harbor bias toward an attorney who is running against him in the upcoming election. The dissent further asserts:

Judges are human. If a judge’s livelihood is being threatened by a lawyer running against him or her, the appearance of lack of impartiality must exist. Even if a judge and attorney are able to place their professional responsibilities above their personal biases, it is inevitable that the parties will perceive an appearance of bias or impropriety. This leaves both parties of the litigation with a legitimate basis for questioning the legal process. The party represented by the lawyer who is running against the judge may wonder if a particular decision was based on the merits of the case, or on the judge’s personal feelings for the lawyer. Conversely, the opposing party may feel that an unfavorable decision was based on a judge’s effort—whether the effort was conscious or not—to show that there was no bias. Not only does this undermine the public faith in the judicial process, it also places judges in a no-win situation.

## Exceptions

The rule requiring disqualification does not, however, allow an attorney to invent situations of bias whenever she does not want a particular judge to hear her case. Therefore, the “mere suggestion” of an attorney’s future participation in an election (*Alabama Advisory Opinion 97-674*), or “mere rumors” are not sufficient to compel a judge’s disqualification (*Arizona Advisory Opinion 04-2*).

Additionally, a judge is not automatically disqualified when an attorney announces her candidacy *after* her case is before the judge. *Alabama Advisory Opinion 94-520*. The Alabama advisory committee included the following quote to explain its position:

Where a party or the party’s attorney acts toward a judge in a manner calculated to create bias or prejudice, disqualification of the judge ordinarily will not be required. A party should not be able to engage in “judge-shopping” by manufacturing bias or prejudice that previously did not exist. (quoting J. Shaman, S. Lubet, J. Alfani, *Judicial Conduct and Ethics* §5.06 at 106 (1990)).

The Alabama advisory committee did warn that a judge should monitor the situation and disqualify himself, for example, “if facts and circumstances exist arising out of the campaign” cause the judge to harbor a personal bias or prejudice toward either the attorney or the clients of the attorney because of his representation.” *See also Alabama Advisory Opinion 00-749* (judge is not disqualified from criminal cases when the assistant district attorney who handled the pretrial motions has informed the judge that he or she intends to qualify to run against the judge in an upcoming primary election); *Alabama Advisory Opinion 98-716* (judge is not disqualified from a case if the plaintiff engages the judge’s campaign opponent as a third co-counsel a few days before the election and

less than two weeks before the scheduled trial date).

Similarly, the Washington advisory committee stated that a judge may sign written findings of facts and conclusions of law in a case in which the oral decision was entered before an attorney for one of the parties filed as a candidate against the judicial officer and all post trial matters will be heard by another judge, including motions for attorneys’ fees. *Washington Advisory Opinion 92-7*.

## Rule of necessity

Commentary to Canon 3E states, “By decisional law, the rule of necessity may override the rule of disqualification.” The rule of necessity allows a judge to preside “despite compelling reasons for disqualification...if no mechanism exists for transfer of the matter to another court or appointment of a substitute judicial officer.” *Arkansas Advisory Opinion 94-7*. The rule of necessity is applied when “failure to hear the case would result in an injustice.” *Florida Advisory Opinion 93-47*.

The Florida advisory committee addressed a request from the sole judge for a county in which the chief assistant had announced her candidacy for county judge. The chief assistant functions primarily as a supervisor but she does sign informations and files an occasional written motion. Citing the rule of necessity, the committee noted “there may be cases where disqualification would result in an injustice either to the defendant or the State. For example, a bond hearing should probably not be continued or delayed because this could result in injustice to a defendant.” The committee concluded that the judge was not disqualified from all criminal cases simply because the assistant state attorney supervises the assistants that appear before the judge or where the assistant state

attorney simply signs informations or motions. *Florida Advisory Opinion 94-28*.

Circumstances where the rule of necessity may allow a judge to preside even when a campaign opponent appears include:

- When no other judge is available to hear the case. *See Arizona Advisory Opinion 04-2*; *Arkansas Advisory Opinion 94-7* (judge is the only local judge who hears juvenile matters).
- When the judge’s political opponent is a government attorney and resulting disqualification would apply in multiple cases. *See Arkansas Advisory Opinion 94-7* (opposing candidate is the deputy prosecuting attorney who typically appears before the judge in 10-20 cases per week); *Florida Advisory Opinion 93-47* (opposing candidate is the assistant public defender); *Florida Advisory Opinion 94-28* (opposing candidate is assistant state attorney).

Disqualification may also be unnecessary in other circumstances. For instance, the Michigan ethics committee advised that a judge is not necessarily disqualified when proceedings involving a campaign opponent are uncontested because “there is little likelihood the judge’s impartiality may be called into question by one of the parties.” *Michigan Advisory Opinion II-096* (1994). However, the opinion did advise a judge to disclose when an attorney in a case is a campaign opponent even in uncontested cases.

## Former opponents

When the election is over and the judge has won, the North Dakota advisory committee recommended “some period during which the judge recuses himself from any proceeding in which a former opponent for judicial office serves as an attorney, whether or not there is actual bias or prejudice on the part of the judge.” *North Dakota Advisory Opinion 95-1*. In determining

## Judicial Campaign Opponents and Impartiality *(continued from page 7)*

an appropriate period of recusal, the committee directed a judge to consider whether actual bias exists and the “reasonable time for public perception to conclude that there is no bias.”

Yet most advisory opinions agree that recusal is not necessary when a former opponent appears absent personal bias or prejudice or extraordinary circumstances creating a reasonable question as to the judge’s impartiality. *Alabama Advisory Opinion 00-761*; *Alabama Advisory Opinion 01-786*. See also *Florida Advisory Opinion 94-10* (judge need not recuse unless personally hostile toward the former opponent); *New Mexico Advisory Opinion 97-8* (judge is not required to continue recusing from cases where a former opponent appears as counsel); *New York Advisory Opinion 03-77* (judge may preside over a case where a former campaign opponent appears as long as he remains confident in his ability to remain impartial). The Alabama committee relies again on *Judicial Conduct and Ethics* to explain its position:

Hostility toward a party’s attorney must be both personal and extreme before it is disqualifying. This is particularly so when the judge’s behavior toward an attorney does not grow out of the particular case the judge is hearing at that time. Antipathy towards a lawyer will not necessarily be considered...as extending to the lawyer’s client, and where the antipathy is against the lawyer but not against the client personally, recusal will not be required.

*Alabama Advisory Opinion 01-786*.

The Wisconsin advisory committee outlined additional guidelines for a judge to consider before deciding whether “particular facts, circumstances, or personal/professional relationships would reasonably call the judge’s impartiality into question,” when a former opponent appears:

- The judge’s level of involvement with the former opponent.
- The interaction of interests between the judge and her former opponent.
- How a failure to recuse would appear to other attorneys, judges, and members of the legal system.
- How a failure to recuse would appear to the general public.
- How a recusal would burden the administration of the court.

*Wisconsin Advisory Opinion 03-1*.

An Oklahoma advisory opinion considered the circumstances of a judge who is the only judge sitting in the county on a daily basis. *Oklahoma Advisory Opinion 03-2*. The attorney continued after the election to request that the judge disqualify. The judge, concerned not only about appearances of impropriety, but also with fulfilling the obligations of his office, questioned whether he must continue to recuse from all cases where his former opponent appears even when he feels he can remain unbiased. The committee stated, “we must take the judge at face value when he asserts that he feels no bias or prejudice.” The issue of public confidence, the committee stated, would depend on whether the election was “heated” or “if it were of a nature to raise a question in the public mind of the ability of the judge to thereafter act impartially in matters in which his former opponent appears as counsel.” Lastly, the opinion pointed out that the attorney would have known how the local court worked prior to opposing the judge and that “it is unreasonable to expect . . . assignment of an outside judge for an extended period of time unless the subsequent actions of the judge indicate to an outside observer that the judge is in fact being less than fair and impartial.”

### Other issues

If a campaign opponent appears before a judge not as an attorney representing a litigant but as a party, the two advisory committees that have addressed the issue agree that the judge is disqualified. *Alabama Advisory Opinion 98-694*; *New York Advisory Opinion 91-110*. However, those committees also concurred that the disqualification ends after the election (*New York Advisory Opinion 91-146*) at least if the election was 12 years earlier and was not “so acrimonious that there might be a reasonable question as to a judge’s impartiality after such a long period of time.” *Alabama Advisory Opinion 838*.

Committees have also advised that a judge is not disqualified when an attorney in a case supported the judge’s election opponent in a current campaign or prior election if the judge believes that he or she can be impartial absent extraordinary circumstances creating a reasonable question as to the judge’s impartiality. *Alabama Advisory Opinion 00-761* (judge is not disqualified to hear cases in which parties are represented by attorneys who supported a judicial candidate who opposed the judge in a recent election); *New York Advisory Opinion 91-129* (judge is not required to recuse him/herself from a non-jury trial where the defendant was campaign treasurer for the judge’s opponent two years ago); *New York Advisory Opinion 03-77* (judge is not required to disqualify himself or herself from a case when a known supporter of the judge’s opponent in a re-election campaign appears). 

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## Pro Se Litigants and Judicial Demeanor (continued from page 3)

1993). The court emphasized that appropriate judicial demeanor is most significant in the adjudication of family matters.

The need for institutional acceptance and respect is highest in family matters, where the damage that can be inflicted by judicial rudeness and intemperance is the greatest. At the same time, we must acknowledge that the stresses on the judge are also heightened in family court. It takes super-human patience to sit through a long day of personal conflict, exacerbated by raw emotion and attitudes that put greater effort on inflicting personal pain than on resolving disputes. The essence of judicial temperament, however, is the ability to diffuse emotional responses and facilitate reasonable ends, voluntarily accepted, especially where children are involved. Judicial intemperance will only undermine the effectiveness of the decisions that the court renders.

### Intimidating

In another discipline case, a judge's angry and sarcastic conduct in the courtroom was found to have intimidated and discouraged some self-represented litigants from presenting their testimony and positions. On several occasions, the judge had warned pro se parties that if they "want to lose, annoy me" or "if you annoy me, that would be a bad thing" or words to that effect. The judge chastised, belittled, and berated several self-represented litigants and prevented some litigants from fully presenting their case by interrupting them without justification. The judge was publicly reprimanded for her comments pursuant to an agreement. *In re Eiler*, Stipulation, Agreement, and Order (Washington State Commission on

Judicial Conduct February 4, 2005) ([www.cjc.state.wa.us](http://www.cjc.state.wa.us)) (an audio recording of portions of one hearing is on the Commission web-site).

Another judge agreed that, in hindsight, his comments, tone, and manner to self-represented litigants in several cases could be perceived as inappropriate, harsh, or rude. The judge stated that he had not intended to humiliate the litigants but had been trying to ensure compliance with court rules and to convey the seriousness of the proceedings. The statement of charges

**The judge . . . prevented some litigants from fully presenting their case by interrupting them without justification.**

had alleged that the judge repeatedly interrupted self-represented defendants; refused to allow them to answer his questions; and engaged in angry, disdainful, and/or protracted dialogues with them regarding the exercise of their rights, which was humiliating and intimidating. The judge was publicly admonished pursuant to an agreement. *In re Lukevich*, Stipulation, Agreement, and Order (Washington State Commission on Judicial Conduct December 1, 2000) ([www.cjc.state.wa.us](http://www.cjc.state.wa.us)).

Another judge admitted he should not have repeatedly admonished a litigant to obtain an attorney or made negative comments about the ability of pro se litigants. The judge stated that he had been "exasperated" with the litigant because she did not engage counsel when he thought she should and for other conduct. The judge was censured for this and other misconduct. *In re O'Brien*, 650 A.2d 134 (Rhode Island 1994). See also *Inquiry Concerning*

*Newton*, 758 So.2d 107 (Florida 2000) (public reprimand pursuant to stipulation for, in addition to other misconduct, telling a self-represented litigant "she'd better be prepared, because she was not going to get by on her good looks" and responding "that is not good enough" when the litigant stated she was trying the best she could); *Inquiry Concerning Ormsby*, Decision and Order (California Commission on Judicial Performance March 20, 1996) (<http://cjp.ca.gov>) (censure pursuant to agreement for, among other misconduct, forcing an unrepresented litigant into an unnecessary colloquy in open court regarding what he was learning in school and questioning him in a demeaning manner that was visibly embarrassing); *In re Hammermaster*, 985 P.2d 924 (Washington 1999) (censure and 6-month suspension without pay for, among other misconduct, threatening self-represented litigants who had not paid their fines with life imprisonment and indefinite jail sentences). 

*This article is adapted from Reaching Out or Overreaching: Judicial Ethics and Unrepresented Litigants, a 2005 publication of the American Judicature Society Center for Judicial Ethics, funded by the State Justice Institute. See ad on page 12.*

In the 2007 amendments to the ABA Model Code of Judicial Conduct, a comment was added that permits a judge to "make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard."

## Comments Regarding Crimes Against Women *(continued from page 3)*

great compassion for her, that's for sure.

At the conclusion of testimony on sentencing factors in a second similar case, the judge stated, "Well, the thing that's unfortunate in this case are the two girls that are putting about four young men in the pen are still running around out on the damned streets, still doing the same thing to more men. That what's unfortunate." Referring to the composure of the victim, the judge stated, "She sat there like, you know, nothing ever happened to her. And she had been dicked by three or four different guys." Commenting to the mother of one of the defendants, he stated, "And then I certainly agree with you that, you know, ten days in jail is too much for a blow job from a thirteen year old. Now, if it was coming from a 40-year old, that might be worth ten days, but from a thirteen year old it wouldn't be worth you know a day in jail." The senior judge resigned and apologized for his comments. The Kansas Commission on Judicial Qualifications entered an order requiring the judge to cease and desist. *Inquiry Concerning Rohleder*, Order (Kansas Commission on Judicial Qualifications June 12, 1997). See also *In the Matter of Lehman*, 812 P.2d 992 (Arizona 1991) (judge remarked to prosecutors and law enforcement officers in a case involving sex-related crimes that he did not think much of the charges because "everyone knows that the girls in Duncan are easy"); *In re Romano*, Determination (New York State Commission on Judicial Conduct August 7, 1998) ([www.scjc.state.ny.us](http://www.scjc.state.ny.us)), *accepted*, 712 N.E.2d 1216 (1999) (after reading charges from the bench against a woman who was accused of sexually

abusing a 12-year-old boy, judge said, "What I want to know is where were girls like this when I was 12"); *In re Meyer*, Consent Order of Formal Remand and Suspension from Office (Tennessee Court of the Judiciary October 4, 1994) (during a hearing regarding a defendant found not guilty of rape by reason of insanity, judge said that defendant "needs a girlfriend" and that the public defender should "arrange a dating service or something" for the defendant).

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### Comments that trivialize crimes such as rape and domestic violence or that disparage the female victims of those crimes violate the code of judicial conduct.

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#### Taking domestic violence seriously

Judges have also been disciplined for making insensitive comments in domestic violence cases. The North Carolina Judicial Standards Commission found that a judge embarrassed and humiliated the victim of an assault by telling her in open court she would ruin her children's lives if she did not reconcile with her estranged husband, that she deserved to be hit, and that she had not been hit that much. A support group was in court with the victim, who was seven months pregnant, and the judge referred to the group as a one-sided, man-hating bunch of females and a pack of she-dogs. Finally, the judge polled the courtroom spectators as to how many of them had little spats during their marriages. Based on the Commission's

recommendation, the judge was censured for this and other misconduct. *In re Greene*, 403 S.E.2d 257 (North Carolina 1991).

One New York judge asked a police officer during an arraignment whether the alleged assault was "just a Saturday night brawl where he smacks her around and she wants him back in the morning." The judge also advised the defendant to "watch your back" because "women can set you up." The State Commission on Judicial Conduct found that the judge's suggestion understated the seriousness

of the conduct, discouraged complaints by the victims of domestic abuse who look to the judicial system for protection, and conveyed the impression that the judge favors the men in such incidents over the

women making the accusations. The Commission admonished the judge pursuant to the judge's agreement. *In the Matter of Bender*, Determination (New York Commission on Judicial Conduct February 7, 1992) ([www.scjc.state.ny.us](http://www.scjc.state.ny.us)).

Pursuant to a stipulation and agreement, the Washington State Commission on Judicial Conduct admonished a judge for inappropriate statements in three domestic abuse cases. *In re Turco*, Stipulation and Admonishment (Washington Commission on Judicial Conduct December 1, 1995) ([www.cjc.state.wa.us/](http://www.cjc.state.wa.us/)). In one case, after finding the defendant guilty of assaulting his wife, the judge stated "you didn't need to bite her. Maybe you needed to boot her in the rear end, but you didn't need to bite her . . ." In the second case, after finding the defendant guilty of assaulting his wife

while forcibly removing her from an apartment where controlled substances were being used, the judge stated “fifty years ago I suppose they would have given you an award rather than what we’re doing now.”

In the third case, after the victim-witness had not appeared, in a colloquy with the city attorney about dismissing the case, the judge stated:

My opinion is that the police do 95% of the work when they separate the parties, so that takes care of 95% of the problem. You know, all we’re doing is slapping someone after the police have remedied the situation. But, so be it. So I mean there’s nothing to get excited about in missing these cases.

During the arraignment of a defendant charged with assault and violation of an order of protection for hitting his wife with a telephone, another New York judge stated “What was wrong with this? You need to keep these women in line now and again.” Both the judge and the defense attorney laughed. The defense attorney then said, “Do you know why 200,000 women get abused every year? Because they just don’t listen.” The judge and the defense attorney laughed, and the judge did not rebuke the lawyer. The defendant was present.

In addition, the judge made statements off-the-bench to his court clerk and the assistant district attorney indicating that he believed that many domestic assault charges were exaggerated by women and unfair to men and that he was skeptical about the merits of domestic assault cases in which the primary witness was the victim and the complaint was signed by a police officer instead of the victim. He said that he did not favor issuing an order of protection or keeping an alleged abuser out of the home unless the victim had come to court with a turban of bandages on

“more discreet” with domestic abuse cases and that the police should not always arrest the defendant because, “most likely, the defendant is the father; he’s the husband; he’s the one who makes the money, and it’s not right that they’re told that they can’t go back into the house.”

The Commission stated that such judicial indifference and gross insensitivity were inappropriate and discouraged complaints from those who look to the judiciary for protection, noting that even isolated remarks cast doubt on a judge’s ability to be impartial and fair-minded. The judge was removed for these comments and other misconduct. *In re Romano*, Determination (New York State Commission on Judicial Conduct August 7, 1998) ([www.scjc.state.ny.us](http://www.scjc.state.ny.us)), *accepted*, 712 N.E.2d 1216 (New York 1999). *See also In the Matter of Barnhart*, Order (New

## The State Commission on Judicial Conduct found that the judge’s suggestion discouraged complaints by the victims of domestic abuse.

her head. The judge said, “If a female victim was truly frightened, [she could] leave the home and go to other family or friends or to the shelter.” The judge also told the assistant district attorney several times that he did not like most domestic violence cases because they involve “he said, she said” issues. The judge periodically told the court clerk that the police and prosecutors should be

Mexico Supreme Court September 8, 2005) (judge asked a defendant charged with domestic violence “did she have it coming?” and then laughed out loud); *In the Matter of Moore*, Determination (New York State Commission on Judicial Conduct November 19, 2001) ([www.scjc.state.ny.us](http://www.scjc.state.ny.us)) (referring to a harassment complainant, judge stated he would have “slapped her around” himself); *In the Matter of Roberts*, 689 N.E.2d 911 (New York 1997) (statements to clerks and another judge that “every woman needs a good pounding now and then” and that orders of protection “were not worth anything because they are just a piece of paper,” are “a foolish and unnecessary thing,” are “useless,” of “no value,” and a waste of time”). 

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## 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>.