

# JUDICIAL CONDUCT REPORTER



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## Confidentiality in judicial discipline proceedings

### Confidentiality during review and investigation

In all states, judicial conduct commission proceedings are confidential at the initial stage after an individual files a complaint against a judge. A commission cannot confirm or deny that a complaint has been filed and is being investigated, unless an exception applies. Confidentiality at this stage is intended:

- To encourage complainants to come forward without fear that the judge will learn and retaliate,
- To encourage witnesses to cooperate without fear that the judge will learn and retaliate,
- To reassure participants that the media or others will not contact them,
- To allow a commission to encourage infirm or incompetent judges to resign before charges become public,
- To allow a commission to caution a judge about minor misconduct without publicity, and
- To protect a judge's reputation from unexamined allegations that may prove baseless.

Commission rules differ on who is bound by the confidentiality requirement.

- In some states, confidentiality applies only to commission members and staff. For example, the rule for the Washington State Commission on Judicial Conduct provides: "Before the commission files a statement of charges alleging misconduct by or incapacity of a judge, all proceedings, including commission deliberations, investigative files, records, papers and matters submitted to the commission, shall be held confidential by the commission, disciplinary counsel, investigative officers, and staff . . ."
- In other states, confidentiality binds everyone: the complainant, the judge, and people interviewed during the investigation as well as commission members and staff. For example, the rule for the South Dakota Judicial Conduct Commission provides: "All participants in the proceeding shall conduct themselves so as to maintain the confidentiality of the proceeding."

There is conflicting caselaw on whether, consistent with the First Amendment, complainants can be prohibited from disclosing that they have filed complaints with judicial conduct commissions.

The U.S. District Court for the Southern District of Florida held that the Florida constitution violated the First Amendment insofar as it prohibited a complainant from revealing that they had filed a complaint with the Judicial Qualifications Commission. *Doe v. Judicial Qualifications Commission*, 748 F. Supp. 1520 (S.D. Florida 1990). The court concluded that, “imposing a forced silence on the fact of filing complaints with the [Commission] is more likely to engender resentment and suspicion than to promote confidence or integrity.”

The federal court explained that the Commission had “failed to cite any evidence that the confidentiality rule furthers” its “interest in facilitating the effective investigation of complaints.” In fact, the court suggested, the publication of a complaint may assist the investigation “by creating awareness of the complaint on the part of third-party witnesses who may then come forward and testify before the JQC.”

The court also held that the Commission’s asserted interest in protecting the reputation and privacy of judges was “insufficient to support the restriction on free speech.” The court found that the Commission overstated “the degree to which publication of the fact that a complaint has been filed will lead the people to believe that the complaint is likely to be true,” noting that the complainant may disclose the facts underlying the complaint regardless of the confidentiality rule.

In contrast, the U.S. Court of Appeals for the Second Circuit held that a prohibition on complainants disclosing during the investigation stage that they had filed a complaint did not violate the First Amendment. *Kamasinski v. Judicial Review Council*, 44 F.3d 106 (2nd Circuit 1994). The court believed that the decision in *Doe* “failed to adequately recognize the manner in which the state’s interests are furthered by limited confidentiality.”

The Second Circuit stated that allowing complainants to make their filing of a complaint public would enable a campaign of harassment that might “lead to the loss of judicial independence as well as an overburdening of the [Connecticut Judicial Review Council] with frivolous complaints.” The court also concluded that a “common result of publication will be that witnesses otherwise willing to speak candidly will decline to do so, in the knowledge that the media and others will pursue them to inquire whether they have in fact testified.” Finally, the court found that the state had a “significant interest in encouraging infirm or incompetent judges to step down voluntarily, a likelihood that is greatly reduced after publication that complaints have been filed against them.”

The Second Circuit distinguished between disclosing “the fact that a complaint was filed,” which it held could be prohibited during the investigation stage, and disclosing “the substance of an individual’s complaint or testimony, i.e., an individual’s own observations and speculations regarding judicial misconduct,” which it held could never be prohibited. It emphasized that an individual could not be penalized for disclosing the substance

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**Commission rules differ on who is bound by the confidentiality requirement.**

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of the complaint because prohibiting criticism of a government official “strike[s] at the heart of the First Amendment.”

See also *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (statute making it a crime for third persons, including news media, to divulge or publish truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission violated the First Amendment).

### Exceptions

Most states have several exceptions that allow the commission to disclose otherwise confidential information under certain circumstances.

- In many states, confidentiality can be waived by the judge. For example, the rule for the Minnesota Board on Judicial Standards provides: “A respondent judge may waive confidentiality at any time during the proceedings.”
- In many states, an exception allows the commission to disclose information to law enforcement agencies and attorney discipline authorities. For example, the rule for the Iowa Judicial Qualifications Commission provides: “Nothing in these rules shall prohibit the commission from releasing any information regarding possible criminal violations to appropriate law enforcement authorities or any information regarding possible violations of the Iowa Code of Professional Responsibility for Lawyers to the Iowa Supreme Court Board of Professional Ethics and Conduct.”
- In many states, an exception allows the commission to disclose information to agencies or officials involved in the judicial appointments process. For example, the rule for the Montana Judicial Standards Commission provides: “If in connection with the selection or appointment of a judge, any state or federal agency seeks information or written materials from the commission concerning that judge, information may be divulged in accordance with procedures prescribed by the commission, including reasonable notice to the judge affected unless the judge signs a waiver of notice.”
- In many states, if the complaint is disclosed by the complainant or otherwise becomes public independent of the commission, an exception allows the commission to release an explanatory statement. For example, the rule for the Wisconsin Judicial Commission provides: “If prior to the filing of a formal complaint or a petition, an investigation of possible misconduct or permanent disability becomes known to the public, the commission may issue statements in order to confirm the pendency of the investigation, to clarify the procedural aspects of the disciplinary proceedings, to explain the right of the judge or court commissioner to a fair hearing without prejudgment, to state that the judge or court commissioner denies the

allegations, to state that an investigation has been completed and no probable cause was found or to correct public misinformation.”

- In many states, an exception allows a commission to disclose otherwise confidential information that may constitute a threat. For example, the rule for the Oregon Commission on Judicial Fitness and Disability provides: “Notwithstanding [the confidentiality rule], when the Commission receives information concerning a threat to the safety of any person or persons, information concerning such threat may be provided to the person or persons threatened, to persons or organizations responsible for the safety of the person or persons threatened, and to law enforcement and/or any appropriate prosecutorial agency.”

### Confidentiality of dismissals

Even if a complaint is dismissed, confidentiality rules continue to bar a commission from publicly disclosing the complaint and the commission’s dismissal. There are some limited exceptions under specific commission rules or practices.

- When the Arizona Commission on Judicial Conduct dismisses a complaint, under its rules, “the complaint and the commission’s order shall be public after all identifying information pertaining to an individual or court has been redacted.” The Commission publishes the redacted documents on its web-site.
- Any action taken by the Arkansas Judicial Discipline and Disability Commission after an investigation is “communicated to the judge by letter which shall become public information. If the allegations leading to the investigation have proven to be groundless, the letter to the judge shall so state.”
- If the New Hampshire Judicial Conduct Committee dismisses a complaint after it has been docketed, the Committee’s “file (other than work product, internal memoranda, and deliberations) including the committee’s disposition, shall be public.” (The Committee does not docket complaints that relate to a judge’s findings, rulings, or decisions or that do not meet other requirements.)
- When it finds insufficient cause for further proceedings, the Vermont Judicial Conduct Board prepares a closure letter that is a public record but does not “identify the complainant, the judge, or any other person by name” although it summarizes “the complainant’s allegations, the Board’s investigation, and the reasons for dismissal.” The redacted closure letters are published on the Board’s web-site.
- The Delaware Court on the Judiciary has summaries of selected complaints dismissed after preliminary investigation on its web-site.

Past issues of the  
*Judicial Conduct  
Reporter*  
and an index are  
available at  
[www.ncsc.org/cje](http://www.ncsc.org/cje).

- The Massachusetts Commission on Judicial Conduct includes in its annual reports examples of cases dismissed after preliminary review or after an investigation.

In some states, an exception to confidentiality allows the commission to disclose a dismissal if the allegations against the judge have become public. For example, the rule for the North Dakota Judicial Conduct Commission provides: “If a judge is publicly associated with having engaged in reprehensible conduct or having committed a violation of the Code of Judicial Conduct, and after an investigation or a formal hearing it is determined there is no basis for further proceedings or for a recommendation of discipline, the Commission may issue a short explanatory statement.” Similarly, the California constitution allows the Commission on Judicial Performance to issue an explanatory statement. The Commission used that exception to explain its closure without discipline of the thousands of complaints it had received about a judge whose sentence in the so-called “Stanford swimmer case” had been “widely criticized as being too lenient, and triggered significant public outrage and media coverage.” [Press release](#) (California Commission on Judicial Performance December 19, 2016).

### Caselaw

Although a commission, its members, and staff are still bound by confidentiality after dismissal of a complaint, complainants have a First Amendment right to disclose the complaint they filed against a judge and the commission’s decision. For example, the U.S. Court of Appeals for the Second Circuit held that, after the investigatory stage and after the commission determines that there is no probable cause to believe that the judge committed misconduct, even the state’s most compelling interests could not justify a ban on a complaint’s public disclosure of information regarding the complaint. *Kamasinski v. Judicial Review Council*, 44 F.3d 106 (2nd Circuit 1994).

Similarly, the U.S. District Court for the District of Montana enjoined the Judicial Standards Commission from prosecuting a complainant for publishing his complaint to the Commission and the letter he received from the Commission dismissing the complaint. *Cox v. McLean*, 49 F. Supp. 3d 765 (U.S. District Court for the District of Montana 2014). By statute, all papers filed with the Commission and all proceedings before it were confidential unless the Commission found the complaint was supported by good cause, the Montana Supreme Court held a hearing in response to the complaint, or the judge named in the complaint waived his or her right to confidentiality. By rule, the requirement of confidentiality remained in place even after the Commission dismissed the complaint and terminated the inquiry.

The plaintiff in *Cox* had filed a complaint with the Commission. The Commission determined that no ethical violation had occurred, dismissed the complaint, and informed the complainant of its decision by letter, reminding the complainant of the confidentiality requirements. The complainant wanted to publish the complaint and the Commission’s letter as part of his efforts to seek the recall of the judge and to run against the judge. When

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the complainant asked if the Commission would bring contempt proceedings if he published his complaint and the Commission's letter, the Commission responded that it would appoint a district court judge to conduct a contempt hearing if the plaintiff breached confidentiality. The complainant filed a federal lawsuit challenging the disclosure ban on First Amendment grounds.

The Commission conceded that the complainant could freely criticize the judge and "publicly raise the same issues that formed the substance of his complaint, subject of course to defamation laws." However, the Commission argued that state interests justified prohibiting disclosure of the existence of the complaint and the dismissal.

The court acknowledged that the state "has an interest in protecting the reputation of its judges" to enhance the public's perception of the judiciary but held that "injury to official reputation is not a basis for 'repressing speech that would otherwise be free,'" citing U.S. Supreme Court decisions. Emphasizing that the Commission inquiry had been completed, the court held that, "besides their conclusory assertion, Defendants make no attempt to justify the perpetual ban on [the complainant] publishing his dismissed complaint and the letter the Commission sent to him over one year ago. . . . Defendants fail to demonstrate that the challenged statute, as applied to [the complainant], is narrowly tailored to achieve a compelling state interest."

Following the federal court's decision, the Commission revised its rules to provide that: "A Complaint dismissed by the Commission . . . is no longer confidential, and a complainant may disclose the complaint and the Commission's response."

### Confidentiality of private dispositions

Following an investigation, if there is evidence of misconduct but the misconduct is relatively minor, commissions in most states can dispose of a matter with an informal resolution or private sanction such as a dismissal with caution, an advisory letter, or a private reprimand. If a commission disposes of a complaint with an informal, private disposition, the complainant is informed of that action in general, but not the specific action taken. For example, the rule for the Alaska Commission on Judicial Conduct provides: "Upon completion of an investigation or proceeding, the commission will disclose to the complainant that the commission . . . has taken an appropriate corrective action, the nature of which, under [statute], cannot be disclosed . . . ."

Although informal dispositions and private sanctions are confidential, several commissions publish on their web-sites, without identifying the judge, redacted versions of their dismissals with comment (Arizona), private reprimands (Kentucky), and private warnings, admonitions, and reprimands (Texas). In addition, approximately 10 commissions briefly describe private dispositions in their annual reports "to educate judges and the public, and to assist judges in avoiding inappropriate conduct," as the California Commission on Judicial Performance annual report explains.

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**Although after dismissal confidentiality continues to bind the commission, its members, and staff, complainants have a First Amendment right to disclose the complaint they filed against a judge and the commission's decision.**

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### Confidentiality after formal charges; public hearings

If, based on the evidence uncovered in an investigation, a commission finds that there is probable cause that a judge has engaged in misconduct warranting a formal hearing and public discipline, the commission files a formal statement of charges, known in some states as a formal complaint. A table showing when confidentiality ceases in formal judicial discipline proceeding in each state is available on the [Center for Judicial Ethics web-site](#).

- In the majority of states (34), when formal charges are filed, confidentiality ceases, the charges and the judge's answer are public, and the subsequent hearing on the charges is also open to the public.
  - In 26 of those states, confidentiality ceases after formal charges are filed.
  - In six of those states, confidentiality ceases when the judge files an answer to the formal charges.
  - In two of those states (Oregon and Rhode Island), confidentiality ceases at the beginning of the fact-finding hearing. The rule for the Oregon Commission on Judicial Fitness and Disabilities provides that the Commission shall issue “a public notice of the hearing not less than 14 days prior to the date of the hearing.”
- In 17 jurisdictions, the formal charges remain confidential, and the hearing is not open to the public.
  - In 13 states, judicial discipline proceedings remain confidential through the hearing, and confidentiality ceases only if the commission files a recommendation for public discipline with the supreme court.
  - In four jurisdictions (Delaware, D.C., Hawaii, and North Carolina), judicial discipline proceedings remain confidential through the hearing and even if there is a finding of misconduct and a recommendation of a public sanction, becoming public only if the supreme court decides to publicly sanction the judge.

The rationale for public hearings (as articulated by the New York State Commission on Judicial Conduct) is that a fundamental premise of the American justice system, is “that the rights of citizens are protected by conducting the business of the courts in public.”

- The public has a right to know when a prosecuting authority has filed formal charges against a public official.
- The prosecuting entity is more likely to exercise its power wisely if it is subject to public scrutiny.
- The discipline process is lengthy, and the public would have a better understanding of the entire process if the charges and hearing portion are open.

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- Maintaining confidentiality is often beyond a commission’s control because, as it and the judge prepare for a hearing, “more ‘insiders’ learn of the proceedings, [and] the chances for ‘leaks’ to the press increase, often resulting in published misinformation and suspicious accusations as to the source of the ‘leaks.’”

(By statute, hearings before the New York Commission are closed to the public, but the Commission has advocated for opening up its proceedings for years.)

## Defining sexual harassment

Under the federal Civil Rights Act, sexual harassment is defined as:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

However, a judge’s “offensive interpersonal behavior” does not have to meet the definition of sexual harassment under federal or state law to violate the code of judicial conduct and warrant judicial discipline, “although undoubtedly all forms of behavior that cross the legal threshold of sexual harassment would constitute judicial misconduct.” *Matter of Seaman*, 627 A.2d 106 (New Jersey 1993). *Accord In re Barr*, 13 S.W.3d 525 (Texas Review Tribunal 1998).

For example, the Ohio Supreme Court recently held that, even if a judge’s “sexual misconduct was not criminal or did not create civil liability,” it could violate the code of judicial conduct. *Disciplinary Counsel v. Horton* (Ohio Supreme Court October 10, 2019). The Court indefinitely suspended the now-former judge from the practice of law for sexual harassment of his secretary and an intern, in addition to other misconduct. The Court explained:

[The code] does not merely proscribe crimes or discrimination—it recognizes the power and authority of judges and sets a higher standard. It also does not police the conduct of judicial employees. The Code of Judicial Conduct is specifically concerned with the actions of judges. The issue is not whether [the secretary] objected to each of [the judge’s] inappropriate statements or acquiesced to the inappropriate culture [the judge] created at his office or if [the intern] implicitly consented to his sexual conduct. [The judge] engaged in sexual harassment in the performance of his judicial duties, abused the prestige of his office for his own personal interests, and acted in a manner that brings disrepute to the judiciary.

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Similarly, the North Dakota Supreme Court rejected a judge's argument that "concepts of sexual harassment under federal and state laws should govern any assessment of the evidence" in a judicial discipline case. *In the Matter of Corwin*, 843 N.W.2d 830 (North Dakota 2014). Noting "judicial disciplinary proceedings 'are neither civil nor criminal,'" the Court stated that the code "does not require the establishment of sexual harassment under federal or state law." The Court suspended the judge from office for one month without pay for conduct toward his court reporter that she reasonably perceived as sexual harassment.

In *In re Miera*, 426 N.W.2d 850 (Minnesota 1988), the judge had argued that he should not be sanctioned for his sexual advances to his court reporter because he had not interfered with her employment or created a hostile work environment as required for a claim of sexual harassment under a state statute. However, the Minnesota Supreme Court stated that the issue was not the judge's "civil liability for damages but his ethical responsibilities as a judge." The Court concluded that the judge's conduct had demonstrated a serious abuse of power and suspended him for one year without pay for this and other misconduct.

Similarly, in *Commission on Judicial Performance v. Spencer*, 725 So. 2d 171 (Mississippi 1998), the judge had argued that his treatment of a court clerk, two deputy clerks, and another judge did not constitute sexual harassment because he was not their supervisor and had not threatened their jobs or engaged in other reprisals. However, the Court held that the issue was not whether the judge's offensive comments met the legal definition of sexual harassment but whether the comments constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The Court removed the judge for this and other misconduct.

### Code of judicial conduct

Although, prior to 1990, the American Bar Association *Model Code of Judicial Conduct* did not expressly refer to bias or harassment, sexual harassment obviously violated the code's provisions: however else it may be characterized, conduct such as inappropriate comments and touching demonstrate a failure to be "patient, dignified, and courteous," to promote "public confidence in the integrity and impartiality of the judiciary," and to "observe high standards of conduct," as required by Canon 3A(3), Canon 2A, and Canon 1 of the 1972 model code respectively.

In 1990, a prohibition on manifesting bias was added to the model code in Canon 3B(5), and a comment to the canon stated that "a judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment . . ."

In the 2007 revisions to the model code, [a new Rule 2.3\(B\)](#) was added that 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 harassment based on sex or gender. [Comment 4 to that](#)

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A judge's "offensive interpersonal behavior" does not have to meet the definition of sexual harassment under federal or state law to violate the code of judicial conduct and warrant judicial discipline.

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[rule](#) explains that, “[s]exual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.” All but approximately 10 states have added an express reference to sexual harassment to their codes of judicial conduct based on the 1990 or 2007 model provisions.

When the Code of Conduct for U.S. Judges, which applies to federal judicial officers, was substantially revised in 2009, no reference to sexual harassment was added although a new comment to Canon 3(A)(3) stated that “the duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.” In March 2019, based on recommendations from a workplace conduct working group, the U.S. Judicial Conference approved [a new Canon 3B\(4\)](#), that still does not explicitly refer to sexual harassment but provides:

A judge should practice civility, by being patient, dignified, respectful, and courteous, in dealings with court personnel, including chambers staff. A judge should not engage in any form of harassment of court personnel. A judge should not retaliate against those who report misconduct. A judge should hold court personnel under the judge’s direction to similar standards.

Commentary states:

A judge should neither engage in, nor tolerate, workplace conduct that is reasonably interpreted as harassment, abusive behavior, or retaliation for reporting such conduct. The duty to refrain from retaliation includes retaliation against former as well as current judiciary personnel.

Under this Canon, harassment encompasses a range of conduct having no legitimate role in the workplace, including harassment that constitutes discrimination on impermissible grounds and other abusive, oppressive, or inappropriate conduct directed at judicial employees or others. . . .

“Sexual harassment” was expressly added to the definition of “cognizable misconduct” in the [Rules for Judicial-Conduct and Judicial-Disability Proceedings](#) for federal judges when the rules were also amended in 2019. The definition in §320, Article II 4(a)(2) now includes:

- (A) engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault;
- (B) treating litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner; or
- (C) creating a hostile work environment for judicial employees.

The amended rules also expressly refer to retaliation and related conduct, stating that “cognizable misconduct includes retaliating against complainants, witnesses, judicial employees, or others for participating in this complaint process, or for reporting or disclosing judicial misconduct or disability” and “refusing, without good cause shown, to cooperate in the

investigation of a complaint or enforcement of a decision rendered under these Rules.”

## Judges serving as fiduciaries

**Rule 3.8(A)** of the 2007 American Bar Association *Model Code of Judicial Conduct* provides:

A judge shall not accept appointment to serve in a fiduciary position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, except for the estate, trust, or person of a member of the judge’s family, and then only if such service will not interfere with the proper performance of judicial duties.

The same rule was in Canon 4(F) of the 1990 model code and Canon 5(D) of the 1972 code. According to the reporter’s notes to the 1972 code, that prohibition prevents “the appearance that the party for whom the judge acted as a fiduciary would have an advantage due to the judge’s status as a judge.” The prohibition applies even if “the amount of work involved is minimal.” [\*U.S. Advisory Opinion 96\*](#) (2009).

The code does allow a judge to serve as a fiduciary under certain circumstances although even then a judge must:

- “Comply with the same restrictions on engaging in financial activities that apply to a judge personally” (Rule 3.8(C));
- Keep informed about the judge’s fiduciary economic interests (Rule 2.11(B)); and
- Disqualify from cases if the judge knows that he or she as a fiduciary has an economic interest in the subject matter in controversy or is a party to the proceeding (Rule 2.11(A)(3)).

Thus, a comment explains, even if an exception would otherwise apply, a judge may not serve as a fiduciary if doing so might require frequent disqualification based on stock held by a trust or estate.

When a judge may serve as a fiduciary under an exception, the judge may be paid a reasonable fee, including a statutorily mandated fee, that does not exceed what anyone else would be paid. [\*Florida Advisory Opinion 1995-7\*](#); [\*Massachusetts Advisory Opinion 2008-9\*](#); [\*New York Advisory Opinion 2014-3\*](#); [\*West Virginia Advisory Opinion 2018-4\*](#); [\*U.S. Advisory Opinion 96\*](#) (2009).

### Continuing to serve

One exception to the prohibition allows a new judge who was serving as a fiduciary when elected or appointed to the bench to continue to serve “but only for that period of time necessary to avoid serious adverse consequences to the beneficiaries of the fiduciary relationship and in no event

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longer than one year.” For example, the Massachusetts judicial ethics committee advised that, when only a few steps remain to wind up the affairs of an estate and the judge anticipates being able to complete those tasks “reasonably quickly,” a new judge may continue to serve as the executor of an estate and trustee of a related trust for someone who was not a member of the judge’s family. *Massachusetts Advisory Opinion 2005-9*. In the specific situation, the committee noted, requiring a new executor and trustee at a late stage “could cause unnecessary delay and added expense for the estate” because the co-executor and co-trustee did not live in the state and had not been actively involved in the affairs of the estate.

Judges have been sanctioned for continuing to serve as a fiduciary for an unreasonably long time after becoming a judge. In *In the Matter of Moynihan*, 604 N.E.2d 136 (New York 1992), the New York Court of Appeals removed a judge from office for continuing to act as a fiduciary in several estates for more than two years after assuming the bench, in addition to other misconduct. Rejecting the judge’s claim that his actions were necessary to fulfill longstanding responsibilities to clients in estate matters that could not readily be transferred, the Court found that over two years was an inexcusably long period, the work involved matters before his own court (albeit before different judges), and there was no justification for his failure to turn over ministerial acts to another attorney.

Similarly, the New York State Commission on Judicial Conduct publicly censured a judge who, for approximately three years after becoming a full-time judge, continued to serve as a court-appointed fiduciary in three matters, in addition to other misconduct. *In the Matter of O’Connor, Determination* (New York State Commission on Judicial Conduct August 12, 2013). For example, in one case, the judge had filed a final accounting as the guardian of an incapacitated person; in a second, he had traveled to Florida to visit his disabled ward; in the third, he had as the trustee for an incapacitated person communicated with the city’s attorneys about a lien on trust property. He received payment for his work in two of the matters. The Commission found that the judge’s actions reflected “continued involvement in the matters and sporadic, dilatory acts, rather than a diligent effort to be replaced as fiduciary or to conclude the matters expeditiously” and “presented a clear conflict with his judicial role.”

See also *Judicial Discipline and Disability Commission v. Simes*, 354 S.W.3d 72 (Arkansas 2009) (suspension without pay for, in addition to other misconduct, continuing to serve as the court-ordered executor of an estate of someone other than a family member for almost 12 years after becoming a judge); *Inquiry Concerning Sullivan, Decision and Order* (California Commission on Judicial Performance May 17, 2002) (censure of former judge for, in addition to other misconduct, continuing to serve as a trustee of several trusts after becoming a judge, failing to disqualify from cases involving trusts for which he was trustee, and failing to disclose trustee fees, loans, and property interests on his statements of economic interest).

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The prohibition on acting as a fiduciary prevents “the appearance that the party for whom the judge acted as a fiduciary would have an advantage due to the judge’s status as a judge.”

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## Family exception

Another exception allows a judge to serve as a fiduciary for a member of the judge's family. "Member of the judge's family" is defined in the model code as:

- Spouse or domestic partner,
- Child,
- Grandchild,
- Parent,
- Grandparent, or
- "Other relative or person with whom the judge maintains a close familial relationship."

The limitation of the exception to members of the judge's family and the definition of that term clearly mean that a judge is not necessarily allowed "to act in a fiduciary capacity for every relative of the judge." *Florida Advisory Opinion 2017-12*. Some states have expanded that exception either by listing other individuals or using a different definition of family member than the model code. For example, the Oklahoma code of judicial conduct permits fiduciary service for a "member of the judge's household," in addition to a member of the judge's family. The Massachusetts code includes "sibling" in the list of members of the judge's family. (The phrase "member of the judge's family" is also used to create a limited exception to the prohibition on a full-time judge practicing law in Rule 3.10.)

Even for individuals covered by the exception, a judge may not serve as a fiduciary:

- If doing so will interfere with the proper performance of judicial duties;
- "If the judge as fiduciary will likely be engaged in proceedings that would ordinarily come before the judge;" or
- "If the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves, or one under its appellate jurisdiction."

## Close familial relationship

Interpreting the phrase "close familial relationship," the Pennsylvania Court of Judicial Discipline considered "traditional family settings or structure, i.e., cohabitation" and interactions "common to traditional family relationships." *In re Horgos*, 682 A.2d 447 (Pennsylvania Court of Judicial Discipline 1996). Thus, the Court stated that the exception may include a relationship between persons who are not related by blood or marriage and who have not lived together but whose relationship "resembles a family relationship such as between spouses, parent and child, or siblings," "is nurturing," and "possesses some of the characteristics typical of a traditional family relationship . . . ."

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The Court listed eight factors relevant to the analysis whether a judge's relationship with an individual is close and familial enough to permit the judge to serve as a fiduciary under the exception:

1. Intimacy of address,
2. Recognition by others of a close relationship,
3. Shared meals,
4. Frequent contact either by phone or in person,
5. Shared holidays,
6. Shared family events,
7. Assistance with physical, medical, legal or emotional needs, and
8. Longevity.

In *Horgos*, the Court dismissed disciplinary charges filed against a judge for serving as the executor of the estate of a family friend, finding that the judge had had a close familial relationship with the decedent. The Court noted that:

- The decedent visited the judge approximately three times a week at his judicial office, sometimes arriving before the judge and his secretary;
- The decedent and the judge spoke together often on the phone;
- The decedent often dined at the judge's home and referred to the judge's mother as "Mama;"
- The judge's family welcomed the decedent at social events;
- People who knew them regarded the relationship as brotherly; and
- The judge "acted in a brotherly, protective manner towards the decedent."

That the judge had "never entered the decedent's home," the Court found, did not outweigh the other factors. The Court concluded that "the level of interaction between the Respondent and decedent, which involved emotional support and caretaking of the decedent's brother, demonstrates a relationship far superior to many real family relationships."

Citing the eight factors from *Horgos*, the Washington committee advised that the inquiring judge could serve as the executor/trustee of a friend's will/trust and as guardian of the friend's child in the event of the friend's death based on their "long and involved relationship" that "appears to be more than just a mere friendship" and "more akin to a close familial relationship." [\*Washington Advisory Opinion 2019-4\*](#). The committee noted:

- The judge and her friend had grown up together and known each other for 40 years.
- "Although they live in different states, they stay in touch by phone almost daily, spend extended time together, share holidays and family events together, provide emotional support for each other, and both families recognize the nature of the relationship."

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**The Court listed eight factors relevant to the analysis whether a judge's relationship with an individual is close and familial enough to permit the judge to serve as a fiduciary.**

- “The friend is like a sister to the judge, and the judge cares for the friend’s child like the judge’s own niece and nephew.”

The Massachusetts advisory committee also stated that it would consider the eight factors identified in *Horgos* when distinguishing “mere friendship from a close familial relationship.” It noted that “not every factor need be present for a close familial relationship to exist” and that “the presence of fewer than all of the factors would suffice where ‘the essence of the relationship [was] nurturing.’” *Massachusetts Advisory Opinion 1997-3*.

In that opinion, the committee found that the inquiring judge had had a “nurturing and lasting relationship of personal trust, support and reliance” with the decedent, “similar to that of trusted siblings,” and approved the judge’s service as executor of the estate. The committee noted:

- The judge and the decedent had been friends for almost 30 years.
- More than 15 years before, the decedent married another friend of the judge, the judge arranged for the wedding officiant, and the judge was one of only four guests at the wedding who was not related to the couple.
- The judge frequently socialized with the decedent and his spouse and regularly shared holidays and religious holy days with them.
- The judge included the decedent’s family in their own family celebrations.
- The decedent shared personal financial information with the judge and sought the judge’s advice about finances, including estate planning.
- The decedent relied on the judge for advice and guidance about family problems and looked to the judge for “support in times of family crisis.”
- The decedent relied on the judge to assist him in adequately providing for his brother.
- The decedent allowed the judge to make decisions about his “extensive interest in and support for various charitable organizations.”

The Massachusetts committee has applied the eight factors to approve fiduciary service in several subsequent opinions. Stating that “no one factor is determinative” and that “the result is based on an overall evaluation of the status of the relationship,” the committee concluded that a judge could serve as a trustee of a friend’s family trust based on the length of the friendship (over 20 years), their frequent and regular contact that included their families, shared of vacations and holidays, their mutual service as emergency medical contacts, and the judge’s own assessment that the friend was “one of her closest, most important friends” and that her family had no closer relationship other than with her siblings. *Massachusetts Advisory Opinion 2016-7*.



The committee also approved a judge holding the durable power of attorney for her spouse's uncle and serving as co-executor of his will because the judge played a role in the uncle's "important decisions on personal and business matters" that was significant and "very analogous to that played by a son or daughter with a parent." [\*Massachusetts Advisory Opinion 2000-2\*](#). In addition, the judge and her spouse's uncle have had a close familial relationship for over 35 years; despite the distance between their residences, they have maintained regular contact, "seeing each other on holidays and important milestones;" and the uncle treats the judge's sister as a niece and has frequent contact with the judge's parents.

The Massachusetts committee also allowed a judge to continue as the executor of an estate and the trustee of a trust for an unrelated decedent with whom the judge had a relationship analogous to that "between an uncle and nephew or disparately-aged cousins." [\*Massachusetts Advisory Opinion 2008-9\*](#). The committee noted that the judge had known the decedent since the judge was a junior in college; the judge regularly talked with the decedent by telephone and in person while he was alive; the judge nurtured and supported the decedent during an illnesses and rehabilitation; the judge included the decedent in important family gatherings; and the judge and the decedent shared the judge's vacation home. Finally, the committee noted that the decedent had no relatives other than nieces, nephews, and their progeny. Other advisory committees have also listed the unavailability of anyone closer to the decedent as a factor that favors the judge serving as a fiduciary. See [\*Pennsylvania Informal Advisory Opinion 6/6/01\*](#) (a judge may serve as executor and trustee for a former next-door neighbor who had no family in the area and whom the judge considered to be the equivalent of an aunt or grandmother); [\*South Carolina Advisory Opinion 5-2016\*](#) (a judge may serve as an executor of a will and as an agent under a health care power of attorney for a friend with whom the judge has maintained a 40-year friendship, who is a widow with no children, who has been a mother figure to the judge and a grandmother figure to the judge's child, and who has been included in all of the judge's family functions); [\*West Virginia Advisory Opinion 2017-24\*](#) (a judge may serve as the administrator for her deceased uncle's estate and as the conservator for her elderly aunt when they had a close familial relationship, the judge is the only blood relation who could hold the position, and they lived in a county where the judge does not preside).

The Massachusetts committee has also used that eight-factor analysis to determine that a judge did not have a close enough relationship to serve as a fiduciary. In [\*Massachusetts Advisory Opinion 2008-10\*](#), the inquiring judge had been appointed as guardian by a court in 1978 as a disinterested professional; the judge had had no prior involvement with the ward, who was the client of a state agency and lived in a state-licensed facility. The committee stated that, although a long-standing guardianship relationship might create a close familial relationship that would justify continuing as a guardian after becoming a judge, in this case, it did not: there was no relationship by blood; the judge and the ward did not share an address; there was no recognition by others that they have a close relationship; the judge

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himself did not perceive the relationship as close; the judge did not provide “any ‘direct’ assistance with physical, medical or emotional needs;” they did not share meals, holidays or family events; and they were not in frequent contact. The committee directed the judge to “take reasonable steps to resign in a timely and expeditious manner.”

In *Massachusetts Advisory Opinion 2003-3*, the committee stated that a judge’s relationship with a lifelong family friend was not so close that the judge could be co-executor of her estate, noting, for example, that when the decedent had named the judge as executor, she had had her niece call the judge to be sure that he was “alive and well.” That the estate would be probated in Canada, not in Massachusetts, was irrelevant, the committee stated, because the rule “on its face applies regardless of where the probate may occur.”

### “Nurturing, personal, and lasting”

Other committees have applied similar factors in approving or disapproving judges’ serving as fiduciaries. The Indiana committee stated that a judge could hold a power of attorney and serve as the executor of the estate of a family friend when the judge’s role in the “friend’s life has been filial in nature, nurturing, personal, and lasting,” that is, “ideally, the characteristics of a close family relationship.” *Indiana Advisory Opinion 5-1989*. The judge had known his elderly friend “since he was a young child.”

The families were neighbors and close friends for 40 years, and the judge often visited the friend and his wife, who were childless. As an adult, the judge looked after the couple, helped during the wife’s illness and death, and has continued caring for and socializing with his friend, who lives nearby. The judge drives his 95-year-old friend to lodge meetings, other social functions, and to doctor appointments. For this man’s convenience, a power of attorney was given to the judge, who pays the man’s bills, does his banking and otherwise handles his affairs, which are not complex.

The committee noted that administration of the estate would probably not be complicated.

The Kentucky committee stated that a judge may serve as the executor of the estate of a deceased uncle if “the uncle stood more or less in loco parentis during the judge’s childhood or adolescence, or if there was a close bond of friendship between them, or if the person is regarded as a member of the judge’s extended family.” *Kentucky Advisory Opinion JE-11* (1980). The committee did note that, if the estate was large and complex and, therefore, likely to consume a lot of time, “the judge would be well advised to refuse appointment” to ensure it did not interfere with the proper performance of his judicial duties.

The advisory committee for federal judges stated that residence in the judge’s household or relationship by blood, adoption, or marriage was not required to fall within the family member exception for a “close familial relationship.” *U.S. Advisory Opinion 96* (2009). On the other hand, it advised, “more is required than mere residence in the household, longstanding affective ties, or an underlying business relationship. Persons must be

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treated by the judge as a member of the judge's family in order to be considered family members . . . ."

See also [\*Florida Advisory Opinion 2017-12\*](#) (a judge may be co-trustee of an irrevocable trust created by the judge's brother-in-law when the judge has known him since the judge was eight years old (57 years); the judge thought of him as more of a brother than a brother-in-law; the brother-in-law and the judge's father had been in business together; on the judge's father's death, the brother-in-law took on the role of family patriarch; and the judge routinely consults the brother-in-law for advice and looks to him as a father figure); [\*Pennsylvania Informal Advisory Opinion 1/24b/02\*](#) (a judge may not serve as co-executor of the will of a person the judge has known for many years when the judge does not have a particular friendship with the person or his family); [\*Pennsylvania Informal Advisory Opinion 8/17/09\*](#) (a judge may serve as the co-executor of the estate of an aunt who was a mentor to the judge and with whom the judge had a close familial relationship); [\*Pennsylvania Informal Advisory Opinion 3/27a/06\*](#) (a judge may serve as the executor of a friend's estate if the friend is more than an acquaintance and is someone with whom the judge has a close familial relationship, such as sharing religious and secular holidays, serving as a godparent to the friend's children, and being named to make medical decisions if the friend could not do so); [\*South Carolina Advisory Opinion 14-2011\*](#) (a master-in-equity may serve as the executor of a trust for a lifelong friend of the master's spouse who has been the master's friend for 20 years and for whose child the master and the master's spouse have acted as surrogate parents).

In New York, a judge may serve as a fiduciary for a non-family member "with whom the judge has maintained a longstanding personal relationship of trust and confidence" if the judge gets the approval of the Chief Administrator of the Courts. In considering whether there is "a longstanding personal relationship of trust and confidence," the New York judicial ethics committee advised judges to use the same factors they use to analyze whether to disqualify themselves when an attorney with whom they socialize appears in a case: the nature of their relationship, "the inter-relationships among their respective immediate family members, the frequency and context of their contacts, and whether they or their respective family members share confidences." [\*New York Advisory Opinion 2018-180\*](#). See [\*New York Advisory Opinion 2011-125\*](#). See also [\*New York Advisory Opinion 2011-117\*](#) (a new judge may not continue to serve as co-trustee of a testamentary trust established in 1967 under the will of an individual with whom the judge had no relationship but who was a client of the judge's former law partner; a court appointed the judge successor co-trustee after her partner's death, just before she became a judge).

## Recent cases

### **Ex parte communications: “Convenience, happenstance, and habit”**

Based on a special committee report, the Judicial Council of the U.S. Court of Appeals for the Seventh Circuit publicly admonished a district court judge for his practice of exchanging ex parte emails with the U.S. Attorney’s Office. *In re Bruce, Memorandum* (7th Circuit Judicial Council May 14, 2019). The Council also ordered that the judge remain unassigned to any matters involving that office until September 1, watch a training video, and read excerpts of the federal code of judicial conduct.

Before being appointed in 2013 to the U.S. District Court for the Central District of Illinois, the judge worked for 24 years in the U.S. Attorney’s Office in the Central District and had, “unsurprisingly,” formed friendships with several people working in that office. After being appointed, the judge remained friendly with many people in the office, including paralegal Lisa Hopps.

In December 2016, Hopps complained in an email to the judge about his absence from a going-away party for U.S. Attorney Jim Lewis, and the judge responded that he had missed the party because he was presiding over the trial in *U.S. v. Nixon*. The judge then criticized an “entirely inexperienced” Assistant U.S. Attorney in the case for repeating “the bull\*\*\*t” from the defendant’s testimony and turning a “slam-dunk” case into a “60-40” one for the defendant. The judge said he was bored and added that he “work[s] hard not to try” cases, that is, he tries not to act as an advocate even when a case is being poorly tried.

In late 2017, Hopps shared those emails with Assistant U.S. Attorney Timothy Bass after the judge found that Bass had misled him in a high profile criminal case in which the defendant was a former member of Congress. Bass told others in the U.S. Attorney’s Office about the emails, and that office disclosed the emails to Nixon’s counsel. Nixon filed a motion for a new trial based on the emails, which is still pending.

The U.S. Attorney’s Office discovered additional emails between the judge and members of the office in other cases and disclosed the emails to the defense in those cases. The Federal Defender in the Central District, whose office represented the defendants in many of those cases, filed a complaint against the judge.

In August 2018, the *Illinois Times* published an article titled, “Federal judge engaged in ex parte talk.” Other news outlets also reported the story, and the “coverage and its aftermath prompted” the Chief Judge of the 7th Circuit to file a complaint. The District’s Chief Judge removed the judge from all cases involving the U.S. Attorney’s Office.

Following an investigation, the special committee found that the judge frequently had ex parte communications with employees of the U.S. Attorney’s Office about requests for warrant approvals, draft plea agreements, jury instructions, docketing issues, and scheduling matters. Some of the

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emails included criticisms of specific assistant U.S. Attorneys. Most of the communications were by email, but some were in person or over the phone. The judge also occasionally communicated with the U.S. Attorney's Office after he had entered judgment in a criminal case, for example, congratulating assistant U.S. attorneys when they prevailed on appeal in cases over which he had presided. The committee also found that probation officers regularly contacted the judge directly by email and copied the U.S. Attorney's Office but not defense counsel.

Further, in addition to the *Nixon*-related emails, the committee found that the judge had communicated *ex parte* about a second pending trial with the U.S. Attorney's Office. In *U.S. v. Gmoser*, after the judge and Assistant U.S. Attorney Elly Peirson had a misunderstanding during a pretrial-conference about what documents had been filed, Peirson sent the judge a series of docket entries, copying his clerk and defense counsel. In a private response, the judge stated, "My bad. You're doing fine. Let's get this thing done." During the discipline hearing, the judge explained that his comment was only intended to comfort Peirson after the misunderstanding. Disclosure of this email prompted a defense motion for a new trial, which remains pending.

The committee noted that there was no evidence that the emails "impacted any of his rulings or advantaged either party" or were on the merits of cases, with the exception of the emails related to *Nixon* and the appeals. The judge "admitted that some of his communications were flatly inappropriate and others were unwise." However, he initially claimed that the emails about scheduling and other ministerial matters were not objectionable, arguing that *ex parte* communications about minor matters were "permissible for the efficient operation of the court," were the "default," and were part of the "culture" of the courthouse that went back at least to his predecessor as district judge.

However, although the code allows an *ex parte* communication for scheduling "when circumstances require it," the special committee emphasized that, "when circumstances require it" is key. As Judge Bruce now concedes, the majority of his *ex parte* communications did not "require" the exclusion of defense counsel; they were often a matter of simple convenience, happenstance, and habit." The committee acknowledged that "certain circumstances will require *ex parte* communications, including genuine emergencies and emails relating to warrant applications," but stated that the judge had provided no good reason why defense counsel could not have been included in "the routine scheduling and ministerial discussions" and that the communications violated the code even if the practice was attributable to courthouse culture.

The special committee disagreed with the judge's argument that his sanction should be private, concluding that a public response was required given the news reports and defense motions for new trials. The committee stated that "the public heeds the judiciary's decisions on the belief that it operates independently and with integrity, and this case suggests that such belief in Judge Bruce's work on cases involving the Office may have waned."

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However, the committee also emphasized that it was not condemning the judge's continuing friendships with members of the U.S. Attorney's Office, stating that "such relationships are normal," "there is ample guidance on when recusal or disqualification based on friendship is appropriate," and there was no evidence that the judge "had an inappropriate relationship with anyone at the Office."

In October, even without any evidence of *ex parte* communications in the specific case before it, a panel of the 7<sup>th</sup> Circuit reversed a sentence imposed by Judge Bruce based on his "extensive *ex parte* communication with the prosecuting U.S. Attorney's Office about other cases." *U.S. v. Atwood* (U.S. Court of Appeals for the 7<sup>th</sup> Circuit October 24, 2019). The court explained:

In sentencing, the most significant restriction on a judge's ample discretion is the judge's own sense of equity and good judgment. When those qualities appear to be compromised, the public has little reason to trust the integrity of the resulting sentence. The government has conceded that Judge Bruce compromised his appearance of impartiality. Allowing *Atwood's* sentence to stand would undermine the public's confidence in the fairness of this sentence and in the impartiality of the judiciary.

### Private, individual, and secret interests

Agreeing with the State Commission on Judicial Conduct, a Texas Special Court of Review publicly admonished a judge for authorizing the use of his name, title, and likeness on materials supporting a candidate for director of an electric cooperative. *In re Oakley, Opinion* (Texas Special Court of Review October 25, 2019).

The judge serves on the board of directors of a member-owned, non-profit corporation formed under the Texas Electric Cooperative Corporation Act. Donna Wilcox, a social acquaintance of the judge, asked him to publicly endorse her candidacy for another position on the board. The judge agreed and permitted Wilcox to use his name, likeness, and "The Honorable James Oakley, Burnet County Judge" in her campaign materials. The materials were mailed to the approximately 35,000 members of the cooperative in the district that would be represented by Wilcox and were available on social media platforms. The judge believed he could publicly endorse Wilcox because she was not running for a public office.

Wilcox lost. If she had been elected, she would have received a \$36,000 annual stipend.

The Commission charged the judge with lending the prestige of his office to advance Wilcox's private interests, violating Canon 2B in the Texas code of judicial conduct. The judge contended that Wilcox's election was not a "private" interest because the position "provides no secret or clandestine benefits;" the judge relied on the definition of "private" as "confidential; secret," one of three alternative definitions in *Black's Law Dictionary*.

Noting that in Canon 2B "private" modifies "interests," the Court held that the judge's "proffered definition . . . is nonsensical" in that context.

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If we followed Judge Oakley’s construction to its natural conclusion, any impropriety or appearance of impropriety would be permissible as long as it occurred openly. But violations take many forms; some are committed surreptitiously, . . . while others take place in plain view. . . . Thus, we find Judge Oakley’s construction to be inconsistent with the Code’s broad objectives of maintaining public trust and confidence in a fair and impartial judiciary.

*Black’s Law Dictionary* also defines “private” as “of, relating to, or involving an individual, as opposed to the public or the government,” and the Court found that definition to be consistent with the context of Canon 2B. Applying that definition, it concluded that the judge “used the prestige of his office to advance Wilcox’s private interests” because the compensation she would have received “would have benefited her individually.”

### Courtroom protest

The Texas State Commission on Judicial Conduct publicly admonished a judge for protesting the confirmation of Justice Brett Kavanaugh to the U.S. Supreme Court by closing his courtroom and draping black fabric over the door. [\*Public Admonition of Lipscombe\*](#) (Texas State Commission on Judicial Conduct August 8, 2019).

On Monday October 8, 2018, a TV news reporter posted to Twitter a photograph of the judge’s closed courtroom doors draped in black fabric, with the statement:

County Court of Law, Judge John Lipscombe draped his door with funeral bunting and shut down his court today (office is still open) as a form of silent protest after Brett Kavanaugh was confirmed as a Supreme Court Justice. He told me he felt the need to do something because Kavanaugh’s confirmation was a big step backwards for this country. He said it shows disrespect to women and men. The rest of the courthouse is open.

Other news outlets picked up the story. Five complaints were filed with the Commission.

The judge had 107 matters on his docket that day, and 69 criminal defendants had been scheduled to appear. The judge asked the President of the Austin Criminal Defense Lawyers Association to put a notice of the closure on its private server for members. The judge’s bailiff advised attorneys and litigants when they arrived that the courtroom was closed. The judge stated that he was in his office working the entire day and available to attorneys and others who wished to speak with him. His court coordinator responded to emails from home, his bailiff was in the courthouse to “answer questions and give resets,” and the prosecutors who work in his court were in the courthouse conducting “their everyday business with Defense Attorneys.”

When the Commission asked him to explain his conduct, the judge stated:

As I watched the confirmation process for Brett Kavanaugh, I became more and more disgusted and concerned for the future of the Supreme Court

. . . not because he comes from a political party different from mine, but because of his character and conduct. I was concerned about the person, but also the process of confirmation. . . . My feelings about this are anything but political. I strongly felt and continue to feel, that the Supreme Court and our entire Judiciary has been besmirched and that I had a personal obligation to show my disapproval and demonstrate my utmost respect for the Judiciary and my dedication to our Constitution and its principles of fairness and justice.

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