

# JUDICIAL CONDUCT REPORTER



★★★★★ A PUBLICATION OF THE NATIONAL CENTER FOR STATE COURTS CENTER FOR JUDICIAL ETHICS

VOLUME 37, NO. 3 • FALL 2015

## Before and after the bench: Part 2 by Cynthia Gray

Jurisdiction over a judge's pre-bench misconduct as an attorney was covered in the first part of this two-part article, published in the summer issue of the *Judicial Conduct Reporter*. Part 2 discusses jurisdiction over judicial misconduct after a judge has left the bench, including bar discipline of a former judge who was not disciplined as a judge and subsequent discipline as an attorney after being sanctioned as a judge. This article also describes states where judicial discipline and attorney discipline may be handled in the same proceeding.

### Attorney discipline of former judges

Whether attorney discipline can be imposed for judicial misconduct was originally and necessarily an issue prior to the establishment of judicial conduct commissions. For example, in a 1961 attorney discipline proceeding involving a sitting judge and the practice of "killing" tickets in a municipal court, the New Jersey Supreme Court held that its disciplinary power over attorneys extended to their conduct as judges. *In the Matter of Mattera*, 168 A.2d 38 (1961). (The state's Advisory Committee on Judicial Conduct was not created until 1974.) The Court noted that any misbehavior that "reveals lack of the character and integrity essential for the attorney's franchise constitutes a basis for discipline" because "the character of a man is single." Further, the Court reasoned:

In terms of rational connection with fitness at the bar, behavior of an attorney in judicial office cannot be insulated from the demands of professional ethics. On the contrary, the judge's role is so intimate a part of the process of justice that misbehavior as a judge must inevitably reflect upon

qualification for membership at the bar.

The Court rejected arguments that the availability of impeachment excluded other remedies, that disbarment was inappropriate because it would lead to loss of the judicial office, and that discipline is incompatible with judicial independence. However, in the case before it, the Court declined to sanction the judge, finding that the evidence of his complicity in the mishandling of tickets was equivocal and that he had no improper motive. *Accord Gordon et al. v. Clinkscales*, 114 S.E.2d 15 (Georgia 1960) (12 years before the establishment of the Judicial Qualifications Commission, holding that a petition for disbarment against a sitting judge should not have been dismissed simply because he could be removed from office only by impeachment and was not practicing law).

Disbarring a former judge prior to the 1966 establishment of the Judicial Qualifications Commission, the Nebraska Supreme Court explained that the "violation of his judicial oath aggravates the offense of disregarding his oath as a lawyer." *State of Nebraska ex rel. State Bar Association v. Conover*, 88 N.W.2d 135 (Nebraska 1958) (disbarment of a former judge for practicing law in his court, failing to remit to the county costs collected in cases over which he presided, and other misconduct). *Accord In the Matter of Hasler*, 447 S.W.2d 65 (Missouri 1969) (disbarment of a former judge for ex parte communications with the wife in a divorce suit over which he was presiding; the Commission on Retirement, Removal, and Discipline was not created until 1972).

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- Absent a legal requirement, a judge may not create, maintain, and/or produce information about cases specifically and exclusively for a prosecutor's benefit. *New York Opinion 2014-154*.

- A judge may not assist a newspaper improve the accuracy of its reporting by regularly providing it with factual information about cases. *New York Opinion 2015-30*.

- A judge who learned a fugitive's cell phone number and address during a judicial hearing may not disclose that information to law enforcement. *West Virginia Opinion (June 4, 2015)*.

- A judge may not ask another court to condition the disposition of a case on the defendant's payment of fines or surcharges the inquiring judge had previously imposed. *New York Opinion 2015-50*.

- A magistrates' association may publicly support a resolution urging the legislature to increase the money reimbursed to towns and villages for processing tickets. *New York Opinion 2015-48*.

- A judge who performs wedding ceremonies during regular court hours should remit any funds received to the court. A judge may personally accept a reasonable fee for solemnizing a marriage outside of normal court hours, even at the court. *Indiana Opinion 2-2015*.

- A judge who has been publicly disciplined as a result of complaints by the prosecutor's office and the public defender's office is disqualified from matters in which attorneys from those offices appear for two years after the disciplinary decision. *New York Opinion 2015-37*.

- A judge whose first-degree relative was killed by a driver charged with driving under the influence or a judge who was a victim of domestic violence is not disqualified from cases involving persons charged with the same offenses. *New York Joint Opinions 2015-35 and 2015-75*.

- A clerk magistrate who is married to a state patrol officer may not handle citations or complaints involving his spouse by, for example, signing citations she issued, collecting fines for those citations, or being in the courtroom when she testifies. *Nebraska Opinion 2015-2*.

- Judges who are members of a specialty bar association dedicated to the advancement of women in law and society are not disqualified from matters involving female litigants, such as family law matters. *California Oral Advice Summary 2014-6*.

- To determine whether an organization practices invidious discrimination, a judge must thoroughly investigate its history and purposes, fully understand its current policies and practices, consider the role of the local chapter in developing, implementing, or enforcing those policies and practices, consider the nature of the organization's activities locally and in the broader geographic area, and assess how the public and the community perceive the organization. *Pennsylvania Formal Opinion 2015-2*.

- A judge may serve on the board of directors of a non-profit organization that assists persons convicted of crimes to find jobs, mental health counseling, and housing. *Florida Opinion 2015-11*.

- A judge may not be an officer of a non-profit organization that benefits the families of law enforcement officers and firefighters who lost their lives in the line of duty. *Florida Opinion 2015-12*.

- A judge may be a member of a non-profit organization that promotes a religion's culture through festivals, holiday celebrations, educational programs, and social and economic justice campaigns. *New York Opinion 2015-118*.

- A judge may serve as an officer of her religious institution, preach and allow her sermons to be streamed live on the internet, and make administrative announcements, but may not solicit tithes or contributions. *New York Opinion 2015-92(A)*.

- A judge may serve as the treasurer of his synagogue. *Pennsylvania Informal Opinion*

4/16/2013.

- A judicial official may not sign a letter in support of a child advocacy organization. *Connecticut Informal Opinion 2015-16*.

- A judicial official may serve as the grand marshal of a municipality's ethnic day parade. *Connecticut Emergency Staff Opinion 2015-18*.

- A judge who has withdrawn as an honoree at a school fund-raising event and removed her name from all event communications may attend the event. *New York Opinion 2015-60*.

- A judge may not permit an organization to advertise his attendance at or participation in a fund-raising event or issue invitations citing his participation. *Pennsylvania Formal Opinion 2015-3*.

- A judge and her family may share their experience at a non-profit religious organization's camp with families who are considering sending their children there and accept the camp's offer of a discount or a t-shirt or sweatshirt. *New York Opinion 2015-42*.

- A judge may write to the American consulate in a foreign country confirming that he has invited relatives to visit him, demonstrating he is a responsible person able to meet their material and accommodation needs, and detailing his income and its source. *New York Opinion 2015-92(B)*.

- As part of an equitable distribution, a judge may accept a percentage of future legal fees earned by her former spouse at the conclusion of cases deemed part of the spouse's law practice. *New York Opinion 2015-96*.

- A judge may not write a letter on behalf of a close relative who has been found guilty of a crime and is awaiting sentencing in another court. *Oklahoma Opinion 2015-2*.

*The Center for Judicial Ethics has links to judicial ethics advisory committees at [www.ncsc.org/cje](http://www.ncsc.org/cje).*

## Recent advisory opinions

## Troublesome but not unethical

Following a de novo trial, a Special Court of Review appointed by the Texas Supreme Court dismissed charges that a judge's comments about pending cases on her Facebook page violated the code of judicial conduct. *In re Slaughter*, Opinion (Texas Special Court of Review September 30, 2015) (<http://www.scjc.state.tx.us/caseinfo.asp>). The State Commission on Judicial Conduct had admonished the judge for the posts. The Texas code of judicial conduct provides: "A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case."

The judge maintained a public Facebook page that displayed a photograph of her in a judicial robe and a photograph of the Galveston County Courthouse and described her as a "public figure" and as "Judge of the 405th Judicial District Court." The Review Court found that the judge was "motivated by the admonition of the Preamble to the Code of Judicial Conduct for judges to 'strive to enhance and maintain confidence in our legal system,' as she sought to educate the public of the events occurring in her court." The judge testified that she commented on Facebook to keep her campaign promise to her constituents to be transparent and to keep the public informed of cases being tried in her court. The Court concluded that, although she also may have been motivated by future re-election, "that goal was not necessarily inconsistent with the proper performance of her duties."

On April 28, 2014, a high profile, criminal jury trial was scheduled to begin in the judge's court in which the defendant was charged with keeping a nine-year-old boy in a six-foot-by-eight-foot wooden enclosure inside the family home. The case became known in the media as "the Boy in the Box" case. A couple of days before the trial was to begin, the judge posted on her Facebook page:

We have a big criminal trial starting Monday! Jury selection Monday and opening statements Tues. morning.

In response, a person posted the following comment: "One of my favorite Clint Eastwood movies is 'Hang 'Em High,' jus sayin your honor..."

The following day, the judge posted several comments on her Facebook page:

Opening statements this morning at 9:30 am in the trial called by the press "the boy in a box" case.

After we finished Day 1 of the case called the "Boy in

the Box" case, trustees from the jail came in and assembled the actual 6'x8' "box" inside the courtroom!

The judge also posted, "This is the case currently in the 405th!" with a link to a news article entitled "Texas father on trial for putting son in box as punishment."

Defense counsel filed a motion to recuse the judge and a motion for mistrial based on her Facebook activities. A visiting judge removed the judge from the case, and the transferee judge granted the defendant's motion for mistrial. In the subsequent trial, the defendant was acquitted.

Relying on expert testimony presented by the judge, the Court concluded that the Commission had not presented evidence that the judge's posts violated the code by suggesting to a reasonable person the judge's probable decision on the case or casting reasonable doubt on her capacity to act impartially. However, the Court noted that "extrajudicial comments made by a judge about a pending proceeding will likely invite scrutiny, as it did in this case."

While the Respondent's comments were ultimately proven to not be suggestive of her probable decision on any particular case, the process for reaching this conclusion required the expenditure of a great deal of time, energy, and expense. And as this case illustrates, comments made by judges about pending proceedings create the very real possibility of a recusal (or even a mistrial) and may detract from the public trust and confidence in the administration of justice.

The Court also warned judges to be cautious and exercise discretion to avoid posting factual statements regarding pending proceedings that may invite disparaging comments about the parties, the judiciary, or the administration of justice.

The Commission had examined all of the judge's Facebook posts and found others it believed improper. One of the posts stated regarding another matter pending in her court:

We have a jury deliberating on punishment for two counts of possession of child pornography. It is probably one of the most difficult types of cases for jurors (and the judge and anyone else) to sit through because of the evidence they have to see. Bless the jury for their service and especially bless the poor child victims.

The judge posted the following comment on Facebook regarding a third case: "We finished up sentencing today with a very challenging defendant."

The Review Court found "troublesome that these comments went beyond mere factual statements of events occurring in the courtroom and add the judge's subjective interpretation of these events at or near

## Recent cases

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the time of their occurrence,” but concluded “such comments, at most, showed what amounted to an error in judgment by posting facts from a pending case in her court.” However, it emphasized:

The timing of the posts is troublesome for the judiciary. A judge should never reveal his or her thought processes in making any judgment. Even calling attention to certain facts or evidence found significant enough for the judge to comment on in a pending matter before any decision has been rendered may tend to give the public the impression that they are seeing into the deliberation process of the judge.

### Interesting posts

The Minnesota Board on Judicial Standards publicly reprimanded a senior judge for comments he posted on his Facebook page about cases to which he was assigned. *In the Matter of Bearse*, Public reprimand (Minnesota Board on Judicial Standards November 20, 2015) (<http://www.bjs.state.mn.us/file/public-discipline/1517-news-release-and-reprimand.pdf>). The judge had believed that his Facebook posts could only be viewed by approximately 80 family members, friends, and members of his church, but they were available to the public. He stated that he now realizes that he should not have shared the posts even with friends.

In September 2015, after the first day of trial in a case in which a defendant was charged with sex trafficking, the judge posted on Facebook:

Some things I guess will never change. I just love doing the stress of jury trials. In a Felony trial now State prosecuting a pimp. Cases are always difficult because the women (as in this case also) will not cooperate. We will see what the 12 citizens in the jury box do.

After two more days of trial, the jury found the defendant guilty. The county attorney’s office discovered the judge’s Facebook post and disclosed it to the defense after the trial but before sentencing. The defendant moved for a new trial. The judge to whom the motion was assigned granted the motion.

The Board found that the judge’s post “could reasonably be interpreted as showing that Judge Bearse had concluded that [the defendant] was guilty before he heard any evidence. His conduct burdened the administration of justice because it resulted in vacating the verdict rendered after a three-day trial.”

In July 2015, the judge presided over a serious felony bench trial. During the trial, defense counsel had an apparent panic attack and was taken away by ambulance. In August, the judge posted on Facebook:

Now we are in chaos because defendant has to hire a new lawyer who will most likely want to start over and a very vulnerable woman will have to spend another day on the witness stand. . . . I was so angry that on the way home I stopped to see our District Administrator and told him, “Michael, you are going to have to just listen to me bitch for awhile.” . . . [W]e know the new lawyer (probably quite justifiably) will be asking for another continuance. Terrible day!!!

The judge described a medical school graduate’s petition to expunge her conviction for disorderly conduct. The judge commented, “[L]isten to this and conclude that lawyers have more fun than people.” He then related that the conviction was based on the graduate’s assault on her boyfriend whom she had found having sex with her best friend. He stated that he granted the petition although “[s]he is about two years early based on our new statute” and if the prosecution appealed, “which they will not, I think I will be reversed.” Others commented on the judge’s post, including the following: “I am always heartened by the application of common sense. An excellent decision, in my opinion,” and “You’re back in the saddle again Judge.”

These favorable comments about the judge’s posts, the Board stated, “could create the appearance that Judge Bearse’s decisions on cases could be influenced by the desire to make a good impression of himself on his Facebook page.”

The judge also made negative remarks in Facebook posts concerning criminal defendants with lengthy histories of bench warrants, in one instance commenting, “We deal w/a lot of geniuses!” Other comments included “What a zoo!” (referring to the court on a particular day) and “Just awful his son turned out to be such a Klunk” (referring to a case in which the son was charged with being a felon in possession of a shotgun).

The Board found that the judge’s “posts put his personal interest in creating interesting posts ahead of his duty to maintain the appearance of impartiality.” The Board noted that it did not conclude that the judge prejudged any cases or that his decisions were influenced by his posts. But, the Board explained, its “concerns are with the appearance of lack of impartiality, with Judge Bearse’s putting his personal communication preferences above his judicial responsibilities, and with conduct prejudicial to the administration of justice.” ★

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### Mooted sanctions

Since the creation of judicial discipline commissions, the issue of attorney discipline of a former judge arises if a judge leaves office before a judicial sanction can be imposed. Although, in most states, a former judge remains subject to judicial discipline authorities (*see* box on page 12), in some states, a judge's resignation or retirement terminates judicial discipline proceedings or limits the types of sanctions that can be imposed. In those states, former judges have been disciplined as attorneys for judicial misconduct that was the subject of a pending investigation or recommendation at the time they left office. Some states have provisions that directly address the issue of attorney discipline of former judges. *See* box below.

Agreeing with the recommendation of the attorney discipline agency, the Utah Supreme Court disbarred a former judge who had pled guilty to drug charges that arose while

he was a judge. *In the Matter of Harding*, 104 P.3d 1220 (Utah 2004). The judge had been arrested after police officers, responding to a domestic disturbance call, discovered cocaine, heroin, and drug paraphernalia at his home. News media accounts reported the arrest, including allegations that he had presided over court proceedings while under the influence of controlled substances. He was suspended with pay from his duties.

The Judicial Conduct Commission instituted formal proceedings and, following a hearing, recommended his removal. At approximately the same time, the Utah House of Representatives passed a resolution to impeach the judge. Before the Court received the Commission's recommendation and before the senate could vote, the judge resigned. Approximately one week later, he pled guilty to attempted possession or use of a controlled substance.

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### Provisions regarding lawyer discipline of former judge

**Alabama:** "Former judges who have resumed their status as lawyers are subject to the jurisdiction of the Supreme Court of Alabama and the disciplinary commission and the disciplinary board of the Alabama state bar for misconduct that occurred while they were judges, before they became judges, or after the resumption of the practice of law and that would have been grounds for lawyer discipline." *Rule 1(a)(2), Rules of Disciplinary Procedure.*

**Arizona:** "A former judge who has resumed the status of a lawyer is subject to the jurisdiction of the state bar and the [supreme] court not only for that person's conduct as a lawyer, but also for misconduct that occurred while serving as a judge that would have been grounds for lawyer discipline, provided that the misconduct was not the subject of a judicial discipline proceeding as to which there has been a final determination by the court." *Rule 46b(d), Rules of the Supreme Court.*

**California:** "The State Bar may institute appropriate attorney disciplinary proceedings against any judge who retires or resigns from office with judicial disciplinary charges pending." *Article 6, §18(e), California Constitution.*

**Delaware:** "A former judge who has resumed the status of a lawyer is subject to the disciplinary jurisdiction of the Court under these Rules not only for conduct as a lawyer but also for misconduct that occurred while a judge and that would have been grounds for lawyer discipline." *Rule 5(b), Lawyers' Rules of Disciplinary Procedure.*

**Florida:** "A formal complaint may be filed [by the State Bar] if the Supreme Court of Florida has adjudged the respondent guilty of judicial misconduct in an action

brought by the Florida Judicial Qualifications Commission, the respondent is no longer a judicial officer, and the facts warrant imposing disciplinary sanctions." *Rule 3-3.2 (b)(6), State Bar Rules.*

**Louisiana:** "A former judge who has resumed the status of a lawyer is subject to the jurisdiction of the [Attorney Disciplinary Board] not only for conduct as a lawyer but also for misconduct that occurred while the lawyer was a judge and would have been grounds for lawyer discipline. This jurisdiction of the agency should not be exercised if the misconduct was the subject of a judicial disciplinary proceeding in which there has been a final determination by the court, unless the court reserved to the agency the right to pursue lawyer discipline in accordance with this subsection. Misconduct by a judge that is not finally adjudicated before the judge leaves office falls within the jurisdiction of the lawyer disciplinary agency. If a judge is removed from office or retired involuntarily by the court, the lawyer disciplinary agency should only exercise jurisdiction in the event the court reserves to the agency the right to pursue lawyer discipline in the final decree of the court in which the judge is removed from office, or retired involuntarily. In such circumstances, the record made up by the judiciary commission, including its recommendation of discipline, the transcript, and the commission's findings and conclusions, as well as this court's decree of judicial discipline, shall be admissible in any hearing . . ." *Rule XIX, § 6.B, Rule for Lawyer Disciplinary Enforcement.*

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At that time, the Court found that the judge's resignation had rendered the recommendation for removal moot but ordered that he be permanently disqualified from any judicial position in the state. It also referred the matter to the Office of Professional Conduct.

Subsequently, the Court rejected the former judge's argument that attorney discipline proceedings subjected him to double jeopardy after his permanent disqualification from the bench. The Court stated that double jeopardy did not apply because judicial discipline and lawyer discipline are "matters of appointment, oath, and privilege" and not of criminal sanction.

Although noting that the judge's possession and use of unlawful controlled substances alone might not warrant disbarment, the Court concluded that sanction was justified by the total circumstances. For example, the Court stated:

[D]espite being unable to hear cases due to the pending criminal charges, Harding continued to draw his full salary and otherwise enjoyed the emoluments of judicial office. Not only did such behavior bring disrepute upon the legal profession and undermine public confidence in the judiciary, it placed an undue burden upon his colleagues on the Fourth District Court and adversely affected those citizens served by that court. Compounding these abuses, Harding delayed his decision to resign until the last possible moment, and only did so under intense media coverage of the looming dual threat of impeachment by the legislature and removal by this court.

Connection of a crime is both judicial misconduct and attorney misconduct and has been the basis for attorney discipline of former judges. *See, e.g., In the Matter of Scholl*, 25 P.3d 710 (Arizona 2001) (six-month suspension of a former

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### Provisions regarding lawyer discipline of former judge (continued)

**Maine:** "A former justice or judge who has resumed the status of a lawyer is subject to the jurisdiction of the Board [of Overseers of the Bar] not only for conduct as a lawyer but also for misconduct that occurred while the lawyer was a judge and would have been grounds for lawyer discipline, provided that the misconduct was not the subject of a judicial disciplinary proceeding as to which there has been a final determination by the [Supreme Judicial] Court. Misconduct by a justice or judge that is not finally adjudicated before the justice or judge leaves office falls within the disciplinary jurisdiction of the Board. The Board shall coordinate with the Committee on Judicial Responsibility and Disability in any investigations or proceedings concerning a justice or judge arising out of the same or related conduct." *Rule 10(b), Maine Bar Rules.*

**Michigan:** "[N]othing in this paragraph deprives the attorney grievance commission of its authority to proceed against a former judge." *Rule 9.201, Rules of the Judicial Tenure Commission.*

**Minnesota:** "The Office of Lawyers Professional Responsibility shall have jurisdiction over a lawyer who is no longer a judge to consider whether discipline is warranted with reference to allegedly unethical conduct that occurred during the time when the lawyer held judicial office. The board [on judicial standards] shall notify the Office of Lawyers Professional Responsibility if a judge leaves judicial office while an inquiry, investigation, Formal Complaint, or Formal Statement of Disability Proceeding is pending." *Rule 2(d), Rules of Board on Judicial Standards.*

**New Jersey:** "Where a judge has been removed or

disciplined . . . , those proceedings shall be conclusive of the conduct on which that discipline was based in any subsequent disciplinary proceeding brought against the judge arising out of the same conduct." *Rule 1.20-14(c), Discipline of Members of the Bar.*

**North Dakota:** "A former judge who has resumed status as a lawyer is subject to the jurisdiction of the court under these rules, not only for conduct as a lawyer but also for conduct that occurred while the lawyer was a judge, unless the conduct was the subject of a judicial discipline proceeding as to which there has been a final determination by this court." *Rule 1.1(D), Rules for Lawyer Discipline.*

**Utah:** "A former judge who has resumed the status of a lawyer is subject to the jurisdiction of the Supreme Court not only for conduct as a lawyer but also for misconduct that occurred while the lawyer was a judge and would have been grounds for lawyer discipline provided that the misconduct was not the subject of a judicial disciplinary proceeding as to which there has been a final determination by the Supreme Court." *Rule 14-506(c), Judicial Council Rules of Judicial Administration.*

**Vermont:** "These rules apply to . . . a former judicial officer who has resumed his or her status as a lawyer, not only for conduct as a lawyer but also for misconduct that occurred while the lawyer was a judge and would have been grounds for lawyer discipline, provided that the misconduct has not been the subject of a judicial discipline proceeding as to which there has been a final determination by the Court." *Rule 1(a)(4), Attorney Disciplinary Rules.* ★

judge from the practice of law following his conviction for filing false tax returns and structuring currency transactions to avoid reporting requirements; he had resigned from the bench shortly after the conviction, rendering moot pending proceedings before the Commission on Judicial Conduct); *In re Scott*, 802 P.2d 985 (California 1991) (disbarment of a former judge for, while a judge, using illegal drugs, pleading guilty to possession of cocaine, and authorizing the reduction of bail for a defendant who had sold him drugs; the judge had resigned from the bench as part of the plea agreement); *In the Matter of Blicht*, 706 S.E.2d 461 (Georgia 2011) (disbarment of a former judge following his guilty plea to federal honest services fraud); *In the Matter of Brooks*, 449 S.E.2d 87 (Georgia 1994) (three-year suspension of a former judge from the practice of law for unwanted touching of a sexual nature of several women while a judge; he had pled nolo contendere to sexual battery and simple battery); *State of Oklahoma ex rel. Bar Association v. Thompson*, 194 P.3d 1281 (Oklahoma 2008) (disbarment of a former judge who had been convicted of exposing himself while a judge to individuals in the courthouse).

### By extension

Attorney discipline has also been imposed on former judges for judicial misconduct that was not also a crime. The Louisiana Supreme Court suspended from the practice of law a former judge who had, based on contacts with interested persons or the assertions of the sheriff, instructed the sheriff's office to perform actions when there were no cases pending. *In re Whitaker*, 948 So. 2d 1067 (Louisiana 2007). For example, he had issued ex parte orders regarding child custody, community property disputes, release of a vehicle from a mechanic, and the arrest of a probationer. The judge also wrote a letter in support of a disbarred lawyer on judicial stationery. The Court stated that his conduct was "in blatant disregard of the due process protections set out in our law" and "by extension, constitutes conduct prejudicial to the administration of justice for purposes of . . . the Rules of Professional Conduct."

The Judiciary Commission had begun to investigate the

allegations, but the judge retired before it was completed, which, under Louisiana case law, mooted the judicial discipline proceedings. See *In re Blanda*, 624 So. 2d 431 (Louisiana 1993). But the matter was transferred, pursuant to a rule that "[m]isconduct by a judge that is not finally adjudicated before the judge leaves office falls within the jurisdiction of the lawyer disciplinary agency."

See also *The Florida Bar v. Gardiner*, 2014 Fla. LEXIS 1805 (Florida 2014) (disbarment of a former judge for a significant personal and emotional relationship with the lead prosecutor in a death penalty case; the Judicial Qualifications Commission had filed charges that were dismissed when the judge resigned); *In the Matter of Van Rider*, 715 N.E.2d 402 (Indiana 1999) (approving an agreement submitted by bar disciplinary counsel, public reprimand of a former judge for failing to recuse from a case against his son and ordering his son's release from jail; his term had expired shortly after the incident); *Kentucky Bar Association v. Bamberger*, 354 S.W.2d 576 (Kentucky 2011) (disbarment of a former judge for entering orders containing false statements of fact and other conduct that assisted the plaintiffs' attorneys in mass tort litigation defraud their clients and personally benefitted the judge; the Judicial Conduct Commission had publicly reprimanded him, the only sanction it could impose following his resignation); *In the Matter of Hoffman*, 595 N.W.2d 592 (North Dakota 1999) (based on findings of the Judicial Conduct Commission, six-month suspension of a former judge from the practice of law for stalking his ex-wife, showing disrespect for the courts, inserting his personal situation into proceedings in which he presided as a judge, and a lack of courtesy; he had resigned from office); *State ex rel. Oklahoma Bar Association v. Lile*, 194 P.3d 1275 (Oklahoma 2008) (disbarment of a former judge for, while he was on the court of criminal appeals, submitting requests for reimbursement of personal expenses, misrepresenting that personal travel was for official business, attempting to influence the prosecution of criminal cases against his son, interfering with the incarceration of his son, and interfering with the arrest of a woman with whom he had a relationship; the judge had resigned); *In the Matter of Brown*, 522 S.E.2d 814 (South Carolina 1999) (18-month suspension of a former judge from the practice of law for failing to comply with an order not to retain compensation for performing marriages; he had been publicly reprimanded in judicial discipline proceedings, the only sanction available following his resignation).

### Consecutive sanctions

Some judges who have been removed from judicial office have subsequently also been disbarred for the same misconduct. Dual discipline has been held to be appropriate if



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**JUDICIAL CONDUCT REPORTER**  
Fall 2015

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© 2015  
National Center for State Courts  
ISSN: 0193-7367

National Center for State Courts  
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the judicial misconduct reflects on fitness to practice law as well as fitness to hold judicial office.

Rejecting a former judge's argument, the New Jersey Supreme Court held that judicial discipline "neither obviates nor forecloses professional discipline." and that "an attorney who has engaged in ethical misconduct while serving as a judge may be exposed to professional discipline in his or her capacity as a lawyer." *In the Matter of Yaccarino*, 564 A.2d 1184 (New Jersey 1989). The Court recognized that judicial misconduct that reflects "only or primarily on the person's qualifications as a judge," such as "errors in judgment, inappropriate displays of temperament, or lapses in adherence to necessary procedures," could not be subject to attorney discipline.

However, the Court also explained that "there is a duality of professional responsibility on the part of lawyers who serve in the judiciary."

Their professional loyalty runs both to the judicial office in which they serve and the profession of which they are members. Indeed, the status of an attorney as a member of the legal profession is a condition for the holding of judicial office. . . . Thus, if misconduct affects both the judicial office and the professional status of a lawyer, the public interest in both judicial and professional integrity can be implicated by the lawyer's conduct in judicial office.

The Court stated that "a single act of misconduct may offend the public interest in a number of areas and call for an appropriate remedy as to each hurt," including removal from office, removal from the roster of attorneys, and criminal prosecution. These different remedies, the Court explained, "are not cumulative to vindicate a single interest; rather each is designed to deal with a separate need."

Thus, the Court concluded that attorney fitness can be affected by judicial misconduct such as "overreaching and misuse of judicial office for personal advantage," "acts of dishonesty, venality or greed," and "acts that undermine the integrity of the administration of justice. . . ." Treating the findings of fact from the judicial discipline proceedings as "conclusive and binding," the Court reviewed each finding and concluded most constituted attorney misconduct as well. The judge had been removed for using the prestige of office to advance his daughter's interests after she was arrested; possessing an interest in liquor licenses held by two bars and failing to disclose and trying to conceal that interest; and meeting ex parte with the parties in a property dispute and then attempting to buy the property for

himself. *In re Yaccarino*, 502 A.2d 3 (New Jersey 1985).

The New York Court of Appeals removed a judge who had directed that funds from settlements involving infants in his court were to be deposited in a credit union that had given him several interest free loans. *In the Matter of Cohen*, 543 N.E.2d 711 (New York 1989). In bar proceedings against the now-former judge, the Appellate Division of the New York Supreme Court found that, although not every act that results in a judge's removal also warrants disbarment, disbarment was appropriate in the case because the judge had

used his office for personal gain and breached the public trust. *In the Matter of Cohen*, 598 N.Y.S.2d 797 (New York Supreme Court, Appellate Division 1993).

In other attorney discipline cases from New York, collateral estoppel has been applied to find former judges guilty of professional misconduct based on the removal determinations of the State Commission on Judicial Conduct.

*Compare In the Matter of Collazo*, 691 N.E.2d 1021 (New York 1998) (removal for inappropriate comments about a female law intern and deceptive behavior regarding those comments), with *In the Matter of Collazo*, 750 N.Y.S.2d 263 (New York Supreme Court, Appellate Division 2002) (censure as an attorney for the same misconduct). *Compare In the Matter of Alessandro*, 918 N.E.2d 116 (New York 2009) (removal of a judge for delaying repayment of a \$250,000 loan, not including the loan on his financial disclosure statements and loan applications, and misleading testimony during the Commission investigation), with *In the Matter of Alessandro*, 953 N.Y.S.2d 114 (New York Supreme Court, Appellate Division 2012) (disbarment for the same misconduct).

In judicial removal cases, the Louisiana Supreme Court has reserved to the Attorney Disciplinary Board the right to file a complaint against a removed judge pursuant to an exception to a rule otherwise providing that board cannot exercise jurisdiction over misconduct that "was the subject of a judicial disciplinary proceeding in which there has been a final determination by the court . . ." For example, accepting the recommendation of the Judiciary Commission, the Court removed a judge for releasing at least 900 detainees, allowing individuals with criminal backgrounds to frequent her courtroom, failing to competently administer her court, failing to timely file campaign finance disclosure reports during 15 campaigns for public office, holding herself out as a notary public after her commission had

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Dual discipline has been held to be appropriate if the judicial misconduct reflects on fitness to practice law as well as fitness to hold judicial office.

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been suspended, and failing to represent several clients or to return unearned fees. *In re Hughes*, 874 So. 2d 746 (Louisiana 2004). The order also stated that, to consider “how Judge Hughes’ conduct bears on her fitness to practice law, we expressly reserve the right of the Attorney Disciplinary Board of the Louisiana State Bar Association to institute lawyer discipline proceedings against Judge Hughes.” Thus, in subsequent bar proceedings, the Court permanently disbarred the former judge for the same conduct. *In re Hughes*, 956 So. 2d 575 (Louisiana 2007). The documentary evidence in the lawyer discipline case consisted of the record and the Court’s opinion from the judicial discipline case. *Compare In re Benge*, 24 So. 3d 822 (Louisiana 2009) (removal of a judge for failing to decide a case on the evidence presented at trial, allowing outside influences to dictate her decision, and other misconduct), *with In re Benge*, 100 So. 3d 818 (Louisiana 2012) (three-year suspension from the practice of law for the same misconduct).

The North Carolina Court of Appeals has held that facts proven before the Judicial Standards Commission would not be re-litigated and could be used to conclusively establish allegations by the State Bar. The North Carolina Supreme Court had censured and suspended and, in a second case several months later, removed a judge who failed to disclose his business relationship with an attorney or to disqualify himself from matters involving the attorney; attempted to coerce the district attorney into signing a remittal of disqualification and retaliated after the district attorney refused to sign; exhibited habitual rudeness to those who appeared before him; in a domestic violence protective order case, awarded spousal support when none had been requested, ordered the bailiff to search the husband’s wallet and turn his money over to the wife, and made statements that created the appearance of bias against the husband, who was Hispanic; and, during the Commission investigation, made untruthful statements to a State Bureau of Investigation agent and attempted to influence the recollections of a deputy clerk and the plaintiff’s attorney. *In re Badgett*, 657 S.E.2d 346 (North Carolina 2008); *In re Badgett*, 666 S.E.2d 743 (North Carolina 2008). He was disbarred in subsequent proceedings for his conduct related to the remittal, his treatment of the Hispanic defendant, and his false statements during the investigation. *North Carolina State Bar v. Badgett*, 2011 N.C. App. LEXIS 1302 (North Carolina Court of Appeals 2011).

In contrast, the Florida Supreme Court dismissed a state bar complaint against a former judge based on the same conduct for which he had been removed from office. *Florida Bar v. Graham*, 662 So. 2d 1242 (Florida 1995). The Court had removed the judge for making allegations of misconduct against fellow judges, elected officials, and others, without reasonable factual basis or regard for their reputations; imposing improper sentences and improperly using

the contempt power; acting in an undignified and discourteous manner toward litigants, attorneys, and others; and closing public proceedings. *Inquiry Concerning Graham*, 620 So. 2d 1273 (Florida 1993).

In the subsequent attorney discipline proceeding, however, the Court held that “an attorney should not be disciplined for misconduct committed while serving in a judicial capacity unless that conduct involved a crime, dishonesty, deceit, immorality, or moral turpitude.” Although noting that the State Bar unquestionably had the authority to bring disciplinary proceedings against a former judge, the Court emphasized that judges are held to standards that are much higher than those for attorneys.

Essentially, conduct that is improper for a judge will not always be improper for an attorney. For instance, judges must always strive to conduct themselves in a neutral manner. Attorneys, on the other hand, must represent their clients to the best of their ability and will almost always conduct themselves in a non-neutral manner in which they advocate a position. Moreover, as shown by the conduct at issue here, abuse of power or other judicial misconduct may not necessarily result from a dishonorable motive and may, in fact, be well-intended. . . .

The Court did, however, subsequently reprimand as an attorney the same former judge for his disruptive and improper attitude and actions during the Judicial Qualifications Commission proceedings that had led to his removal. *Florida Bar v. Graham*, 679 So. 2d 1181 (Florida 1996).

### Concurrent sanctions

Some states have rules that provide for the handling of judicial and attorney sanctions in the same proceeding. *See* box at page 10. For example, after the Commission on Judicial Conduct and a judge entered into a stipulated resolution in which the judge agreed to resign while he was being investigated, pursuant to its rule, the Arizona Supreme Court invited the judge and the State Bar “to submit briefs on whether attorney discipline should be imposed and, if so, the appropriate sanction.” After considering the submissions, the Court censured the now-former judge and permanently enjoined him from serving as a judicial officer in Arizona — the only judicial discipline sanction available following his resignation — and also suspended him from the practice of law in Arizona for two years. The judge had heard cases involving an attorney with whom he had an intimate relationship, engaged in unwanted sexual conduct toward an assistant public defender and retaliated against her when she rejected his advances, and sent e-mails of a sexual nature to a third attorney. *In the Matter of Abrams*, 257 P.3d 167 (Arizona 2011).

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Pursuant to its rule, the Minnesota Supreme Court has imposed both judicial and attorney discipline in the same decision. For example, in *Inquiry into Ginsberg*, 690 N.W.2d 539 (Minnesota 2004), the Court removed a judge for dismissing charges in three criminal cases without hearing from the prosecution, retaliating against attorneys who filed complaints with the Board on Judicial Standards, urging a defendant in an animal cruelty case to pick a sheriff's deputy with whom to fight, pleading guilty to criminal charges arising from his assault of a juvenile who had hidden his son's bike, and being convicted of criminal charges after he scratched the hood of a car with his keys in a confrontation in a parking lot. The Court also retired him for disability based on evidence he suffered from several

mental illnesses that prevented him from functioning as a judge currently and for the foreseeable future.

Noting the rule authorizing it to address lawyer discipline in a judicial discipline proceeding, the Court stated that a determination that misconduct warrants removal from judicial office does not necessarily mean that the individual should be barred from the practice of law. The Court also stated that an individual who is disabled from performing judicial functions is not necessarily disabled from representing clients, noting "that an individual who for psychological reasons cannot handle the demands of judicial office could find an appropriate setting in which the lawyer could

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## Provisions regarding concurrent sanctions

**Arizona:** "Upon removal or resignation from office of an incumbent judge as the result of a judicial discipline or disability proceeding, the [supreme] court shall afford the state bar and the judge an opportunity to submit to the court a recommendation whether lawyer discipline or disability status should be imposed based on the record in the judicial proceeding, and if so, the extent thereof." *Rule 46(f), Rules of the Supreme Court, Discipline and Disability Administration.*

**Arkansas:** "The Supreme Court, when considering removal of a judge, shall determine whether discipline as a lawyer also is warranted. If removal is deemed appropriate, the court shall notify the judge, the Commission and the Supreme Court Committee on Professional Conduct and give each an opportunity to be heard on the issue of the imposition of lawyer discipline." *Rule 12D, Rules of Procedure of the Judicial Discipline and Disability Commission.*

**Florida:** "When the Judicial Qualifications Commission files a recommendation that a judge be removed from office, The Florida Bar may seek leave to intervene in the proceedings before the Supreme Court of Florida. If intervention is granted, The Florida Bar may seek disciplinary action in the event the judge is removed by the court." *Rule 3-4.5, Rules Regulating the Florida Bar.*

**Maine:** "[I]f an incumbent justice or judge is to be removed from office in the course of a judicial discipline or disability proceeding, the Court shall first afford the Board [of Overseers of the Bar] and the respondent an opportunity to submit a recommendation whether lawyer discipline should be imposed, and if so, the extent thereof." *Rule 10(c), Maine Bar Rules.*

**Minnesota:** "When the hearing panel recommends the removal of a judge, the [Supreme] Court shall

promptly notify the judge and the Lawyers Professional Responsibility Board and give them an opportunity to be heard in the Court on the issue of lawyer discipline." *Rule 14(f), Rules of Board on Judicial Standards.*

**North Dakota:** "If an incumbent judge is removed from office in the course of a judicial disability or discipline proceeding, the [supreme] court shall afford the [disciplinary] board and the judge an opportunity to recommend whether lawyer discipline should also be imposed, and if so, the extent of the discipline." *Rule 1.1E, Rules for Lawyer Discipline.*

**Vermont:** "If an incumbent judicial officer is to be removed from office in the course of a judicial discipline or disability proceeding, the [Supreme] Court shall first afford disciplinary counsel and the respondent an opportunity to submit a recommendation whether lawyer discipline should be imposed, and if so, the extent thereof." *Rule 5B, Permanent Rules Governing Establishment and Operation of the Professional Responsibility Program.*

**West Virginia:** "The Judicial Hearing Board may recommend or the Supreme Court of Appeals may consider the discipline of a judge for conduct that constitutes a violation of the Rules of Professional Conduct. If discipline of a judge for a violation of the Rules of Professional Conduct is deemed appropriate, the Judicial Hearing Board or the Supreme Court of Appeals shall notify the judge and the Lawyer Disciplinary Board and give them an opportunity to be heard on the issue of lawyer discipline, if any, to be imposed. The Judicial Hearing Board shall have exclusive jurisdiction to recommend discipline of a judge for conduct that constitutes a violation of the Rules of Professional Conduct for lawyers." *Rule 3.12, Rules of Judicial Disciplinary Procedure.* ★

competently practice law.” In the case before it, however, the Court concluded that the judge’s misconduct warranted a one-year suspension from the practice of law and that his disability required that he be placed on disability inactive status as a lawyer after the suspension. *See also Inquiry into Blakely*, 772 N.W.2d 516 (Minnesota 2009) (a six-month suspension without pay and censure as a judge and reprimand as an attorney for obtaining a substantial fee reduction from his personal attorney while contemporaneously appointing her to provide mediation services); *In re Miera*, 426 N.W.2d 850 (Minnesota 1988) (a one-year suspension without pay and censure as a judge and public reprimand as an attorney for unwanted advances toward a court reporter).

Accepting a settlement agreement by the Judicial Hearing Board, the West Virginia Supreme Court of Appeals censured a judge who had “initiated a physical confrontation” with a criminal defendant in his courtroom; the judge also agreed to resign. *In the Matter of Troisi*, 504 S.E.2d 625 (West Virginia 1998). At the same time, the Court accepted a settlement agreement between the judge and the lawyer disciplinary counsel requiring that the judge attend counseling and that his law practice be supervised for one year.

The Court used the case to adopt a new rule providing

that the Judicial Hearing Board has exclusive jurisdiction over a judge even for conduct that violates the Rules of Professional Conduct but stating that, if the Judicial Hearing Board determines that lawyer discipline is also warranted, the Lawyer Disciplinary Board will be notified and given an opportunity to be heard. The Court explained that the rule was necessary because “separate judicial and lawyer disciplinary proceedings arising from the same misconduct is fraught with difficulties” and inefficient.

It normally entails separate investigations, separate hearings below, and culminates in separate hearings before this Court. In considering the recommendations of two separate boards, the Court receives two records, two sets of briefs, and disposes of the cases with two opinions. Thus, all parties involved are plagued with the effort and expense of a duplication of labor despite the fact that all charges arose from the same set of facts.

Finally, in California, Indiana, Mississippi, Montana, and North Dakota, when a judge is removed from office, the judge, by rule, statute, or constitutional provision, is also automatically suspended from practicing law in the state pending further order of the supreme court. ★

### Only in Ohio

Ohio is unique among the states in that judicial discipline and attorney discipline are handled by the same agencies using the same procedures with the same sanction options, eliminating questions of jurisdiction over pre-bench conduct or former judges. Grievances against both judges and attorneys are filed with either Disciplinary Counsel or the Ohio State Bar Association’s Certified Grievance Committee. If substantial credible evidence is found, a complaint is then presented to a three-member probable cause panel of the Board on Professional Responsibility (formerly called the Board on Grievances and Discipline.) If that panel finds probable cause, a fact-finding hearing is held before a different three-member panel of the Board, and that panel makes a recommendation to the full Board on whether a violation has occurred and the appropriate sanction. If the full Board finds a violation, it makes a recommendation to the Ohio Supreme Court, which renders the final decision. The Court can publicly reprimand, place on probation, or disbar an attorney or judge, or suspend an attorney from the practice of law or a judge without pay (subject to a stay in whole or in part). Because a law license is required to be a judge in Ohio (except in mayor’s courts), disbarment is, in effect, removal.

*See, e.g., Disciplinary Counsel v. McAuliffe*, 903 N.E.2d 1209 (Ohio 2009) (disbarment of a judge who was found guilty of fraud for burning down his house to defraud an insurance company); *Disciplinary Counsel v. Hoskins*, 891 N.E.2d 324 (Ohio 2008) (disbarment of a judge for attempting to conceal a possible conflict of interest created by his ownership of a building and trying to sell the building to a felon whom the judge believed had access to funds acquired in a credit-card scam; commenting on the results of a polygraph examination administered to a court employee; failing to disqualify himself from a criminal case against his office administrator’s son and a foreclosure action against her; and mishandling the estates of his uncle and cousin); *Disciplinary Counsel v. Medley*, 819 N.E.2d 273 (Ohio 2004) (18-month suspension of a judge without pay, with six months stayed, for disposing of some criminal charges against a defendant in exchange for a guilty plea at arraignment when neither the prosecutor nor defense counsel was present, misrepresenting facts in a journal entry and providing relief from a default judgment without giving the creditor an opportunity to be heard, and using an improper procedure in debt collection cases). ★

## Continuing authority to discipline former judges

In most states, the judicial conduct commission or supreme court retains the ability to impose a judicial discipline sanction on a former judge, although some states have a time limit. In some states, that authority includes removal of a former judge; in some states, a former judge cannot be removed but can receive a reprimand or similar sanction. In other states, however, as a matter of case law or rule, the end of a judge's tenure eliminates the jurisdiction of the judicial discipline authority or moots the question of sanction. See "Authority to Discipline Former Judges," *Judicial Conduct Reporter* (Winter 2006) ([www.ncsc.org/cje](http://www.ncsc.org/cje)). Some states have provisions that expressly answer that jurisdictional question.

**California:** "The Commission on Judicial Performance may . . . censure a . . . former judge . . . for action occurring not more than 6 years prior to the commencement . . . of the former judge's last term . . . . *Article VI, § 18(d), California Constitution.*

**Florida:** "The [judicial qualifications] commission shall have jurisdiction over justices and judges regarding allegations that misconduct occurred before or during service as a justice or judge if a complaint is made no later than one year following service as a justice or judge. *Article V, §12(a)(1), Florida Constitution.*

**Hawaii:** "The conduct of any justice or judge, full-time or part-time, shall be subject to the jurisdiction of the Commission, regardless of the justice's or judge's status at the time the conduct is reported to the Commission, including, but not limited to, having resigned or retired from office and provided the conduct is reported to the Commission no later than ninety (90) days after the judge leaves office." *Hawaii Rules of Professional Conduct, Rule 8.2(b).*

**Massachusetts:** "The Commission [on Judicial Conduct] shall have jurisdiction over... conduct of a lawyer who is no longer a judge that occurred while he held judicial office." *Chapter 2.11(C), §2(2), Massachusetts General Laws.*

**Michigan:** "Judge' includes . . . a person who formerly held judicial office and is named in a request for investigation that was filed during the person's tenure, except that with respect to conduct that is related to the office, it is not necessary that the request for investigation be filed during the person's tenure." *Rule 9.201, Rules of the Judicial Tenure Commission.*

**Minnesota:** "The board [on judicial standards] shall have jurisdiction over an inquiry, investigation, Formal Complaint, or Formal Statement of Disability Proceeding commenced before a judge left judicial office provided the conduct at issue occurred while the judge was in judicial office and the conduct at issue occurred in the judge's judicial capacity. The board may at any time

dismiss a matter involving a former judge if the board determines that pursuing the matter further is not a prudent use of the board's resources." *Rule 2(d), Rules of Board on Judicial Standards.*

**Montana:** "Jurisdiction of the [Judicial Standards] Commission also extends to conduct that occurred while a judge is in office . . ." *Rule 9(a), Judicial Standards Commission Rules.*

**New Mexico:** "The judicial standards commission's jurisdiction is invoked when notice of formal proceeding is served upon the judge under investigation. The jurisdiction continues irrespective of the judge's subsequent resignation and/or termination from office." *Rule 38, Judicial Standards Commission Rules.*

**New York:** "The jurisdiction of the court of appeals and the commission . . . shall continue notwithstanding that a judge resigns from office after a determination of the commission that the judge be removed from office has been transmitted to the chief judge of the court of appeals, or in any case in which the commission's determination that a judge should be removed from office shall be transmitted to the chief judge of the court of appeals within one hundred twenty days after receipt by the chief administrator of the courts of the resignation of such judge." *§ 47, Judiciary Law.*

**South Carolina:** "The Commission [on Judicial Conduct] has continuing jurisdiction over former judges regarding allegations that misconduct occurred during service as a judge." *Rule 3(b)(2), Rules for Judicial Disciplinary Enforcement.*

**Utah:** "The [Judicial Conduct] Commission has continuing jurisdiction over former judges regarding allegations that misconduct occurred . . . during service as a judge if a complaint is received before the judge left office." *R595-1-2.B, Administrative Code.*

**Vermont:** "The [Judicial Conduct] Board has continuing jurisdiction over former judges regarding allegations that misconduct occurred during their judicial service if a complaint is made within three years of the discovery of the grounds for the complaint. *Rules 3(1), Rules for Disciplinary Control of Judges.*

**Washington:** "The commission [on judicial conduct] has continuing jurisdiction over former judges regarding allegations of misconduct occurring prior to or during service as a judge." *Rule 2(b)(2), Rules of the State Commission on Judicial Conduct.*

**Wyoming:** "This section applies to . . . to former judicial officers regarding allegations of judicial misconduct occurring during service on the bench if a complaint is made within one (1) year following service." *Article 5, § 6, Wyoming Constitution.* ★