

JUDICIAL CONDUCT REPORTER

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Defining charitable “fund-raising event” by Cynthia Gray

Ethical standards for judges limit participation in fund-raising for charitable organizations to ensure that the prestige of office is conserved for its essential purpose—maintaining public confidence in the independence, impartiality, and integrity of judicial decisions. The restrictions also address the concern that people may feel pressured to make donations when a judge is asking or may expect future favors from a judge in return for a donation. But the rules impose limits, not absolute prohibitions, in recognition of judges’ desire to contribute to their communities off-the-bench as well as on.

The exact limits on participation vary. For example, an exception added to the 2007 American Bar Association *Model Code of Judicial Conduct* allows judges to be featured on the program of, and permit their titles to be used in connection with, events that serve a fund-raising purpose “only if the event concerns the law, the legal system, or the administration of justice.” Thus, for organizations that are not

law-related or in jurisdictions that have not adopted that exception, a judge needs to determine whether an event is a fund-raiser before deciding whether to, for example, speak or accept an award at the event. If a non-profit organization expressly characterizes and promotes an event as a fund-raiser, the nature of the event and the limits on a judge’s participation are clear. In the absence of a clear label under circumstances in which featured participation would be prohibited, a judge cannot participate if the judge cannot determine with certainty that the event is not a fund-raiser. *Delaware Advisory Opinion 2011-3.*

An event is defined as a fund-raiser when “the sponsors’ aim is to raise money to support the organization’s activities beyond the event itself” in the Massachusetts code of judicial conduct. The Florida advisory committee has identified “indicia” of a fund-raising event: “(1) the goal of the

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Treatment of judicial discipline complainants by Cynthia Gray

Rule 2.16(B), added to the American Bar Association *Model Code of Judicial Conduct* in 2007, provides: “A judge shall not retaliate, directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.” As the reporters’ notes explain, “for a judge to retaliate against a person for cooperating in disciplinary proceedings against him or her would be patently unethical.” Thus, that type of conduct was sanctioned even before the prohibition was made an express provision in the code.

Attorneys have been the targets of judicial reprisals through, for example, the filing of attorney discipline complaints, rulings in cases, and public criticism of the complainant/attorney. For example, in 1996, the New York State

Commission on Judicial Conduct had privately admonished a judge for telephoning the complaining witness in a criminal case and making favorable remarks about the defendant (the son of his former client) that persuaded the witness to withdraw the complaint. Subsequently, blaming the district attorney for bringing the incident to the Commission’s attention, the judge began asking defense attorneys to complete forms disclaiming any professional or social relationship between the defendant and the judge. In open court, when distributing the form, the judge frequently remarked “that the District Attorney had previously filed a complaint against him which had cost him half a million dollars to

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- A local rule allowing a judicial officer in a family law matter to determine whether to hold a hearing on a request for an emergency order (other than a domestic violence order) without the moving party providing notice to the other side (or showing good cause for a waiver) is not expressly authorized by law and would facilitate a violation of the prohibition on ex parte communications. *California Opinion 2014-4*.

- Prior to an arraignment, a judge may search the judiciary's case management system for a defendant's criminal history but should disclose any information he considers. *New Mexico Opinion 2014-1*.

- A judge may not sua sponte advise defendants of a specific plea agreement the judge anticipates the prosecutor will offer. *New York Opinion 2014-12*.

- A judge may accept the services of an intern or other volunteer employee who receives a stipend through a fellowship program from a law school or a national bar association, educational institution, or charitable organization, unless the funds for the stipend are solicited from lawyers or provided by a pool of local law firms. An intern should not accept a simultaneous appointment with another branch of government or the state government. An intern may not perform legal or paralegal work at a law firm but may provide assistance without compensation to a legal pro bono non-profit organization if the work does not involve a matter of public controversy, an issue likely to come before the court, litigation against a federal, state, or local government, or appearing in any court or administrative agency. *U.S. Opinion 111 (2014)*.

- A judge is not disqualified merely because a lawyer in a case is participating in her current election campaign, but disqualification is required if the lawyer's current campaign activities evidence a substantial political relationship with the judge based on factors such as the length and level of the lawyer's involvement, whether the lawyer has campaign management responsibilities, the extent of the lawyer's fund-raising, whether the lawyer's name appears on solicitations, whether the election is contested, and whether the election is state-wide, multi-county, or local. *Ohio Opinion 2014-1*.

- A judge is disqualified when an attorney from whom he has borrowed money or to whom he is indebted for legal fees appears in a case. *Minnesota Opinion 2014-1*.

- A judge may write a letter to a probation agent's superiors commending the agent's work in the drug court but must avoid language that might raise questions about her ability to be impartial. *Utah Informal Opinion 2014-1*.

- A judicial officer may not serve in adult volunteer leadership positions with the Boy Scouts that gay persons are barred from holding. *Connecticut Opinion 2014-1*.

- As part of a Boy Scouts Merit Badge Day event, judges

may meet with small groups of scouts during the noon hour in their courtrooms to discuss the law and the legal system and to share their backgrounds and why they are passionate about the justice system and being a judge. *Washington Opinion 2014-4*.

- A new judge may continue to act as a disk jockey on a weekend "classic hits" program for a commercial radio station as long as her hosting duties do not demean her office, she is not an employee of the station, and she does not personally participate in on-air promotions, contests, or commercials. *Florida Opinion 2014-3*.

- A judge may not use LinkedIn to recommend a lawyer who regularly appears before him but may recommend a former law clerk to a specific prospective employer. A judge may use social networking sites personally even if the site reveals his professional status but should avoid

participating in discussions about matters falling within his court's jurisdiction. A judge is not disqualified per

Recent advisory opinions

se in cases where a litigant or lawyer is a "friend" with the judge through social networks. A judge must scrupulously avoid using social media to research facts, litigants, or lawyers in matters pending before him. A judge may "like" a public official's official Facebook page but not the Facebook page of a candidate or a local law enforcement official. *Arizona Opinion 2014-1*.

- Frequent social media exchanges between a judge and a lawyer who appears before her may convey or permit the lawyer to convey the impression that the lawyer is in a special position to influence the judge. When using social media, a judge should not identify herself as a judge when supporting an establishment frequented by lawyers near the courthouse. A judge may exchange on social media ideas about outside activities (for example, gardening, sports, or cooking) but must consider whether those activities involve a political position or debatable issue that might be presented to the court. A judge must behave on-line in a manner that avoids embarrassing the court. A judge should not post materials in support of or endorsing a political candidate or issue, "like" or become a "fan" of a candidate or movement, circulate an on-line invitation to a political event, or post pictures that affiliate the judge with a political party or candidate. *U.S. Opinion 112 (2014)*.

- The prohibition on a judicial candidate soliciting campaign funds "in person" means speaking directly to, signing a letter to, talking on the telephone to, or sending an e-mail or text message to an individual potential donor and does not apply to such actions directed toward groups of individuals. *Kentucky Opinion JE-125 (2014)*. ★

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

Offer at arraignment

Based on a stipulation and agreement, the Washington State Commission on Judicial Conduct admonished a judge for encouraging defendants at an arraignment to immediately enter a guilty plea, promising a specific outcome, and failing to require written plea forms for defendants who accepted her offer. *In re Seitz*, Stipulation, Agreement, and Order (February 24, 2014) (http://www.cjc.state.wa.us/Case%20Material/2014/7365_Seitz_stip.pdf).

At the beginning of the arraignment calendar one day, the judge announced that, because of the large number of cases, she would allow anyone charged with driving while license suspended in the third degree to plead guilty without a written plea form and would impose a fine of \$248 or 25 hours of community service. She also implied that the sentence may not be available later. When each of the 12 defendants who took advantage of her offer pled guilty, the state formally objected, and the attorney present in the courtroom to advise pro se defendants stated that the defendant was entering the plea against advice.

The Commission found that the judge violated her duty to avoid coercive conduct and a well-established court rule requiring written guilty plea forms. The Commission stated that, although the judge's method may have been convenient for some people and the court, judges may not disregard the law for the sake of expediency.

Personal tasks, religious activities for court staff

Accepting an agreement, the New York State Commission on Judicial Conduct censured a judge for, on numerous occasions, asking and/or causing her court staff (1) to perform non-work-related personal tasks for her and (2) to participate in activities associated with her religion or church. *In the Matter of Brigantii-Hughes*, Determination (December 17, 2013) (<http://www.cjc.ny.gov/Determinations/B/Brigantti-Hughes.Mary.htm>).

From 2006 through 2011, on approximately nine occasions, the judge asked her secretary or court attorney to pick up her young daughter from school, take the child home or to the courthouse, and watch the child until relieved. On multiple occasions during regular business hours in July and August, the judge brought her child to court during the day. On approximately five of these occasions, the judge's court staff supervised the child while she was on the bench.

On about three occasions, the judge had her secretary drive her to a hair salon, wait, and then drive her home or to the courthouse. On at least one occasion during regular business hours, the judge had her secretary drive her to New Jersey so the judge could go shopping. The judge had her court attorney accompany her to a Home Depot during regular business hours to help purchase soil and plants for a function at the judge's church. When they

returned to chambers, the judge had the attorney assist her in repotting the plants. On as many as nine occasions during regular business hours, the judge had or permitted her secretary, her court attorney, and the assistant court librarian to do typing, printing, and/or copying of religious material for the judge's personal use.

The Commission found:

By repeatedly using her court staff to perform child care and other personal services, respondent misused court resources and engaged in conduct that was implicitly coercive and inconsistent with the ethical rules. . . . The record . . . amply demonstrates that these extra-judicial services were not de minimis and went well beyond the professional courtesies or occasional acts of personal assistance that might ordinarily be provided in emergency situations by subordinates to supervisors, or vice versa.

Recent cases

In 2003, the judge obtained permission from the court administration for a Bible study/prayer group to meet in the courthouse during the lunch hour. From 2006 to 2011, on about 13 occasions, during regular business hours other than the lunch hour, the judge asked her secretary and her court attorney to pray with her in chambers; the judge and her court staff often joined hands during the prayers. Finding that these prayer sessions "clearly went beyond the parameters" of the permission the judge had received, the Commission found that "repeatedly asking her staff to join her in such sessions misused the prestige of her judicial position, added an element of implicit coercion and crossed the line into impropriety . . ."

In the courthouse during regular business hours, the judge occasionally invited members of her court staff to attend church and religious events after regular business hours. As a result of her invitations, her secretary attended a Friday church service and a Saturday church event; her court attorney attended a church fund-raiser at her own expense, one or two church services, a Saturday religion class, and an evening prayer group; a second court attorney attended a church service, a church event for women, and, at her own expense, a weekend retreat in Pennsylvania.

The Commission stated:

Although we recognize that respondent extended these invitations "out of her sincere devotion to her religious principles" . . . , it is clear that she should have been more sensitive to the serious potential for impropriety in injecting her religious practices into the workplace in such a manner. As stated in the stipulated facts, "in the workplace, respondent's right to the free exercise of her religious beliefs must be balanced with the right of her subordinates to freely exercise their own religious beliefs and to be free of coercion to engage in the religious practices of others."

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event; (2) the manner of financing the event; (3) whether the speaker’s name or office is used in any manner to obtain funds; (4) the activities that take place before and during the event; and (5) the profit, if any, to be realized.” *Florida Advisory Opinion 2005-2*. For example, an event is considered a fund-raiser if during the event there is a fund-raising component, such as a raffle, a drawing for prizes, or an auction (*Florida Advisory Opinion 2005-9, Florida Advisory Opinion 2012-30*) or pledge cards are distributed seeking donations and a speaker urges attendees to be generous. *Illinois Advisory Opinion 2001-4*.

Further, featured participation by a judge may be precluded if an event is part of a fund-raising campaign. For example, the Connecticut advisory committee stated that a judge may not be a guest speaker at a thank-you breakfast for those who supported a legal aid organization during its annual giving campaign, even if no additional requests for contributions would be made at the event. *Connecticut Advisory Opinion 2009-9*. (At the time, Connecticut had not yet adopted the exception for fund-raisers for law-related organizations.) The committee believed that the breakfast was the final event of a fund-raising campaign and, therefore, the judge’s participation would be “tantamount to endorsing the donors’ contributions and encouraging them to contribute in the future.” Other opinions concur.

• A judge may attend a testimonial dinner in his honor as long as the dinner is not directly or indirectly related to a campaign for or solicitation of funds and the price of the ticket is not in excess of the cost of the dinner. *Maryland Advisory Opinion Request 1974-2*.

• A judge may not serve as the grand marshal of a parade, or as a speaker at a rally held after the parade, if the organization sponsoring the parade will be holding fund-raising events prior to the parade and engaging in fund-raising activity at its booth at the end of the parade route. *New York Advisory Opinion 1998-49*.

Ticket prices

Opinions classify an event as a fund-raiser if the cost to attend includes a “fund-raising premium” (*New York Advisory Opinion 1988-13*), in other words, the price of a ticket to a dinner, for example, is more than the cost of the dinner, with the surplus constituting a contribution to the organization’s work.

• A judge may be honored at a dinner as the recipient of the Distinguished Eagle Scout Award when the ticket

and advertisement sales cover only the costs of the dinner. *Alabama Advisory Opinion 00-760*.

• A judge may not be a speaker at a church banquet when the portion of the proceeds from ticket sales that exceeds the costs of the banquet will go to the church’s scholarship fund. *Arkansas Advisory Opinion 1994-3*.

• A judge may attend a testimonial dinner in his honor as long as the price of the ticket does not exceed the cost of the dinner. *Maryland Advisory Opinion Request 1974-2*.

• A judge may accept a man-of-the-year award from a charitable organization at its annual dinner when the price of a ticket covers only the costs of the event. *Massachusetts Advisory Opinion 1999-10*.

• A judge may accept an award at a luncheon for a research institute when the organization projects that individual ticket sales and sales of tables would raise

less than 70% of its costs for holding the luncheon. *Massachusetts Advisory Opinion 1999-2*.

• Even if an event is primarily commemorative, a judge may not introduce the keynote speaker if excess funds from a fee charged to attendees are used for a scholarship fund. *Nebraska Advisory Opinion 2007-1*.

• A judge may be the guest of honor at a dinner held by the high school from which she graduated when it is not anticipated that there will be a differential between the costs of a ticket and the expenses incurred. *New York Advisory Opinion 1997-79*.

• A judge may receive an award at a dinner sponsored by the Boy Scouts if the tickets are not priced to cover substantially more than the costs of the dinner. *New York Advisory Opinion 1988-66*.

• A judge may serve as master of ceremonies at a dinner sponsored by a religious organization when the ticket price does not include a fund-raising premium. *New York Advisory Opinion 1988-13*.

However, an event is not a fund-raiser simply because the price of an individual ticket is more than the cost of an individual’s attendance if the excess covers other costs related to the event, for example, invitations, decorations, and expenses for honorees. The New York judicial ethics committee advised that “requiring an absolute dollar for dollar match between the cost of the dinner and the ticket price is neither practical nor essential to prevent the evil at which the rule is aimed.” *New York Advisory Opinion 96-122*. Thus, the committee advised a judge that she could be an honoree at the annual dinner of a national religious organization if

An event is defined as a fund-raiser when “the sponsors’ aim is to raise money to support the organization’s activities beyond the event itself”

the difference between the price of a ticket and the cost of a dinner would be used to pay for the dinners of invited guests, dignitaries, and individuals unable to afford a ticket, with the possibility of a minimal surplus. Similarly, the Massachusetts committee concluded that a luncheon was not a fund-raising event because, even though the cost of a table for 10 people was \$150 more than the cost of 10 individual tickets and entitled the purchaser to recognition in the program, the premium only covered event costs that were not met by the sale of individual tickets. *Massachusetts Advisory Opinion 2003-1*.

Further, an event is not a fund-raiser if there may be a small, incidental surplus that goes to the organization. For example, the Delaware advisory committee stated that a judge may be the master of ceremonies at a foundation's award dinner that was not designed or intended to raise funds even if any proceeds above costs would be considered donated to the organization. *Delaware Advisory Opinion 2011-1*. Although the invitation indicated that "a portion of your donation will be tax deductible," the organization clarified that the tickets were priced to cover the cost of the dinner and only if there was money left over

would attendees be advised of the amount to be used as a tax deduction. The committee concluded "that the dinner is not intended as a fundraising event and, actually, will only become a fundraising event if, by accident, the proceeds of the event exceed its costs."

Other indications

Other signs an event is a fund-raiser include different pricing levels or requests for donations above the price of a ticket. For example, the Connecticut committee found that a dinner was a fund-raising event based on its three-level ticket-pricing structure (benefactor at \$250, patron at \$100, and friend at \$50), the organization's statement to ticket purchasers that all but \$20 of the ticket price could be tax-deductible, and the fund-raising terminology the organization used in describing the event. *Connecticut Informal Advisory Opinion 2009-11*. Similarly, the Nebraska committee concluded that a judge could not participate as a keynote speaker at an event because the invitation included a form that allowed invitees to indicate, "Unfortunately I/we cannot attend this year's breakfast, however, I/we wish to contribute to the [group name] Scholarship Fund this

Canon history

There have been limits on judicial fund-raising for charities since at least the 1924 ABA *Canons of Judicial Ethics*. Canon 25 stated:

A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; he should not solicit for charities

The 1972 model code covered activities related to organizations to improve the law, the legal system, and the administration of justice in Canon 4 and activities related to other educational, religious, charitable, fraternal, or civic organizations in Canon 5. With respect to fund-raising events, for the former, Canon 4C prohibited a judge from "personally participat[ing] in fund-raising activities," and, for the latter, Canon 5B(2) prohibited a judge from being "a speaker or the guest of honor at an organization's fund-raising event," but allowed attendance at such events.

The 1990 model code did not distinguish between types of organizations; a comment to Canon 4C(3)(b) stated that "a judge must not be a speaker or guest of honor at

an organization's fundraising event, but mere attendance at such an event is permissible if otherwise consistent with the Code."

As noted, after 2007, the model code again distinguished between types of organizations with respect to participation in fund-raising events, providing in Rule 3.7(A)(4):

A judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including . . . appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice.

Comment 2 adds, "Even for law-related organizations, a judge should consider whether the membership and purposes of the organization, or the nature of the judge's participation in or association with the organization, would conflict with the judge's obligation to refrain from activities that reflect adversely upon a judge's independence, integrity, and impartiality."

breakfast supports. Enclosed please find check # ____ with my/our contribution of \$ ____.” *Nebraska Advisory Opinion 2007-1*.

The New York advisory committee stated that, even if there is no solicitation of funds at the event itself, a judge may not accept an award from a non-profit organization at a cocktail reception if the invitation states that “donations are appreciated” and the response card suggests “100% tax-deductible donations” of \$250, \$100, \$50, \$25, or “other.” *New York Advisory Opinion 2004-86*. The committee also stated that an event is a fund-raiser if the invitation requests significant additional donations beyond the cost of the event in honor of those named as honorees, despite the organization’s assurance to the judge that the event was not a fund-raiser. *New York Advisory Opinion 2011-35*.

Further, an event is a fund-raiser if, in connection with the event, funds are raised for the organization through the sale of advertisements purchased by businesses, family, friends, and others for publication in a souvenir journal to congratulate the organization holding the event or the honoree/judge.

- A judge may not be inducted into a county women’s hall of fame at an annual luncheon when program advertisements are sold to raise funds. *Florida Advisory Opinion 1999-9*.

- A judge may not accept an award at a ceremony the expenses of which will be paid by the sale of tickets and congratulatory, business or personal ads in an event publication. *Florida Advisory Opinion 2010-33*.

- A judge may not be honored as “woman of the year” at a luncheon if, although tickets would cover only the costs of the luncheon, funds would be raised for a relief fund through a souvenir program containing messages of congratulations from business and community leaders. *Maryland Advisory Opinion Request 1975-1*.

- A judge may not be honored by his synagogue as “man of the year” at a dinner when proceeds from a program book dedicated to him will be used to help balance the synagogue’s budget. *Massachusetts Advisory Opinion 1992-4*.

Further, even if a judge may participate in a fund-raising event with a program book because the host organization is law-related, the judge may not participate in the solicitation of advertisements for the program. *New York Advisory Opinion 1989-39*; *New York Advisory Opinion 1994-48*. Cf., *Arizona Advisory Opinion 2000-6* (a judge’s name or

picture may not be published in a booklet in connection with a fund-raising dinner for a university if the judge is being honored primarily because of his judicial position, but may be used if the university has independent reasons for honoring him as an alumnus, if he is only one of many honored alumni, and if his title and position are not publicized); *Pennsylvania Informal Advisory Opinion 5/10/04* (if she believes her participation will not assist a non-profit organization raise funds, a judge may give medals to the winners of athletic contests when the funds will be raised before the public receives the program book with her name and photograph).

An event is not a fund-raiser simply because the price of an individual ticket is more than the cost of an individual’s attendance if the excess covers other costs related to the event

Sponsors

If the costs of a charitable organization’s event are underwritten by sponsors, the event is not considered a fund-raiser unless the amount raised from event sponsors is calculated to result in a surplus that will be used for general support

of the organization. Even if participation in the event is appropriate, the judge’s name may not be used in the solicitation of sponsors.

- Judges who began their careers with a legal services organization may be honored at the organization’s event because it concerned “the law, the legal system, or the administration of justice,” but their names may not be used to encourage law firm participation and special care must be taken “that no appearance is created that any of the donors or the legal aid organization is in a special position to influence” them. *Connecticut Informal Advisory 2010-30*.

- A judge may be a guest speaker at a Knights of Columbus dinner honoring law enforcement officers that will be underwritten by business sponsors who will donate \$250 each when the financial goal is to break-even unless the judge’s name or office is used to obtain the sponsorships. *Florida Advisory Opinion 2005-2*.

- A bar organization event honoring judicial excellence is a fund-raising event if sponsors will contribute an amount that exceeds the ticket price at various levels designated as “benefactors,” “friends,” and “patrons” and the proceeds from the event that exceed the costs will be used to support the host organization’s projects. *Massachusetts Advisory Opinion 2014-1*.

See also *Massachusetts Advisory Opinion 2002-12* (a judge may not attend a “high-end” reception to honor judges sponsored by the law school from which she graduated even if the costs exceed the anticipated ticket revenue if

the event is underwritten by individuals or organizations whose identity will be disclosed to the general public or to those attending the event).

Further, the Massachusetts committee has issued several opinions advising that, even if an event is not a fund-raiser, the prohibition on a judge “convey[ing] or permit[ing] others to convey the impression that they are in a special position to influence the judge” prevents a judge from receiving “an award or gift at an event that is publicly sponsored by law firms and other entities where those sponsors have substantial business before the courts . . . even if no such influence is intended or in fact occurs.” *Massachusetts Advisory Opinion 2003-1*. Therefore, the committee stated that a judge may not accept an award from the Greater Boston Chamber of Commerce at a non-fund-raising luncheon because the announcement that the judge will be an honoree may serve as an inducement to purchase tables, a large law firm that regularly appears in the court where the judge serves is one of the sponsors, and the Chamber of Commerce sometimes litigates or files amicus briefs and takes positions on matters likely to affect issues that will come before the courts.

Noting that it recognized that its interpretation “may seem overbroad,” in a subsequent opinion, the committee explained:

Public confidence in a justice system’s true impartiality depends at least as much on the appearance of impartiality as it does on the reality. But the appearance of impartiality can be degraded by the cumulative impact of many small incursions just as surely as it can be by a few instances of major dereliction. Accordingly, the Code of Judicial Conduct was designed to operate in a strongly prophylactic manner to prevent the subtle erosion of public confidence that, if unchecked, inevitably undermines confidence to the point of collapse. The code’s prophylactic requirements do not prohibit judges from accepting all awards and they do not keep judges from appearing at all award ceremonies. But, as presently written, the code’s requirements do prohibit judges

from accepting awards from individuals and firms who are likely to appear in the courts where they sit and the code’s requirements do prohibit judges from accepting awards at events those firms and individuals publicly sponsor.

Massachusetts Advisory Opinion 2009-1. Thus, the committee advised that a judge may not be recognized at a function sponsored in part by a law firm with considerable business in the state’s courts and a consulting firm that is frequently involved in litigation in the state’s courts.

Most recently, the committee addressed the propriety of a judge accepting an award for judicial excellence at a bar organization event sponsored by law firms that appear in the judge’s court and by law-related service providers that have substantial, recurring business before the courts. *Massachusetts Advisory Opinion 2014-1*. The committee stated:

The committee here recognizes that you likely believe the sponsorship of the event by law firms with business before the courts will not influence your actions. It is also likely that the law firms sponsoring the event did not do so to curry favor or expect the sponsorship to give them influence with you, and those attending the event will likely not perceive undue influence based on the sponsorship. The concern also recognized in the Code, however, is with the appearance of a judge’s impartiality to the public.

The committee concluded that “an objective, disinterested observer fully informed of the relevant facts could entertain a serious doubt about a judge’s ability to handle impartially a matter in which one side was represented or assisted by a firm that had publicly sponsored a large public function at which the judge had received a major award.” The committee did note “that the concern for the appearance of special influence would be substantially lessened where the event was publicly sponsored by a very large number of lawyers and firms, such as a bar association event that did not involve individual firm sponsorships.” See also *Massachusetts Advisory Opinion 2007-4* (a judge may attend and be honored at an event to “celebrate Justices of Color” hosted by a law firm and sponsored by a consortium of firms and other organizations that employ attorneys as long as membership in the consortium is available to all, invitations are sent to representatives of all segments of the bar, the host does not use its role in the event or the names or images of the honorees in promotional materials, the thanks to the hosting firm is modest and discreet, and some mention is made at the event that the role of host is rotated among the members of the consortium). Cf., *New York Advisory Opinion 2013-45* (a judge may attend and be honored at a bar association reception underwritten by commercial sponsors, including a law firm that will host the reception at its offices and provide all refreshments, if the event is publicized and open generally to members of the bench and bar, unless the host law firm is actively engaged in litigation in the judge’s court). ★



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Sexual harassment

The North Dakota Supreme Court suspended a judge for one month without pay for conduct toward his court reporter that she reasonably perceived as sexual harassment. *In the Matter of Corwin*, 843 N.W.2d 830 (North Dakota 2014).

After work on July 15, 2010, the judge, the court reporter, and other courthouse personnel went to a restaurant and bar where they consumed alcohol. The judge and the court reporter then went on a bicycle ride, and the judge invited her into his home where they each had a glass of wine. The judge engaged the court reporter in a conversation that she reasonably construed as a proposition for a sexual relationship. The court reporter rejected the offer, telling him she had read that “it was a mistake to get involved with your boss.” The judge responded that not all office romances end badly, pointing to his own 20-plus year marriage to his former secretary. As the court reporter was leaving the home, the judge hugged and kissed her.

Subsequently, the judge frequently asked the court reporter into his office, closed the door, and discussed personal topics, including their relationship. He also repeatedly asked her to have lunch with him, but she consistently made excuses why she could not and told him in an e-mail that, “to save you the trouble of asking again, I’m gona [sic] pass on lunch permanently. None of the judges go to lunch w[ith] staff. Makes people talk. Don’t need/want that.” She also declined other invitations. In December, the judge confronted the court reporter at a grocery store, stating, “You know what I want for Christmas? I want us to stop treating each other like shit.”

In April 2011, the judge suggested they ask the court administrator to switch the court reporter to a new team. When she objected, the judge told her, “if this were still the law firm, I’d have taken care of the problem a long time ago, but since you work for the state it’s going to be a little tougher.” The court reporter sent the judge two e-mails telling him she did not want to be involved with him personally, the second ending with the statement: “Maybe this is what you need to see in writing to get it—leave it alone and leave me alone!”

The Court rejected the judge’s argument that the Commission’s hearing panel had erred by refusing to allow expert testimony about the law on sexual harassment. The Court noted that the code of judicial conduct “does not require the establishment of sexual harassment under federal or state law” but merely “a finding of ‘conduct that could reasonably be perceived as sexual harassment.’”

The judge contended that his communications were “a persistent attempt to maintain or restore an amicable working relationship” with the court reporter, and the case “was the result of misunderstandings, not deliberate misconduct.” However, the Court concluded that, even if it accepted that claim, his attempts “were at best naive.”

Most of Judge Corwin’s communications were requests for meetings with the court reporter to occur outside the workplace setting. This was abnormal for judges and their coworkers. More significant, Judge Corwin was made well aware of how the court reporter interpreted his attempts to reestablish their “relationship” through her communications to him. Yet, Judge Corwin persisted in his unsuccessful efforts to meet the court reporter in nonwork settings. It was reasonable for the court reporter to interpret Judge Corwin’s conduct as seeking much more than an “amicable working relationship.”

Unauthorized fee

Pursuant to the judge’s consent, the Arkansas Judicial Discipline and Disability Commission admonished a judge for imposing unauthorized fees on criminal defendants who changed their pleas from not guilty to guilty. *Letter of Admonishment to Blackman* (March 21, 2014) (<http://www.arkansas.gov/jddc/pdf/blackman3-28-14.pdf>).

After taking office in January 2005, the judge instituted a \$35 fee for defendants who changed their pleas from not guilty to guilty. He called it a “witness fee,” under his interpretation of a statute and an Arkansas Supreme Court opinion. After some months, he changed the title to “contempt fee,” based on his interpretation of a different statute and two different opinions. He explained that the basis for the fee was that the change of plea took place in open court and that the purpose was to dissuade defendants from “abusing the legal process by causing untold hours of work and attendance of witnesses and court and law enforcement personnel,” noting that the defendants’ actions caused “many dollars to be expended in the preparation of subpoenas and other paperwork and service of subpoenas and transportation and loss of work for witnesses required to appear.” Finally, the judge also commented on how the “duplicity of re-docketing such cases and having to handle them a second time extended the time in court.”

Some defendants who paid the fee filed a lawsuit alleging illegal exaction. The circuit court enjoined the fee as improper and without legal basis and ordered that the fees be refunded to the defendants who made claims.

The Commission stated:

By instituting this investigation and recommending this sanction, the JDDC wishes to prevent potential prejudice to future litigants and the judiciary of this state in general. . . . Every individual charged by the State of Arkansas with violating the law wears a cloak of innocence until proven otherwise by the State or charging party. Defendants have a right to change their plea at any time before the submission of the facts of their individual case to the fact finder. ★

defend against and that due to illnesses in his family he had neither the time or money to defend himself against future complaints." *In the Matter of Cerbone*, 812 N.E.2d 932 (New York 2004).

In *Inquiry into Ginsberg*, 690 N.W.2d 539 (Minnesota 2004), the Minnesota Supreme Court found that the judge's "actions in retaliation against the attorneys who filed complaints with the Board [on Judicial Standards] reflect a disrespect for the disciplinary process and a lack of recognition or acknowledgment of possible fault on his part." After learning that the city attorney had filed a complaint about his dismissal of three criminal cases, the judge had called the city attorney to complain about the assistant city attorneys involved in the cases. One morning, cases being handled by one of those assistant city attorneys were assigned to the judge's calendar, and the attorney filed a notice to remove him from her cases. When a court supervisor informed the judge, he refused to leave the bench and announced to the gallery:

I have some bad news for all of you who are here today for Minnetonka, Minnetrista, and St. Bonafacius cases. Your cases will all be continued as the city attorney seems to be dissatisfied with the way I handle their cases. Now, don't be upset with me, I would be happy to handle your cases, so don't be mad at me, be mad at the Minnetonka City Attorney.

See also *Letter of Censure to Crow* (Arkansas Judicial Discipline and Disability Commission May 17, 2013) (www.arkansas.gov/jddc/pdf/5-17-2013.pdf) (judge filed complaints against a public defender after learning the public defender had filed a complaint against him); *In the Matter of Terry*, 323 N.E.2d 192 (Indiana 1975) (to punish attorneys who had requested that he be investigated for a pattern of discourtesy, judge delayed their cases); *In the Matter of Tavormina*, Determination (New York State Commission on Judicial Conduct May 5, 1989) (www.cjc.ny.gov/) (in the courthouse hallway, judge loudly and repeatedly called an attorney a "liar" after learning she had filed a complaint about his demeanor). Cf., *In re Schenck*, 870 P.2d 185 (Oregon 1994) (judge should have disqualified himself from cases involving an attorney when, after the attorney filed a complaint against him, the judge called the attorney and asked, "Who in the hell made you God's gift to the legal profession?" and sent a letter to each member of the county bar association, enclosing a copy of the complaint and characterizing it as "pathetic" and "a petulant response").

Threatening retaliation has also been sanctioned. For example, several days after a judge received a copy of a complaint filed by an attorney, the judge approached the attorney in the courthouse and said he was "going to win" and was "going to get" the attorney. The New York State Commission found that "by threatening an attorney who properly availed himself of judicial grievance procedures,

respondent prejudiced the administration of justice and obstructed the very search for truth which our courts and judges are supposed to enhance." *In the Matter of Mahar*, Determination (New York State Commission on Judicial Conduct June 10, 1982) (www.cjc.ny.gov/).

Litigants

Judges have also been disciplined for retaliating against litigants who filed judicial discipline complaints, exacerbating misconduct in the underlying case or even creating misconduct where there had been none. For example, after learning that a defendant had complained about his threat to impose bail for routine traffic charges, a judge denied the defendant's request for an extension of time to pay a fine, which was a departure from his usual practice, and stated sarcastically, "You turned me in to the state and you want me to do you a favor?" *In re Tripp*, Determination (New York State Commission on Judicial Conduct April 20, 2010) (www.cjc.ny.gov/). See also *Inquiry Concerning Rodella*, 190 P.3d 338 (New Mexico 2008) (after a couple had complained that he was impatient during a hearing, judge told the administrative office of the courts that he suspected the husband had forged a document in the case, which prompted the state police to investigate).

Other complainants or witnesses have also been subject to judicial retaliation through attempts or threats to affect their employment or business or other harassment. See, e.g., *In the Matter of Drury*, 602 N.E.2d 1000 (Indiana 1992) (when his girlfriend and her mother reported that he had borrowed thousands of dollars from them without disclosure, judge sent "inflammatory" documents purportedly from "concerned parents" to the state agency that regulated their day care business); *Commission on Judicial Performance v. Brown*, 918 So. 2d 1247 (Mississippi 2005) (after his daughter-in-law complained that he had interfered with her domestic violence complaints against his son, judge insisted she drop the complaint and told her he would come after her job); *Commission on Judicial Performance v. Bishop*, 761 So. 2d 195 (Mississippi 2000) (although allegations he had engaged in sexual relations with a female minor were dismissed, judge was suspended for conspiring with a jailer and an employee of the sheriff's department to intimidate her family by parking his vehicle across from their house); *In the Matter of Myers*, Determination (New York State Commission on Judicial Conduct October 21, 1985) (www.cjc.ny.gov/) (during an investigation of his use of criminal summons, judge accused a state trooper of lying and threatened to have him fired).

Staff

Court staff may be particularly vulnerable to retaliation just as they may be particularly knowledgeable about

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judicial misconduct. For example, in a recent case, retaliation against court staff was one of the grounds for removal of an Indiana judge; the other grounds included mismanagement, delays, and dereliction of duties; failure to complete necessary paperwork and adequately train or supervise court staff; inappropriate demeanor; and failure to cooperate with the court's executive committee. *In the Matter of Brown*, 4 N.E.3d 619 (Indiana 2014).

After hearing that the chief bailiff was putting together a complaint about her conduct, the judge took away some of the chief bailiff's responsibilities. The chief bailiff soon took a family or medical leave of absence. Before the chief bailiff returned to work, the judge had the human resources director notify her that she was terminated. The Indiana Supreme Court stated that "the use of judicial power as an instrument of retaliation is a serious violation of the Code of Judicial Conduct," noting the judge was unable to specify any performance issues that led her to discharge the chief bailiff and others rated the chief bailiff's work highly. The judge also issued disciplinary warnings to two other employees that, the masters found, were in retaliation for those employees' cooperation in the discipline proceedings.

In *In the Matter of Danikolas*, 838 N.E.2d 422 (Indiana 2005), the Indiana Supreme Court suspended a judge for 60 days without pay for discharging a magistrate in retaliation for her testimony during a previous disciplinary matter and for providing fallacious excuses for the discharge under oath. In the previous matter, accepting a conditional agreement, the Court had publicly reprimanded the judge for releasing a man the magistrate had incarcerated for contempt for non-payment of support. During a deposition in those proceedings, the magistrate had refused to admit that her contempt order had been improperly entered despite repeated questions from the judge's attorney. The judge angrily asked the magistrate's court reporter, "Doesn't [the magistrate] realize who her boss is?" Four months later, without any warning or explanation, the judge discharged the magistrate.

The Court found that the judge's stated reasons for discharging the magistrate were pretexts to cover up the real reason—her "perceived disloyalty and her failure to 'fall on her sword' for the judge." Noting that Indiana employers may terminate employees without cause so long as the discharge does not rest on an illegal ground, the Court concluded that the code of judicial conduct holds judges to a higher standard. *See also Public Reprimand of Overson* (Arizona Commission on Judicial Conduct March 29, 2006) (judge filed personnel action against a clerk who had filed a complaint against him, creating the appearance of retaliation); *In the Matter of Buchanan*, 669 P.2d 1248 (Washington 1983) (upon learning of a complaint about his manner with women employees, judge terminated the employment of two women staffers).

Influencing testimony

Attempts to influence the testimony of potential witnesses in judicial discipline investigations have also led to sanctions.

- A judge instructed a court reporter to change her notes from a hearing and instructed her not to tell the Judicial Inquiry Commission about the change or his instruction not to report it. *In the Matter of Dubose* (Alabama Court of the Judiciary June 5, 2008) (www.judicial.state.al.us/documents/final%20orderPri.pdf) (removal for this and other misconduct).

- During an investigation of a judge for inappropriate loans, the judge asked the lender and the lender's husband not to cooperate with the Commission on Judicial Performance, specifically, not to discuss the loan. *Doan v. Commission on Judicial Performance*, 902 P.2d 272 (California 1995) (removal for this and other misconduct).

- A judge suborned perjury by asking a clerk to sign an affidavit stating that her prior statements that he had committed misconduct were untrue. *In the Matter of Dillon, Order* (New Mexico Supreme Court November 9, 2012) (www.nmjsc.org/docs/Dillon_order.pdf) (removal for this and related misconduct).

- After a woman told a judge her son had been asked to talk to the State Commission on Judicial Conduct concerning tickets he had dismissed, the judge told her that her son "had better say the right thing," that he would see who his friends are, and that "people think I am a bastard now. When this is over, they can call me Mr. Bastard for all I care." *In the Matter of Fabrizio*, Determination (New York State Commission on Judicial Conduct December 26, 1984) (www.cjc.ny.gov/) (removal for this and other misconduct).

- During an investigation of allegations that he had directed a court clerk to select a particular juror, a judge falsely stated to the clerk that his recollection was different than hers. *In the Matter of White*, Determination (New York State Commission on Judicial Conduct August 8, 1986) (www.cjc.ny.gov/) (removal for this and related misconduct).

- After learning the State Commission on Judicial Conduct was investigating a complaint that he had an ex parte communication with defense counsel in a criminal case, the judge summoned defense counsel to his chambers and said, "I know you are not going to do anything to hurt me." *In the Matter of Hanofee*, Determination (New York State Commission on Judicial Conduct October 27, 1989) (www.cjc.ny.gov/) (censure for this and other misconduct).

- During an investigation of a judge's handling of a harassment charge brought by a long-time acquaintance, after speaking with the judge, the acquaintance "recalled" information that corresponded to the judge's change of story. *In the Matter of Mossman*, Determination (New York State Commission on Judicial Conduct 1991) (www.cjc.ny.gov/) (removal for this and related misconduct).

- After learning that the State Commission on Judicial Conduct was investigating his handling of a case, a judge called the defendant and told him that, if questioned, he should tell the Commission that he had pleaded guilty to driving while intoxicated and speeding and that he had been represented by counsel, to “save both our asses,” even though the defendant had no lawyer when his case was disposed of by the judge. *In the Matter of Menard*, Determination (New York State Commission on Judicial Conduct March 13, 1995) (www.cjc.ny.gov/) (admonition).

- A judge told an attorney whose client had filed a complaint against him, “If you testify on my behalf, I will testify on your behalf if you get called before the Grievance Committee.” *In the Matter of Hart*, Determination (New York State Commission on Judicial Conduct March 7, 2008) (www.cjc.ny.gov/) (censure for this and other misconduct).

- During an investigation of her handling of a citation received by her son, a judge instructed her office manager to testify that the officer manager had not known of the citation until the judge told her to transfer it. *In re Arnold*, Opinion (June 13, 2012), Order (Pennsylvania Court of Judicial Discipline July 24, 2012) (www.cjdpa.org/decisions/jd12-02.html) (one-month suspension for this and related misconduct).

- While the complainant’s case was still pending before him, a judge had an attorney contact the complainant to find out whether he was going to proceed with the complaint. *In re Bell*, 344 S.W.3d 304 (Tennessee 2011) (suspension for this and related misconduct).

- A judge asked another judge to submit a report falsely stating he had complied with education requirements imposed in a previous proceeding. *In re Lowery*, 999 S.W.2d 639 (Texas Review Tribunal 1998) (removal for this and other misconduct).

Contact with staff

In *Inquiry into Murphy*, 737 N.W.2d 355 (Minnesota 2007), the Minnesota Supreme Court held that a judge’s contact with a witness in a pending disciplinary investigation “outside of work hours, outside of the work setting, for the purpose of discussing the investigation, does not promote public confidence in the integrity and impartiality of the judiciary.” After the Board on Judicial Standards had proposed a public reprimand for the judge’s handling of a citation received by a clerk’s son, the judge then called the clerk at home. She called back, and they exchanged small talk. Then, the judge told the clerk that she had never told him the cited driver was her son. The clerk insisted that she had told him. The clerk also recalled the judge telling her they needed to “get [their] stories straight” for the Board and testified that she felt that the judge was asking her to change her story.

Stating the judge’s “assertion that he was merely carrying on his friendship with the clerk is dubious,” the Court

noted that there was no evidence that they had previously communicated outside of work hours or the workplace. “More disturbingly,” the Court continued, “even if the phone calls were within the parameters of their friendship, Judge Murphy initiated the calls partially, if not exclusively, for the purpose of discussing a pending investigation into his own conduct, knowing that the clerk would be a witness in that investigation. He also went so far as to openly contradict her version of events.” The Court concluded: “Even assuming that Judge Murphy acted in good faith, his contacts with the clerk reflect an alarming lack of judgment.”

In a subsequent decision, the Court held that *Murphy* did not “stand for the proposition that a judge creates an appearance of impropriety simply by discussing judicial misconduct charges with a potential witness.” *Inquiry into Galler*, 805 N.W.2d 240 (Minnesota 2011). There was no “blanket prohibition on a judge discussing a disciplinary matter with a potential witness,” the Court stated, but judges were prohibited from contacting potential witnesses in an attempt to influence their testimony.

While the Board was investigating allegations he had ordered an attorney to apologize to a police officer for impugning the officer’s integrity, the judge had shown his court reporter a summary of the court reporter’s telephone interview with the Board’s counsel and told the court reporter that his attorney wanted the court reporter “to take a look at [the summary] and see if you agree that it’s right or not.” The Court agreed that the judge’s “contact with his court reporter does raise some concerns.”

The court reporter is a confidential employee of the judge, and in this situation, the court reporter may have felt some inappropriate pressure in responding to Judge Galler’s inquiry. A judge must proceed with considerable caution when discussing judicial misconduct charges with a potential witness, particularly an appointed employee who serves at the judge’s pleasure. If a judge is represented by counsel, the better practice is for counsel to initiate contact with a potential witness. A judge who initiates direct contact with a potential witness for the purpose of discussing judicial misconduct charges does so at the risk that his or her questioning may be perceived as an attempt to influence the witness’s testimony, and thus, be viewed as improper.

However, the Court deferred to the hearing panel’s finding that the judge had not contacted the court reporter to discuss the witness’s future testimony, affirming dismissal of the Board complaint. ★

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