



To promote
the effective
administration
of justice

JUDICIAL CONDUCT REPORTER

A publication of the American Judicature Society Center for Judicial Ethics
Volume 29, No. 1 Spring 2007

Bad Faith Sentencing *by Cynthia Gray*

Although an abuse of judicial discretion does not usually constitute judicial misconduct, there are several exceptions to that rule. One exception applies to judicial decisions made in bad faith, in other words, for any purpose other than the faithful discharge of judicial duties.

If a judge acts out of pique or to exact revenge, for example, the judge's decision loses the protection of the "mere legal error" rule. Thus, a judge's sentence — usually unreviewable by a conduct commission — may become the basis for a sanction if a

judge imposes an unusually severe sentence on a defendant who demanded a jury trial (*In re Cox*, 680 N.E.2d 528 (Indiana 1997)) or on a former employer to retaliate for being fired (*In the Matter of Lindell-Cloud, Determination* (New York State Commission on Judicial Conduct July 14, 1995) (www.scjc.state.ny.us)).

Similarly, if a judge chooses to impose a particular sentence to teach a lesson to someone other than the defendant, the judge's decision may constitute judicial misconduct, not simply an abuse of discretion. The

cases that illustrate this exception usually involve budget disputes between a judge and the governing authority.

For example, the Mississippi Supreme Court sanctioned a judge who had suspended fines after the county failed to fund a court bailiff position. *Commission on Judicial Performance v. Sheffield*, 883 So. 2d 546 (Mississippi 2004). (The sanction, which was entered pursuant to an agreement between the judge and the Commission, was a public reprimand and a \$192

(continued on page 8)

New Model Code of Judicial Conduct

At its February 2007 meeting, the American Bar Association House of Delegates adopted a revised model code of judicial conduct, the first comprehensive revision of the code since 1990 (available at www.abanet.org/judicialethics/ABA_MCJC_approved.pdf). There is an overview of the 2007 model code at www.abanet.org/judicialethics/Overview_GAK_030707.pdf. The ABA's Center for Professional Responsibility Implementation Committee is available to assist states as they consider whether to adopt the changes. See the Committee's web-site at www.abanet.org/cpr/jclr/home.html.

The 2007 model code is based on a report and revised report of the Joint Commission to Evaluate the Model Code of Judicial Conduct. The revisions reorganize the code, reducing the number of canons from five to four with numbered rules under each canon. The rules have numbered comments that provide aspirational statements and guidance in interpreting the rules. The code also includes a preamble and scope, terminology, and application sections. There are reporters' notes that explain the changes but are not part of the code (available at www.abanet.org/judicialethics/ABA_MCJC_REMS.pdf). Correlation tables

between the 1990 model code and the 2007 model are available at www.abanet.org/judicialethics/approved_MCJC.html.

The fall 2006 issue of the *Judicial Conduct Reporter* contained an article summarizing the major revisions to the model code. A copy of the article is available at www.ajs.org/ethics/pdfs/JCRmodelcodearticle.pdf. The May/June 2007 issue of *Judicature* has a longer article by Cynthia Gray that discusses the revisions in the code, emphasizing the important and controversial changes and the American Judicature Society's position on the issues. 

Recent Judicial Ethics Advisory Opinions – Extra-Judicial Activities

 A judge may not advertise her availability to perform wedding ceremonies by sending fliers to wedding planners or otherwise solicit business as a wedding officiant. *Colorado Opinion 07-5.*

 A judge may serve as a National Guard judge advocate if the judge's role is limited to performing duties that do not resemble services provided by civilian attorneys for members of the military. A judge may conduct training in the law of armed conflict, operations law, and international law. The judge may not render legal advice on environmental law, fiscal law, tort claims, administrative law matters, and discipline; serve as a recorder, legal advisor, or military defense counsel; draft personal legal documents for military personnel; or give advice in civil law areas such as consumer affairs and domestic relations. *Alaska Opinion 07-1.*

 A judge may not serve on a school district committee that will formulate a drug testing policy. *Kansas Opinion JE-150 (2007).*

 A judge who is a parent and president of a charitable organization that supports a high school may not serve on a committee to develop a drug testing program for school athletes. *Nevada Opinion JE-07-2.*

 A judge should not attend functions sponsored by a domestic violence advocacy organization that provides court-related services solely to domestic violence victims. *New York Opinion 06-5.*

 A judge may not solicit volunteers to serve on the board of

directors of a not-for-profit organization. *New York Opinion 06-113.*

 A judge may not provide items made by the judge to be sold at an auction that is a fund-raiser for the sheriff when, although the judge's name would not be used in any promotional materials, the items are readily identifiable as items made by the judge. *Florida Opinion 07-4.*

 A judge may, during approved vacation time, weekends, or outside of "normal working hours," act a softball umpire for a fee. *Massachusetts Opinion 07-3.*

 Judges may accept a bar association membership that is offered free to the judiciary. *New York Opinion 06-171.*

 A judge may not serve on the board of trustees of a non-profit corporation that has a contract to provide mental health and chemical dependency treatment and counseling services to the court and that defendants use to fulfill conditions of court-ordered probation. *Ohio Opinion 06-7.*

 A judge should not help to promote a program for at-risk youth where his/her court may refer parties to the program and promoting involves soliciting volunteers. *New York Opinion 07-19.*

 A judge may speak to community groups regarding the dangers of on-line predators as long as the judge does not comment on pending cases, answer hypothetical questions in a way that appears to commit the judge to a particular position, or make any remarks that could lead to disqualification or be construed as

an indication as to how the judge would rule in a particular case. *Florida Opinion 06-30.*

 A judge may attend a gubernatorial inauguration and related events, including the ball, but may not engage in fund-raising to pay for attendance, should not use his or her attendance as an opportunity to seek elevation to a higher bench, should not be on the dais or in any position that suggests a particular allegiance with the governor, and should be identified to the extent possible without reference to the judicial title. *Colorado Opinion 06-9.*

 A judge should make a concerted effort to convince his wife not to refer to the judge in a letter to friends expressing her support and soliciting their support for a candidate for the United States Congress. *New York Opinion 06-142.*

 A judge may attend a meeting of the town board regarding a condominium development project the judge's spouse is planning on property owned jointly to discuss the impact on the judge and members of the judge's family of any requirement that they live in one of the condominiums but should not engage in advocacy for the project, discuss the business aspects of the venture, identify him/herself as a judge or allow others to do so, or otherwise exploit the judicial office. *Massachusetts Opinion 07-2.*

* *The Center for Judicial Ethics web-site has links to judicial ethics advisory committees at www.ajs.org/ethics/eth_advis_comm_links.asp.*

Judicial Conduct Commissions in Russia

by Marla N. Greenstein

Yes, there are Judicial Conduct Commissions in Russia. Along with democracy and a new constitution came various permutations of our institutional structures, including judicial disciplinary mechanisms.

My first experience with the commissions in Russia (known as “Qualifications Collegia”) came in November 1998 when I was invited to provide an overview of judicial ethics to a national conference of the various Russian Judicial Qualifications Collegia

held in Belgorod. Belgorod is several hundred miles south of Moscow, near the Ukrainian border. The conference was the first national conference of its kind in Russia and brought various representatives of the Collegia together to meet for the first time. It was notable enough that Chief Justice Lebedev attended personally for one full day.

Unlike our structure of federalism, where each state autonomously decides what form of judicial disciplinary system it wants and what rules or

code governing judicial ethics applies to their judges, Russia is a total federal, *i.e.*, national, system. There are separate Collegia for each region, but their actions ultimately go through the central government in Moscow. Under this system, there is one uniform structure for the makeup of the Collegia and one uniform Code of Judicial Conduct that they enforce. Another key difference is that the Qualifications Collegia also determines whether a judge

(continued on page 9)

Failure to Supervise: Recent Cases

In several recent cases, judges were disciplined for failing to properly supervise court staff. In two of the cases, the judge’s failure to supervise allowed a court employee to embezzle court funds without being detected.

In May 2006, after terminating a secretary for excessive absences, a master-in-equity in South Carolina determined that funds were missing from the court account. The secretary confessed to embezzling the money by having the judge sign blank checks so she could make disbursements from the master-in-equity account. From February 2003 to May 2006, there were 89 checks drawn on the account payable to the secretary totaling \$637,445.68 (including more than \$300,000 in 2005), although the secretary contends a small number of the checks were legitimate payments or reimbursements. To cover her embezzlement, the secretary made false entries in the check ledger concerning the payee and amount.

The judge represents the secretary prohibited other staff from opening

bank statements, stored the statements where he could not reach them from his wheelchair, and, on one occasion when he asked to review the statements, falsely represented that she had taken them home to work on and forgotten to bring them back. The judge concedes that, except for that one occasion, he did not ask the secretary for the records to review them, that he made no meaningful review of the cancelled checks and bank statements, and that the misappropriation would have been easily discovered by reviewing the records for any month from October 2003 through May 2006. The judge reports he did not knowingly or willfully sign blank checks and has no recollection of having done so although he could see how it happened.

With the judge’s consent, the South Carolina Supreme Court suspended him for one year without pay. *In the Matter of Evans*, 638 S.E.2d 64 (South Carolina 2006). (The judge’s misconduct also included charging a fee in cases and expending the funds without statutory authority.)

Reviewing bank statements

The South Carolina court suspended a second judge for one year without pay for, in addition to other misconduct, failing to review bank statements monthly, as required by an administrative order, which allowed a court employee’s embezzlement to go undiscovered. *In the Matter of Cantrell*, 638 S.E.2d 51 (South Carolina 2006). The judge consented to the sanction.

The judge only made “spot checks” to make sure the deposit slips for court funds coincided with the bank statements. On February 3, 2004, \$1,000 in cash was discovered missing from the safe. Law enforcement suspected court employee Toni Cole, but she scored “inconclusive” on a polygraph examination. No criminal charges were brought, and the issue of the missing \$1,000 remained unsolved. The judge made no changes to the financial procedures in the office, and Cole was allowed to continue her duties with

(continued on page 10)

Charitable fund-raising

The New York State Commission on Judicial Conduct admonished a judge for personally participating in fund-raising activities on behalf of a civic organization. *In the Matter of McNulty*, Determination (March 16, 2007) (www.scjc.state.ny.us). The decision was based on an agreed statement of facts and joint recommendation.

In or about 2003, the judge created a flyer for a fund-raiser for Decision Women in Commerce and Professions, an organization that raises and donates funds primarily to local not-for-profit organizations benefiting women and families. The judge personally handed out copies of the flyer to court employees and attorneys who had expressed an interest in attending DWCP events. In early 2005, the judge prepared and mailed a flyer to acquaintances, providing information about an DWCP event, referring to her “many friends” who had attended past fund-raisers.

In early 2006, the judge prepared a flyer to accompany a DWCP invitation to a fund-raiser, placed copies into envelopes with the invitation, and addressed, stamped, and mailed the envelopes at her own expense to between 24 and 27 friends and attorneys. The judge also sent flyers to some attorneys who had appeared before her in court and discussed the fund-raiser with some attorneys in the courthouse hallway. The judge distributed flyers to interested court personnel and posted a large, glossy version of the invitation on the door to her chambers in the private hallway of the courthouse. The judge’s secretary posted one of the judge’s flyers in the court employees’ entranceway. The flyer indicated that interested persons should give the judge a check for the fund-raiser, and that the judge would randomly pick one check and pay for that person’s ticket, returning the win-

ner’s check to him or her. Some individuals personally handed the judge checks; others mailed them to the judge’s house. The judge’s secretary compiled a list of names of individuals who had given the judge checks for the fund-raiser.

The Commission found that the judge compounded her misconduct in fund-raising by “substantial activity in the courthouse and direct solicitations of attorneys who had appeared before her. . . . The judge should have recognized that her highly visible participation in the fund-raising activities as well as her direct approaches to court employees and attorneys who appeared before her could have a considerable coercive effect.”

RECENT DECISIONS

Pattern of failing to advise of constitutional rights

Pursuant to a stipulation and agreement, the Washington State Commission on Judicial Conduct publicly reprimanded a judge who engaged in a practice of failing to properly advise criminal defendants of their constitutional rights at arraignment and probation review hearings and failing to ensure that guilty pleas were validly entered. *In the Matter of Helbling*, Stipulation, Agreement, and Order (December 1, 2006) (www.cjc.state.wa.us/).

Until being contacted by the Commission, the judge’s standard arraignment procedure was that, prior to commencing the court’s arraignment calendar, court personnel would provide each defendant written forms entitled “Advice of Rights” and “Elements of Crimes.” The “Advice of Rights” form identified and explained the nature of a criminal defendant’s fundamental rights, such as the right to remain silent, to be represented by a lawyer, to have a speedy and public

trial before either a judge or jury, and to plead guilty or not guilty. The “Element of Crime” form identified the special elements, classifications, and potential penalties of the various municipal offenses with which a defendant could be charged in the municipal court. Each defendant was required to sign the “Advice of Rights” form and to initial next to the applicable offenses with which the defendant was charged on the “Elements of Crimes” form. The defendant provided the forms to the judge who verified they were signed and initialed.

The judge then would ask the defendant to enter a plea of guilty or not guilty without any inquiry or verbal advisement of rights. The judge did not ask unrepresented defendants whether they had read and understood the forms. The judge’s practice presumed

rather than ascertained that each defendant actually read and understood the rights entering a plea. In addition, the judge failed to advise unrepresented defendants on probation of their rights to subsequent probation review hearings, including their rights to be represented by counsel and to contest any allegation of non-compliance.

The Commission stated that the judge was obligated, at the very least, to inquire whether the unrepresented defendants before him had read and understood the written court information and to engage in some level of colloquy to determine whether the decision to plead guilty and waive important rights was done voluntarily and with an understanding of the consequences. The Commission also stated that a judge must advise an unrepresented defendant on the record of the right to be represented by a lawyer at arraignment and to have an appointed lawyer if the defendant cannot afford one.

Denial of bail

Based on the judge's agreement, the Kentucky Judicial Conduct Commission suspended a judge from office without pay for 15 days for denying bail to 17 defendants. *In re Browning*, Order of Suspension (April 17, 2007).

On three days in August and September 2006, the judge ordered that 17 defendants, most of whom were charged with traffic offenses or misdemeanors, be held in jail without bail pending an investigation by the United States Bureau of Immigration and Customs Enforcement regarding their identity and legal status. In denying bail to the defendants, the judge was prompted by her concern that they were not able to provide satisfactory evidence of their identity for purposes of determining their legal status and their prior criminal records, if any. However, the

Commission stated, the issue whether the defendants were in compliance with immigration laws was not before the judge, noting the prosecutor did not raise any issue about the defendants' legal status or prior criminal records and had not advocated that the defendants be detained without bail. The defendants were released through habeas corpus actions after some had been held without bail for more than three weeks.

Emphasizing that it does not review the decisions of judges for legal error, the Commission concluded that judges were "not free to engage in a practice of denying fundamental rights with impunity" and that it should have been obvious to the judge, as a judge sworn to support the Constitution, that her denial of the right to bail in 17 cases was seriously wrong. Noting that the judge's decisions "created an impression among some members of the community that Judge Browning's conduct was motivated by bias or prejudice against people of a particular ethnic heritage," the Commission stat-

ed that it did not find that the judge had violated the prohibition on manifesting bias or prejudice.

Pre-signed orders

Accepting a stipulation and approving the findings and conclusions of the Commission on Judicial Conduct, the Alaska Supreme Court publicly censured a former judge for (1) making pre-signed bail orders available for prosecutors for out-of-custody arraignments; (2) a lack of diligence in tracking of speedy time constraints; (3) ex parte communications in and presiding over a matter where he should have disqualified himself; and (4) making inappropriate sexual comments to female court employees in the workplace. *In re*

RECENT DECISIONS

Landry, 157 P.3d 1049 (2007).

The judge made pre-signed bail orders available for use by prosecutors for all out-of-custody arraignments. The judge's practice was to leave the bench and allow the prosecutor to fill in the blanks on the orders, which then would be filed with the court.

The judge controlled the tracking of speedy trial time frames even though the customary court procedure was to have court staff track those time frames. Due to his lack of diligence in 2005, at least 14 criminal cases were required by law to be dismissed.

The judge engaged in improper ex parte communications and presided over a matter from which he should have disqualified himself, giving rise to circumstances suggesting that he gave preferential treatment to a defendant in a criminal case.

The judge gave a note to a female employee stating her "Hillbilly thermometers are distracting," gave a note to a female court clerk stating, "I think Ms. _____ wants me," referring to a

juror, described one court clerk as a "shameless hussy," and commented on the physical attributes and attire of clerks and persons who appeared before the court.

Preventing the filing of pleadings

The Kansas Commission on Judicial Qualifications ordered a judge to cease and desist from establishing procedures that prevent the filing of pleadings with the court clerk. The judge accepted the order. *Inquiry Concerning Pilshaw* (March 26, 2007).

The complainant had filed a pro se motion for arrest of judgment related to his conviction following a trial over which the judge had presided. The complainant mailed a motion for recusal of the judge; the judge returned the motion unfiled, having determined that the motion contained inap-

propriate citations to federal law and recitation of facts that were not appropriate under the recusal statute. On August 1, 2005, the complainant mailed a motion seeking to continue a August 12 hearing on his motion for arrest of judgment so that he could obtain counsel. On August 12, the judge denied the motion to arrest judgment as untimely and returned the motion for extension of time unfiled as "not necessary" because the motion for arrest of judgment was not properly before the court.

Noting that documents presented for filing in the Kansas district courts are typically filed with the clerk of court and then referred to a judge for ruling, the Commission found that the judge had followed an alternative procedure in which she apparently reviewed the merits of motions to determine whether the motions should be filed with the clerk, resulting in two pro se motions being returned to the complainant unfiled. 

Developments Following *Republican Party of Minnesota v. White*

This article up-dates information on developments following the decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). A cumulative description is at www.ajs.org/ethics/pdfs/DevelopmentSafterWhite.pdf, which is up-dated frequently.

Model code changes

In February 2007, the ABA House of Delegates adopted a revised model code of judicial conduct that retained most of the restrictions on campaign and political conduct, including the pledges, promises, and commitments clause (as revised in 2003) and the prohibitions on personally soliciting campaign contributions and endorsing other candidates. The revised code did delete the requirement that judicial candidates maintain “appropriate dignity” and the prohibition on candidates personally soliciting publicly stated support. (Because the entire model code has been reorganized, the restrictions on political and campaign conduct are now in Canon 4.) In addition, several new comments were added:

The role of a judge is different from that of a legislator or executive branch official, even when the judge is subject to public election. Campaigns for judicial office must be conducted differently from campaigns for other offices. The narrowly drafted restrictions upon political and campaign activities of judicial candidates provided in Canon 4 allow candidates to conduct campaigns that provide voters with sufficient information to permit them to distinguish between candidates and make informed electoral choices.

* * *

A judicial candidate may make campaign promises related to judicial organi-

zation, administration, and court management, such as a promise to dispose of a backlog of cases, start court sessions on time, or avoid favoritism in appointments and hiring. A candidate may also pledge to take action outside the courtroom, such as working toward an improved jury selection system, or lobbying for more funds to improve the physical plant and amenities of the courthouse.

Judicial candidates may receive questionnaires or requests for interviews from the media and from issue advocacy or other community organizations that seek to learn their views on disputed or controversial legal or political issues. Paragraph (A)(13) does not specifically address judicial responses to such inquiries. Depending upon the wording and format of such questionnaires, candidates’ responses might be viewed as pledges, promises, or commitments to perform the adjudicative duties of office other than in an impartial way. To avoid violating paragraph (A)(13), therefore, candidates who respond to media and other inquiries should also give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected. Candidates who do not respond may state their reasons for not responding, such as the danger that answering might be perceived by a reasonable person as undermining a successful candidate’s independence or impartiality, or that it might lead to frequent disqualification.

Federal court challenges

A federal court held that the prohibition on “a judge, judge-elect, or candidate for judicial office [making] . . . with respect to cases, controversies, or issues that are likely to come before the court, pledges, promises, or commitments that are inconsistent with the

impartial performance of the adjudicative duties of the office” was not unconstitutional on its face but did not prohibit judicial candidates from responding to a questionnaire from Wisconsin Right to Life, Inc. Further, the court held that a requirement that a judge recuse if he or she makes a public statement appearing to commit himself or herself regarding an issue in a proceeding was unconstitutionally overbroad and vague. *Duwe v. Alexander* (United States District Court for the Western District of Wisconsin May 29, 2007).

Finding that, in *White*, the Supreme Court implied that the state’s interest in open-mindedness is a compelling one, the court held that the commit clause “is narrowly tailored to serve this openmindedness interest” and, therefore, not unconstitutional on its face. Emphasizing that the Wisconsin rule did not include the phrase “appear to commit,” the court stated:

Whether a statement is a pledge, promise or commitment is objectively discernable. It requires affirmative assurance of a particular action. It is a predetermination of the resolution of a case or issue. It is not a statement of belief or opinion. Absent a statement committing the speaker to decide a case, controversy or issue in a particular way, the speaker can be confident that the rule is not violated. . . . [W]hile a forceful opinion on an issue may “appear to commit” someone to an outcome, it is not a true commitment. The difference is not merely semantic. People are practiced in recognizing the difference between an opinion and a commitment (which explains why politicians typically stop short of the latter). A promise, pledge or commitment typically includes one of those three words or phrases like “I will” or “I will not.” Phrases like “I believe” or

“It is my opinion” signal the absence of commitment.

The distinction between a commitment and an announced position on an issue is relevant to the health of the judiciary. One presumes that a person is likely to decide in accordance with an opinion or belief, but will only rely upon an actual commitment. As a result, reaction to breaking a commitment or promise is far stronger than to a decision that contradicts an opinion or belief. A genuine commitment creates a different expectation and poses a far greater threat to the impartiality and appearance of impartiality of the judiciary.

The court concluded: “Responses to the Wisconsin Right to Life survey do not constitute promises, pledges or commitments such that they could be constitutionally restricted or sanctioned in the interest of judicial open-mindedness. Responses to these questions are announcements constituting speech protected by the First Amendment as applied in *White*.”

The Wisconsin code provides “a judge shall recuse himself or herself in a proceeding when . . . the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to any of the following: 1. an issue in the proceeding. 2. the controversy in the proceeding.” Stating that the phrase “appears to commit” in the rule “has the effect of requiring recusal in any case where

a judge previously announced a position on an issue in the case,” the court concluded that “the inclusion of the phrase in a direct regulation of speech renders the provision unconstitutionally overbroad and vague, and indistinguishable from the announce clause condemned by *White*.”

While it is true that the recusal requirement is not a direct regulation of speech, the chilling effect on judicial candidates is likely to be the same. Although a candidate would not fear immediate repercussions from the speech, the candidate would be equally dissuaded from speaking by the knowledge that recusal would be mandated in any case raising an issue on which he or she announced a position.

The court stated “it would not be irrational to permit a judge to speak, but to require recusal in the event the issue came before him or her.”

Entering a preliminary injunction, a federal court enjoined enforcement of the pledges, promises, commits, and appears to commit clauses of the Pennsylvania code of judicial conduct. *Pennsylvania Family Institute v. Celluci* (U.S. District Court for the Eastern District of Pennsylvania May 14, 2007). The court noted that it was not bound by the five federal district court decisions that had already held the provisions unconstitutional in other states (Alaska, Indiana, Kansas, Kentucky, and North Dakota) but stat-

ed that “the force of their thorough reasoning compels this court to conclude that Plaintiffs have met their burden of showing that they are likely to succeed on the merits of their First Amendment claims.”

Discipline cases

The Arkansas Supreme Court held that the prohibition on judicial candidates personally soliciting campaign contributions is constitutional and upheld an admonishment issued by the Judicial Discipline and Disability Commission to a judge who had personally solicited campaign contributions from two attorneys who appeared before him. *Simes v. Judicial Discipline and Disability Commission* (January 25, 2007). The court held:

Allowing a judge to personally solicit or accept campaign contributions, especially from attorneys who may practice in his or her court, not only has the possibility of making a judge feel obligated to favor certain parties in a case, it inevitably places the solicited individuals in a position to fear retaliation if they fail to financially support that candidate. Attorneys ought not feel pressured to support certain judicial candidates in order to represent their clients. In addition, the public should be protected from fearing that the integrity of the judicial system has been compromised, forcing them to search for an attorney in part based upon the criteria of which attorneys have made the obligatory contributions.

The New Mexico Supreme Court ordered that a judge be formally reprimanded for endorsing a mayor for reelection and authorizing the use of his name in an endorsement that was published in the local newspaper. *Inquiry Concerning Vincent*, Order (May 1, 2007). In the same one-page order, the court also rejected the judge’s argument that the prohibition on endorsing other candidates was unconstitutional. 

Judicial Conduct Reporter

Spring 2007

Seth S. Andersen
Executive Vice President

Cynthia Gray
Director,
Center for Judicial Ethics
cgray@ajs.org

American Judicature Society
The Opperman Center
at Drake University
2700 University Avenue
Des Moines, IA 50311

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

© 2007
American Judicature Society
ISSN: 0193-7367

To subscribe or if you have a
change of address or questions
about your subscription, contact
515-271-2285 or
llieurance@ajs.org

An index to the Judicial Conduct Reporter is available on the AJS web site at www.ajs.org/ethics/.

Bad Faith Sentencing *(continued from page 1)*

fine.) Upset over a lack of funding for a court bailiff, the judge had stated words to the effect that he would teach the county a lesson or make the county pay. Several days later, the judge suspended fines in 13 criminal cases, depriving the county of the funds.

Similarly, the Michigan Supreme Court publicly censured a judge who, following a dispute with the city involving pension benefits for court employees, had assessed fines, fees, and costs in ordinance cases in a way that reduced the city's revenues. *In the Matter of Justin*, 577 N.W.2d 71 (Michigan 1998). The judge had consented to the censure.

The judge had had discussions with the city about increasing pension benefits for court employees, but officials denied his request. Subsequently, in cases involving violations of city ordinances, the judge began to impose only nominal fines and costs and to assess a pre-sentence fee of \$100 to the county, in lieu of the usual fines and costs that would have been paid to the city. The court adopted the Judicial Tenure Commission's finding that the judges' sentences were a protest intended to "send a message" to city officials. The court also agreed that the judge's conduct had given "the appearance of a willful refusal to follow established practices and procedures" and created a public impression that the judge "harbored personal animus" toward the city.

In *In re Hill*, a city judge entered an order providing that "all fines are \$1 plus \$21 court costs" 10 days after the mayor had notified the city's health plan that the city would no longer pay premiums for the judge. *In re Hill*, 8 S.W.2d 578 (Missouri

2000). Before the judge lifted the order, he imposed \$1 fines in 19 cases — including charges for assault, assault on a police officer, resisting arrest, disturbance of the peace, stealing under \$15, and traffic violations. Concluding that the judge ordered the blanket reduction in fines to compel the payment of his health insurance, the Commission on Retirement, Removal and Discipline had found that the judge's orders were an effort to use the judge's office for his own private gain, were "unfaithful and

The Commission concluded that judicial discretion should not be exercised to send a message to county officials or for other reasons that have nothing to do with the case before the court.

disrespectful to the law," and "excluded judicial discretion."

Generating revenue

In a different twist on the budget dispute scenario, four justices of the peace in Texas reduced virtually all traffic fines to \$1 to send a message to the county commissioners regarding the impropriety of treating courts as revenue-generating agencies; they were publicly admonished by the Texas State Commission on Judicial Conduct. *Public Admonition of Warnke, Moseley, Evans* (Texas State Commission on Judicial Conduct June 25, 1996).

County officials had sent memos to the justices of the peace informing them that they were falling behind the "current revenue estimate," and encouraging them to increase collections and "get back on track with the

estimate." After receiving the memos, the four judges approved a new fine schedule that lowered the fines for almost all traffic offenses to \$1, plus court costs. The Commission concluded that judicial discretion should not be exercised to send a message to county officials or for other reasons that have nothing to do with the case before the court.

Threats

Even implicitly threatening to impose sentences for reasons other than the circumstances of the offenses amounts to misconduct. The New York State Commission on Judicial Conduct recently admonished a judge who made public statements to the town board that linked a proposed salary increase with his discretionary ability to set fines. *In the Matter of*

Tauscher, Determination (New York State Commission on Judicial Conduct February 5, 2007) (www.scjc.state.ny.us). The judge had proposed a court budget that requested a \$200 salary increase for himself and his co-justice and a \$1,000 salary increase for the court clerk. The town board approved a \$200 salary increase for the clerk but rejected the judge's request for himself and his co-justice. The judge appeared at a public hearing and asked the board to reconsider his request. The judge stated:

I would ask that you reconsider the salaries of the judges and the court clerk to be what we had asked them to be. . . . The other thing that I can tell you there was a town justice in Bergen who didn't get a raise when he thought that he should and the town board never asked him to explain anything but they lost \$20,000.00 in revenue because they didn't cooperate or did-

n't even consider asking him why he wanted an increase. They just said, no, you're not getting one. As I said earlier at the opening that judges have a lot of leeway when they're sitting up there in terms of what they can do and what they won't. Whether or not that happens, I can't make a promise. I just tell you that that option is available to the judges.

The judge made similar comments at a subsequent appearance before the town board. When a member of the town board asked if he was saying he would "hold back fining so that the town doesn't make as much money," the judge responded: "I have that

right. I have that liberty . . . as long as I treat everybody the same." The board did not change its decision.

The Commission found that "the clear import of respondent's statements was that he could exercise his discretion in setting fines and forfeiting bails to help fund the requested increase, and, conversely, that he could reduce fines in future cases if the Board refused to raise his salary." A review of the judge's court records indicated that the fines he imposed after his statements were consistent with those he imposed before his budget request. However, the Commission concluded:

Regardless of whether he intended to act on his warning, it was unseemly even to imply that a judge might reduce fines in future cases out of pique unless his salary was increased. Equally important, defendants and the public should never have to wonder if a high fine was imposed, even in part, to increase local revenues and fund the judge's salary. By making such statements, respondent seriously undermined public confidence not only in the integrity and impartiality of his court, but in the judiciary as a whole. 

Judicial Conduct Commissions in Russia *(continued from page 3)*

should be "promoted" to a higher judicial position. They also provide a screening function to determine the qualifications of proposed new judges.

The Code of Honor for the Russian Judiciary parallels our own 1972 version of the model code of judicial conduct. However, interpretation of the provisions differs remarkably due to significant differences in the Russian legal system. Until recently, there was no private bar. Commercial matters, matters where a business is a party, are handled in a separate court system from the general jurisdiction courts. And, most significantly, there is no trial record as we know it here. There is no discovery as part of a pre-trial process, and as a result, the parties do not have equal access to information. Ethics for judges in Russia must be determined in light of these different roles.

Collegia proceedings

In terms of the effectiveness of the Collegia, they are mixed. They are not professionally staffed and so must rely on a local court administrator or the members themselves to do the investigations and issue the findings.

Hearings before the Collegia are similar to those in the United States (with the exception of a lack of discovery). Most recently, public members have been appointed as members of the Collegia.

There are few public decisions issued by the Collegia and few advisory opinions, though they do have the power to issue them. The few decisions they do issue are not easily available, though, as with the court decisions, they are hoping to provide them on the Internet. As with many commissions in our country, the lack of work product is most likely due to a lack of staffing.

In my subsequent work with Russian lawyers and judges and visits to other parts of Russia, I find that the ethical issues are similar to our own. And the judicial personalities are similar as well. Ex parte communications, failure to disqualify, and substance abuse are prevalent issues that are being addressed. The Collegia members take their roles seriously but can be under outside pressures in some cases. They seem to be most impressed by the sheer numbers of decisions issued by United States commissions

and have been comforted by the fact that our code continues to grow and adjust over time.

By the time this article appears, I will have completed my fourth visit to Russia and will have helped host six delegations of Russian jurists on visits to Alaska. Alaska has a "partner" relationship with the region of Khabarovsk in the Russian Far East. My first trip to Belgorod was part of the Russian-American Judicial Partnership and my other three trips were part of the Russian-American Rule of Law Consortium. Both are USAID supported Rule of Law programs. Two of my visits have been to regions in Western Russia that bear some similarities in legal culture to the eastern United States. All of the delegations to Alaska have been from our partner region, which shares Alaska's attributes in many ways including our natural resources and, perhaps more significantly, our distance from the center of the national government. 

Ms. Greenstein is Executive Director of the Alaska Commission on Judicial Conduct.

Failure to Supervise: Recent Cases *(continued from page 3)*

respect to office finances, including unsupervised access to the safe.

In December 2005, \$500 was discovered missing from the safe. Cole subsequently claimed to have found the money behind the file cabinet. There was apparently no inquiry as to the validity of Cole's explanation. The judge did not change the financial procedures, and Cole was allowed to continue her duties with respect to office finances.

On March 8, 2006, a court employee discovered that \$2,500 received as bond payment on February 16, 2006 was not shown as deposited on bank records. On April 5, an employee reconciling bank records discovered that the entire deposit of \$4,803.20 on March 17 was missing. The judge reported the matter to the sheriff's department.

At a meeting with court personnel, two investigators scored the employees in accordance with a psychologically-based deception detection and interview technique. Based on that evaluation, investigators elected to question Cole first, and she confessed to stealing the March 17 deposit as well as two other deposits (totaling over \$15,000) that were not previously known to be missing. Cole also confessed to the \$1,000 theft in February 2004, the \$2,500 theft in February 2006, and to removing and replacing the \$500 in December 2005.

The judge represents that he relied entirely on his staff to properly document and disburse the monies of his office and acknowledges that his supervision and oversight did not comply with the an administrative order from the Chief Justice requiring mag-

istrates to "regularly, but no less than monthly, review bank statements and other records" to ensure compliance with money-handling and record-keeping requirements. The judge does not contest that the misappropriations would have been deterred or minimized had the procedures required by the administrative order been in place.

Ensuring compliance with statutory procedures

Even absent evidence of missing funds, a judge's failure to ensure that

Even absent evidence of missing funds, a judge's failure to ensure that court staff diligently discharge money-handling and record-keeping duties constitutes misconduct.

court staff diligently discharge money-handling and record-keeping duties constitutes misconduct. The New York State Commission on Judicial Conduct censured a judge whose staff failed to deposit funds received by the court within 72 hours of receipt and to remit the funds to the state comptroller within the period required by law. *In the Matter of Burin*, Determination (March 16, 2007) (www.scjc.state.ny.us). (The judge consented to the sanction.) As a matter of practice, court funds were deposited on a monthly basis rather than within 72 hours of receipt, although on occasion, funds were held for up to four months. The reports and remittances were made between 91 and 24 days late.

The judge was aware of the statutory requirements and was also aware that, as a matter of practice, his court

was not meeting them. He took no action to ensure compliance until his salary was stopped and then sought approval of the town board for overtime hours for his clerk. Not until after being contacted by Commission staff, did the judge require the clerk to deposit all court funds within 72 hours of receipt.

The Commission stated that, although the judge's administrative responsibilities may be delegated, a judge is required to exercise supervisory vigilance to ensure the proper

performance of these important functions. The Commission also noted that the delay in remittances deprived the state of funds that should have been remitted earlier and that the amounts involved were considerable.

Failure to discipline discourteous staff

Court staff's duty to be courteous to litigants, lawyers, and others with whom they deal in an official capacity also requires that a judge supervise staff and take corrective action when necessary, as illustrated by a recent Wyoming case involving a judge's clerk who was also his wife. John Crow began a romantic relationship with Jacqueline Ingersoll after hiring her as his secretary in 1989 when he was county attorney. He became a circuit court judge in 1995 and hired Ingersoll as chief clerk of the court. They were married in May 2001.

In November 2001, the Board of Judicial Policy & Administration submitted a verified complaint to the Commission on Judicial Conduct and Ethics that detailed Ingersoll's conflict with a deputy clerk and a complaint about Ingersoll from a member of the

public. The complaint was resolved by a private censure and corrective notice in May 2002. The judge agreed that he had breached his duty when he did not discipline Ingersoll when she treated coworkers, other agency personnel, and members of the public in an impatient, undignified, and discourteous manner.

The judge agreed to educate every employee regarding the duty to be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom they deal in an official capacity and to advise the employees that any complaints or concerns regarding working conditions or mistreatment by coworkers should be directed to the administrator of the Supreme Court. The judge also agreed that, for six months after the order, he would cause all persons coming before his court to be provided with a survey form inviting feedback regarding the quality of service, friendliness, and courteousness of court personnel. A pre-posted envelope addressed to the supreme court administrator was also provided.

On February 8, 2006, the Chief Justice faxed a letter to Judge Crow that noted that three clerks in the judge's court had resigned in the previous five months and that the feedback the supreme court administrator had received in exit interviews was "consistent and extremely disturbing." On February 9, Ingersoll resigned as the judge's chief clerk.

The Commission's findings were based on several of the surveys turned in to the Supreme Court after the judge's 2002 private censure (90% had rated the clerk's office favorably with respect to service, friendliness, and efficiency), numerous other complaints from the public, and statements from deputy clerks, clerks of other courts, and the county attorney and employees in that office, which is across the hall from the circuit court clerk's office. The individuals com-

plained about rude treatment of the public and other employees by Ingersoll and Tracy Dykstra, her deputy.

Impact on the public

Several former deputy clerks gave statements about the stress of the job. For example, in her resignation letter, one former clerk stated, "I cannot tolerate the rude, angry and abusive treatment dealt to the public, other agencies the Court has contact with on a daily basis and myself, as well ... I don't think I have ever felt more worthless, humiliated and downright stupid in all my life."

One of the survey responses from a member of the public reported that when the writer went into the judge's courtroom while court was going on, there was a dog in the courtroom, a telephone kept ringing and no one answered it, there "was a lady up in front," apparently Ingersoll, "and all she did was sit there with her arms folded across her chest," looking at the judge "in a bad way."

For a time, the county attorney's office would ask the district court clerk to take their documents to the circuit court clerk's office for filing because they did not want to deal with Ingersoll and Dykstra. The sheriff's office also began avoiding the circuit court clerk's office. The district court clerk reported that people who came into her office by mistake and were then directed to the circuit court would sometimes say, "Please don't send me over there."

The county attorney stated that Judge Crow openly referred to his wife as "she who is to be feared." The county attorney witnessed bickering between Judge Crow and Ingersoll in open court and tantrums and tirades by Ingersoll and described both Ingersoll and Dykstra as rude and unprofessional in their dealings with litigants, other agency personnel, and each other. He heard Ingersoll criticize Judge Crow in

the presence of the public. The county attorney's staff often asked him to take papers to the circuit court clerk's office because they did not want to deal with Ingersoll or Dykstra.

An employee of the county attorney's office reported that people would frequently come into the county attorney's office to complain about the rude treatment they received in the circuit court clerk's office and that some of these people were reduced to tears. The employee witnessed Ingersoll snickering and rolling her eyes at witnesses in court while Judge Crow was presiding.

The Commission found that there was "no evidence or suggestion that Judge Crow, personally, ever conducted himself in a less than professional manner during his judicial tenure." However, the Commission also concluded that the judge exhibited a persistent course of failing or refusing to appropriately supervise and discipline members of his court staff, including most notably his wife, and that his misconduct extended over a number of years and impacted a large number of members of the public, co-workers, and other agency personnel within the courthouse. The Commission also stated that "because Judge Crow elected to continue an employment relationship with his wife, even after the 2002 private censure, it was especially incumbent that he provide supervision and discipline in a manner and to an extent that would place his office beyond reproach. In this responsibility he failed miserably."

The judge retired in August 2006. The Wyoming Supreme Court publicly censured him for his failure to exercise appropriate oversight of Ingersoll. The court adopted the findings and recommendation of the Commission, to which the judge was deemed to have consented by his failure to file a petition to modify or reject. *In the Matter of Crow*, 151 P.3d 270 (Wyoming 2007). 



The Opperman Center
at Drake University
2700 University Ave.
Des Moines, Iowa 50311

Nonprofit Org.
U.S. POSTAGE
PAID
Chicago, Illinois
Permit No. 2482

JUDICIAL CONDUCT REPORTER



Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants

This publication, funded by the State Justice Institute, maintains that, under the code of judicial conduct, no reasonable question is raised about a judge's impartiality when the judge, in an exercise of discretion, makes procedural accommodations that will provide a diligent self-represented litigant acting in good faith the opportunity to have his or her case fairly heard—and, therefore, that a judge should do so. Written by Cynthia Gray, *Reaching Out or Overreaching* also includes proposed best practices for cases involving pro se litigants and a self-test, hypotheticals, a talk, small group exercises, a debate, and panel discussion for use by judicial educators a session covering the topic at judicial conferences. To purchase, visit <http://ajs.org/cart/storefront.asp>.