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# JUDICIAL CONDUCT REPORTER

A publication of the American Judicature Society Center for Judicial Ethics  
Volume 28, No. 2 Summer 2006

## Ticket-fixing by Cynthia Gray

**T**he urge to do a favor for friends and family is understandable and usually laudable. However, when judges fail to resist that temptation and “fix” tickets for friends, family, friends of friends, constituents, and others, they clearly violate the code of judicial conduct even if no money changed hands.

Ticket-fixing includes a variety of conduct in which a judge dismisses charges or otherwise gives preferential treatment to a defendant without a hearing or the consent of the prosecuting authorities, usually following an ex parte communication with the defendant or a third party. For example, in *Commission on Judicial Performance v. Chinn*, 611 So. 2d 849 (Mississippi 1992), the Mississippi Supreme Court removed a judge from office for, in

addition to other misconduct, engaging in ticket-fixing by dismissing 18 cases placed on a consideration docket. After a citation was issued, an offender could call the justice court office and give an excuse for getting the ticket or present proof to the clerk that the violation (such as expired inspection stickers or license tags) was corrected. If the clerk or Judge Chinn, felt that the case deserved consideration, it would be put on the consideration docket, and the charge would be dismissed. No trials were ever conducted before the charges were dropped, but “not guilty” was written on the ticket, giving the appearance that there had been a hearing. The dismissals caused problems with highway patrolmen, who would appear in court unaware that the charges had been dis-

missed.

Ticket-fixing is a chronic problem in Mississippi’s justice court system, resulting in discipline for at least 10 judges in the last 15 years. In some of the cases, the violation was based on the judge’s acquiescence in the practice of ticket-fixing by clerks or others. See also *Judicial Performance Commission v. Cowart*, 566 So.2d 1251 (Mississippi 1990) (allowed clerks, arresting officers, and other court personnel to dismiss 92 traffic tickets without an adjudication but with the entry of “not guilty” on the docket); *Judicial Performance Commission v. Hopkins*, 590 So. 2d 857 (Mississippi 1991) (allowed clerks and other officials to dismiss tickets without an adjudication);

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## Confidentiality Rules Change in Arizona by E. Keith Stott, Jr.

**N**ew rules for the Arizona Commission on Judicial Conduct went into effect on January 1, 2006. The new rules mark a significant change in the policy governing the confidentiality of complaints against judges and the outcome of disciplinary proceedings.

### Background

In the fall of 2004, the Maricopa

County Attorney’s Office petitioned the Arizona Supreme Court to make all complaints against judges and all forms of judicial discipline public. The county attorney’s office had filed a complaint with the Commission and subsequently received a “confidential” letter advising that the judge had been privately reprimanded. When the county attorney sought reconsideration, arguing that formal charges

should be brought or the reprimand should be made public, the Commission declined.

Stating that some of the conduct for which judges have received private reprimands appeared quite significant, the petition argued:

[T]he public has a right to know about even an isolated act of misconduct or the appearance of impropriety. Judges are

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# Recent Advisory Opinions

 A judge may serve as an officer in the Boy Scouts of America despite the organization's policy of prohibiting membership to homosexual Scout leaders. *Delaware Opinion 06-4*.

 A judge who, while an assistant state attorney, prosecuted a murder case, may meet with the current state attorney to discuss claims made by the defendant in a motion to vacate the judgment and sentence as long as the judge scrupulously avoids advising or assisting in the the post-conviction litigation and limits the discussion to factual matters. *Florida Opinion 06-12*.

 A judge seeking an appointment to another judicial position may not ask an attorney who has appeared or who may appear before the judge to submit a letter of support to the nominating commission. *Kansas Opinion JE 141 (2006)*.

 A judge may attend a hearing regarding complaints about a dog owned by the judge's wife if it is reasonably likely that the judge would be called on to offer factual testimony. The judge should not refer to himself or herself as "judge" and should not permit others to do so, should not interact with others in the courthouse in a way that reasonably conveys that the judge has the status of an insider, and should limit his testimony to factual observations without legal conclusions. *Massachusetts Opinion 06-3*.

 A judge may not accept an award for "Excellence in Adjudication" from Mothers Against Drunk Driving. *Arizona Opinion 06-3*.

 A judge may serve on the board of an organization that seeks funds to assist defendants obtain

court-ordered substance abuse treatment and recommend to a private foundation that it fund programs to the same end, but should not assist in determining which defendants will receive the funds. *Colorado Opinion 06-6*.

 A judge may send a letter in support of a non-profit organization's application for funding to operate a victims' assistance program at the judge's court, but the letter must be limited to stating objectively the facts and the benefits that the program provides for the orderly administration of justice without advocating for funding or conveying the appearance of favoritism. *Massachusetts Opinion 06-5*.

 Educational or promotional advertisements for commercial products and services unrelated to the judicial process and aimed at the elderly should not be displayed near the courtroom. Materials related to the business of the court, such as informational brochures prepared and/or provided by the court for pro se litigants or regarding approved parenting classes required in custody cases, may be displayed. *Nebraska Opinion 06-2*.

 A judge should not make a presentation on effective motions to suppress in a seminar about defense of driving under the influence charges sponsored by the Nebraska Criminal Defense Attorneys Association. *Nebraska Opinion 06-4*.

 A judge may not serve on a committee that will explore the need for a drug testing policy for extracurricular activities for a local high school board or appear at a public hearing to voice the judge's opinion that a drug testing mechanism is needed. *Nebraska Opinion 06-5*.

 A judge does not have a duty to report criminal activities admitted by a party during a civil proceeding but may do so at the conclusion of the proceeding. *South Carolina Opinion 17-06*.

 A judge is not required to report a positive drug test administered to a doctor who is a party to a divorce action in the judge's court but may do so depending on the circumstances including the likelihood of injury if the conduct is not reported. *New York Opinion 06-13*.

 A judge may refer a victim to the Utah Crime Victim's Legal Clinic as long as the referral is not based on an assessment of the victim's case or the quality of representation. *Utah Informal Opinion 05-5*.

 A judge may, acting as an individual and not identifying himself or herself as a judge, solicit pledges from family and friends who would never appear before the judge for a bicycle ride to raise funds for the Leukemia and Lymphoma Society. *Washington Opinion 06-7*

 A judge may not retain or renew a real estate brokers license once he/she assumes judicial office. *New York Opinion 05-130(A)*.

 A judge may not maintain an active real estate sales license. *Ohio Opinion 06-1*.

 A judge may carry a firearm while performing duties on the bench unless it raises legal and administrative issues but should keep the firearm concealed and safeguarded on the judge's person while on the bench. *New York Opinion 06-51*.

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

# Recent Cases: Sports

## **Dereliction of duty**

The California Commission on Judicial Performance publicly admonished a judge who delayed taking a verdict in a murder trial because he was at a baseball game. *In the Matter of Zellerbach* (August 15, 2006) ([cjp.ca.gov/pubdisc.htm](http://cjp.ca.gov/pubdisc.htm)).

Judge Zellerbach presided over a murder case that involved a drunk driving accident in which the defendant's girlfriend and unborn baby were killed. The case went to the jury on October 4, 2004. During the late morning of October 5, the judge left court to attend an afternoon Angels baseball play-off game. Before he left, Judge Zellerbach made arrangements for Judge Robert Spitzer to answer any questions that the jury might have. However, he did not arrange to have Judge Spitzer or any other judge take

the verdict.

The jury reached a verdict around 2:30 p.m. Judge Zellerbach's clerk tried to reach the judge on his cell phone but, when he did not answer, left a message. When Judge Zellerbach did not promptly return her call, the clerk determined Judge Christian Thierbach was available to take the verdict. Judge Zellerbach's clerk then contacted the attorneys in the case and told them to come to court at 3:30 p.m.

Judge Zellerbach then returned his clerk's telephone call. Judge Zellerbach said that he wanted to take the verdict himself and instructed his clerk to tell the attorneys to return to court the next morning. The clerk reached the attorneys before they were to arrive at court and relayed the judge's message. However, the attorneys came to court that afternoon and

asked the clerk to convey to Judge Zellerbach their wish to have the verdict taken that day. When the clerk telephoned Judge Zellerbach at the baseball game again, he reiterated that he did not want another judge to take the verdict and that he would take the verdict himself the next day. Judge Zellerbach took the verdict on the morning of October 6.

In his written response, the judge argued that he did not arrange for another judge to take the verdict while he was at the game because he did not think the jury would return with a verdict that day, given the complicated issues in the trial. The Commission stated that, on the basis of the judge's nearly 30 years of experience as a judge and a prosecutor, "he must have known that it is not pos-

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# Continuing Legal Education Reporting: Recent Cases

## **False report**

The South Carolina Supreme Court sanctioned a judge for claiming on a CLE compliance report that he had attended three days of a seminar when he had attended only one day. *In the Matter of Augustus*, 626 S.E.2d 346 (South Carolina 2006). The sanction, a one-year suspension without pay, was pursuant to the judge's consent, and was also for repeating the misrepresentation to Disciplinary Counsel during its investigation.

The judges' association sponsored a seminar from Thursday, March 3, 2005, through Saturday, March 5, 2005. Judge Augustus needed the continuing legal education hours to meet his mandatory CLE requirements for the reporting period ending June 30, 2005. As instructed by the judge, an employee enrolled the judge in the

seminar and picked up the judge's enrollment package at the seminar on March 3rd. The judge only attended the seminar on March 5th.

Based on his enrollment in the seminar, the Commission on CLE & Specialization sent the judge a compliance report that included 12 hours of CLE credit for attendance at all three days of the seminar. The judge signed the compliance report under oath before a notary public and then submitted the report to the CLE Commission.

## **Untimely reports**

Agreeing with the recommendation of the Judiciary Commission based on a stipulation of facts, the Louisiana Supreme Court sanctioned a judge for failing to timely reimburse the court for travel advances beyond the costs

actually incurred and to timely file travel reports. *In re Lee*, 933 So. 2d 736 (Louisiana 2006). The 120-day suspension without pay was also for failing to issue judgments in 18 cases for periods ranging from three to nine months and to report that those cases were under advisement.

The judge's court had adopted an order that required travel expense reports to be submitted no later than the 10th day of the following month. Between January 1, 2001, and December 31, 2003, the judge went on 28 court-related trips. For 19 of those trips, the judge did not file travel expense reports within the time limit even though she owed the court money because she had incurred reimbursable expenses that were less than the

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# Campaign Speech Developments

This article up-dates information on the states' responses to recent federal decisions holding unconstitutional several canons in the code of judicial conduct regarding political activity. Previous articles were published in the summer 2002, winter 2005, summer 2005, and spring 2006 issues of the *Judicial Conduct Reporter*. A cumulative description is at [www.ajs.org/ethics/pdfs/DevelopmentsAfterWhite.pdf](http://www.ajs.org/ethics/pdfs/DevelopmentsAfterWhite.pdf).

In May 2006, the Iowa Supreme Court adopted some of the amendments to the model code enacted by the American Bar Association in 2003. As amended, the Iowa code prohibits both judges and judicial candidates from 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." The court also adopted a variation of the 2003 disqualification change; the Iowa code now disqualifies a judge from a case if the judge "while seeking appointment for a judicial vacancy or serving as a judge, . . . made a public statement, other than in a prior judicial decision or opinion, that commits, or appears to commit, the judge to reach a particular result with respect to an issue in the proceeding or a controversy in the proceeding." With the change in Iowa, 12 states (**Arizona, Florida, Iowa, Louisiana, Maryland, Minnesota, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, and Wisconsin**) have adopted the ABA 2003 restrictions on speech.

The Florida Supreme Court removed a judge from office for "flagrant misrepresentations made to the voting public" during his judicial campaign coupled with serious campaign

financial misconduct and violations of law. *Inquiry Concerning Renke*, 933 So. 2d 482 (Florida 2006).

## Questionnaires

In April, 2006, the Kansas advisory committee concluded that a candidate may not answer a questionnaire distributed by Kansas Judicial Watch that asks for the candidate's views on, for example, whether the state constitution is intended to protect a right to assisted suicide. *Kansas Advisory Opinion JE-139* (2006). In 2004, the committee had advised that candidates were prohibited from soliciting signatures on nomination petitions. *Kansas Advisory Opinion JE-117* (2004). Subsequently, Judicial Watch and other plaintiffs filed a lawsuit challenging the canons as interpreted by those advisory opinions.

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# Providing Help for Judges in Distress

The American Judicature Society recently published a symposium issue of its journal *Judicature* entitled *Providing Help for Judges in Distress*. The goal of the symposium is to advance the discussion of the issue of judges with personal problems and to inspire action that will offer a remedy before their judicial performance, health, and personal lives suffer. As the editorial in the issue notes, to meet all the other challenges facing the judiciary, "all judges need to be acting at their fullest capacity and with the confidence that there are resources available if they need them."

The issue includes a foreword by Mary M. Schroeder, Chief Judge of the United States Court of Appeals for the Ninth Circuit, and three inspiring sto-

ries from judges or former judges that provide hope that an often seemingly overwhelming situation can have a happy ending. Dr. Isaiah Zimmerman contributes an article based on his years of helping judges and teaching in court programs, and there is an edited transcript of the AJS 2005 annual meeting that includes descriptions of some of the current efforts designed to assist judges. The issue includes an article on addressing disability and promoting wellness in the federal courts by Richard Carlton and an article by Cynthia Gray on judicial discipline approaches to the problem of impairment. Extra copies may be available. Contact [cgray@ajs.org](mailto:cgray@ajs.org).

Two recent cases illustrate the problems that prompted the symposium

issue. Granting a petition for discipline upon stipulation, the New Mexico Supreme Court ordered that a judge be formally reprimanded, suspended without pay for two days, and fined \$1,000 after his prolonged and unexplained absence from court. The judge stipulated that he suffers from the disease of alcoholism. *Inquiry Concerning Pope*, Order (July 21, 2006).

Because the judge failed to return to court on Monday April 17, a criminal jury trial was left unfinished before the defense concluded its case and the matter was given to the jury. A stipulated mistrial was ultimately entered. The chief judge had to make arrange-

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## Ticket-fixing (continued from page 1)

*In re Inquiry Concerning Seal*, 585 So. 2d 741 (Mississippi 1991) (at the request of third parties, found 13 defendants not guilty without a trial, hearing, or notice to the arresting officers; allowed clerical personnel to dismiss non-moving violations at the request of or with the agreement of the issuing officer; knowingly allowed clerks and officers to dismiss 109 tickets pursuant to a standing policy absent any trial or hearing; dismissed 14 cases, both moving and non-moving violations, by marking not guilty on the court records without any trial or hearing but merely upon ex parte proceedings or without any appearance of the defendant at all); *Judicial Performance Commission v. A Justice Court Judge*, 580 So. 2d 1259 (Mississippi 1991) (finding defendants not guilty based upon ex parte communications with defendants without hearing or trial and without hearing the state's side of the case); *Commission on Judicial Performance v. Gunn*, 614 So. 2d 387 (Mississippi 1993) (dismissed 8 tickets without conducting a hearing or notifying officers who issued the citations); *Commission on Judicial Performance v. Bowen*, 662 So. 2d 551 (Mississippi 1995) (dismissed 31 speeding tickets after holding ex parte communications with defendants); *Commission on Judicial Performance v. Dodds*, 680 So. 2d 180 (Mississippi 1996) (had ex parte communications about tickets and dismissed cases without hearing); *Commission on Judicial Performance v. Boykin*, 763 So. 2d 872 (Mississippi 2000) (dismissed tickets based on ex parte communications with defendants); *Commission on Judicial Performance v. Warren*, 791 So. 2d 194

(Mississippi 2001) (had ex parte communications and dismissed speeding tickets without conducting any hearing or notifying officers).

### The real world

Pursuant to the recommendation of the Judiciary Commission, the Louisiana Supreme Court sanctioned a judge for, accepting requests to “fix” traffic tickets and other offenses and having an employee of his court contact the prosecutor's office to relay the messages. *In re Fuselier*, 837 So. 2d 1257

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**The Commission found that “the gravamen of Judge Wasilenko’s wrongdoing is that he set up a two-track system of justice, with special handling available for relatives, friends and others with special connections.”**

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(Louisiana 2003). Files indicated calls from a sheriff, the office of a member of the state house of representatives, and a police chief, for example. The judge explained:

You know, there are . . . some that are in writing, some that are long distance phone calls that come from various people . . . and then the Mayor of Alexandria or Lake Charles calls and says, “By the way, my next door neighbor or my daughter is going to school at McNeese in Lake Charles and got arrested, . . . can you help me?” Well, it would be not only bad manners, but unrealistic to say “I’m sorry, Mayor, I’ve known you since we were in law school together at Tulane, but I can’t speak to you about this at all.” . . . I’m not gonna tell him, “No, I’m not going to call.” You know, I would call [the prosecutor] and say, “Look, the Mayor called,” or

something like that, “You have to take action. But out of courtesy, just out of respect, he called, I’m telling you he called, would you please call him back and y’all take care of your business.” That’s how I would handle it. If that’s misconduct or improper ex parte communications, . . . I think that’s the real world.

The court noted that the prosecuting attorney may have felt pressured to do what the judge suggested, knowing that the judge would be presiding in many cases he prosecuted. The court also rejected the judge’s defense that it was his clerk, and not him, who actually contacted the prosecutor about the requests for help, noting “everyone knew the information was coming from Judge Fuselier.”

The court held:

We acknowledge that requests for “help” may be submitted to judges in both rural and urban areas and

that judges may have a difficult time avoiding them. However, a judge is forbidden from accepting requests for help, and from passing these requests along to the prosecutor. By accepting these requests for help and passing them along, Judge Fuselier cultivated an atmosphere where people believed Judge Fuselier was open to such requests and that they could gain an advantage by contacting the judge privately.

The California Commission on Judicial Performance also rejected a judge’s attempt to justify his conduct based on the sparse population of the county in which he sat and in which he had lived his entire life, making it inevitable that he “regularly sees individuals that he is familiar with on some level before him in court on traffic matters.” *Inquiry Concerning*

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## Ticket-fixing (continued from page 5)

*Wasilenko*, Decision and Order (California Commission on Judicial Performance March 2, 2005) (cjp.ca.gov/pubdisc.htm). The Commission responded:

By their terms, the canons impose uniform statewide standards. Whenever an assigned case involves a party the judge “knows,” the judge must be particularly vigilant to ensure the appearance and reality of independence and impartiality. The situation may arise more frequently in a small town than a major metropolitan area, but the judge’s ethical duties are the same irrespective of population statistics.

The judge had disposed of 10 cases in which the defendants were relatives, friends, and friends-of-friends. The cases had not been pending before him and otherwise would not have been assigned to him. He afforded the defendants expedited, convenient, favored procedures and in some instances substantively lenient dispositions. (The Commission censured the judge and barred him from ever serving as a judge again, which was the harshest sanction available because he had retired the day before the final oral argument.) The Commission found that “the gravamen of Judge Wasilenko’s wrongdoing is that he set up a two-track system of justice, with special handling available for relatives, friends and others with special connections.” A court clerk who had brought one of the files to the judge’s chambers and knew of his relationship to the defendant testified that she “was mad after it happened” because she had just paid her own daughter’s ticket and she “just didn’t like it.” The Commission stated that “the evil inherent in a two-track system of justice is so apparent; people ‘just don’t like it’ because it is so clearly wrong – yet these simple points obviously elude Judge Wasilenko.”

### Favors for sharks

The California Commission publicly censured a second former judge and barred him from assignments from any state court for, in addition to other misconduct, ticket-fixing in 24 cases. *Inquiry Concerning Danser*, Decision and Order (California Commission on Judicial Performance June 2, 2005) (cjp.ca.gov/pubdisc.htm). The judge had retired the day that the hearing before the masters began. He was also convicted of criminal charges related to the ticket-fixing scheme.

The defendants in the cases were members of or closely connected to an inner circle of the judge’s friends, acquaintances, and court staff. Many of the defendants were friends of or had connections with Randy Bishop, who was a friend of the judge, had been a detective with the local police department, and handled law enforcement affairs for the San Jose Sharks professional hockey team. Judge Danser has been a Sharks fan since about 1990. The defendants whose traffic cases the judge dismissed included five players or employees of the Sharks, the girlfriend of a player, an employee of the home arena, two employees of the San Jose Earthquakes soccer team (which was run by the Sharks or their marketing arm), the girlfriend of the Earthquakes’ equipment manager, and the owner of a restaurant frequented by Sharks players.

None of the cases Judge Danser dismissed were assigned to him, and none would have come before him in the ordinary course of judicial business. Judge Danser did not conduct a hearing in any of the cases. He made no disclosures on the record of any ex parte communications or relationships to any of the defendants or other involved persons. None of the cases were on the calendar when Judge

Danser dismissed the charges, and none of the defendants appeared in court nor did any retained counsel appear on behalf of any of them. In most of the cases, the minute orders stated that the dismissal was in the “interests of justice,” but the judge admits that the actual reasons for the dismissals was to do a favor for Bishop.

The judge asserted that the vehicle code authorized the dismissals. However, the Commission found that the vehicle code allowed a judge to dismiss a case only after an arresting officer determined that a citation should be dismissed “in the interest of justice” and only if the judge entered findings on the record. The Commission concluded that “the statute cannot be twisted to cover these situations.”

*See also Inquiry Concerning Platt*, Decision and Order (California Commission on Judicial Performance August 5, 2002), *review denied*, (California Supreme Court February 2003) (cjp.ca.gov/pubdisc.htm) (fixed 4 tickets and attempted to influence other jurists in three cases); *In re Zupsic*, Opinion (December 30, 2005) and Order (Pennsylvania Court of Judicial Discipline March 15, 2006) (www.cjdpa.org/decisions/index.html) (attempted to interfere in 5 cases by attempted to persuade the prosecuting witness to reduce the charge and failing to disqualify from 2 of those cases); *In the Matter of O’Kelley*, 603 S.E.2d 410 (South Carolina 2004) (dismissed parking tickets outside of court); *In the Matter of Singleton*, 605 S.E.2d 518 (South Carolina 2004) (adjudicated 14 traffic tickets issued to close family members and three traffic tickets issued to friend. 🛠️)

## Confidentiality Rules Change in Arizona *(continued from page 1)*

elected or retained by the voting public. In order to vote responsibly, the public needs information about judicial disciplinary actions and complaints. Likewise, the public should be allowed to see which complaints the commission has dismissed. . . .

\* \* \*

Although some complaints may be “frivolous” and some discipline minor, citizens should be permitted to evaluate the information for themselves, as they do with other professionals. . . . Arizona citizens can currently learn if their doctors have been careless or their lawyers were suspected of misconduct, but they will not necessarily be told when their judges are reprimanded for violating the ethical rules.

The petition was supported by prosecutors, the Arizona Newspapers Association, and one private citizen.

In opposition, the Commission argued that dismissed complaints should remain confidential, noting that the majority of complaints are dismissed because there is no evidence of misconduct or the complaints involve legal issues outside its jurisdiction. The Commission made an alternative proposal to replace private admonitions and advisory letters with confidential dismissals with comments and to authorize public reprimands without a formal hearing.

In partial support of the Commission’s position, public defenders and defense attorneys recommend-

ed that the Commission should provide greater public access to its decisions as long as the judiciary has reasonable protection from frivolous complaints. The state bar, which discloses complaints against lawyers, supported the disclosure of reprimands of judges but opposed the use of information that might impact the independence of the judiciary or mislead the public about judges. In other comments on the proposals, courts, judges’ associations, and individual judges focused on the potential misuse of confidential information in judicial elections and the balance between judicial independence and accountability.

### The rule change

The Arizona Supreme Court amended the rules to provide greater public disclosure of judicial disciplinary records beginning January 1, 2006. (The new rules are on-line at [www.supreme.state.az.us/ethics](http://www.supreme.state.az.us/ethics).) The court eliminated advisory letters and admonitions as disciplinary alternatives for the Commission although complaints may be dismissed with comments.

Under the amended rules, the Commission must disclose all complaints against judges; however, the amount of information disclosed varies according to the action taken. If the Commission dismisses a com-

plaint, it will redact the names of the complainant and the judge and other personal information before making the complaint and the dismissal order public. (A complaint is dismissed if it is frivolous, is unfounded on its face, is beyond the Commission’s jurisdiction, or raises issues that are solely appellate in nature.) Dismissed complaints and orders of dismissal (redacted as required by the new rules) are now posted on the Commission’s web-site after the deadlines for motions for reconsideration have passed.

The identities of complainants and judges will be revealed in cases in which the Commission finds misconduct. In informal proceedings in which the Commission issues a public reprimand, the complaint, the judge’s response, and the Commission’s decision will be released at the conclusion of the case with the names intact (addresses and telephone numbers will still be redacted). These sanctions will also be posted on the Commission’s web-site.

No change was made in the rules governing disclosure in formal proceedings. Once formal charges are filed against a judge, the complaint, the judge’s response, and the pleadings will be posted on the Commission’s web-site, and formal hearings will be open to the public.

So far, the system appears to be working, although it requires considerably more time and effort to redact documents and post the information on the web. These hidden costs along with a substantial increase in motions for reconsideration will need to be analyzed carefully next year to determine just how well the new rules work.



*Keith Stott is executive director of the Arizona Commission on Judicial Conduct.*

### Judicial Conduct Reporter

Summer 2006

**Richard F. Perrault**  
Acting Executive Vice President

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

© 2006  
American Judicature Society  
ISSN: 0193-7367

**Cynthia Gray**  
Director,  
Center for Judicial Ethics  
[cgray@ajs.org](mailto:cgray@ajs.org)

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

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## Recent Cases: Sports *(continued from page 3)*

sible to predict how long a jury will deliberate, irrespective of how complicated the issues or how long the trial.” The judge also asserted that he instructed his clerk to put the case over until the next day, rather than allowing another judge to take the verdict, because he was concerned about complicated legal issues related to the possible verdict. The Commission stated that, “given the asserted complexity of the legal issues, Judge Zellerbach should not have gone to the baseball game while the jury was deliberating.” Noting that the judge had referred to other cases in which other judges had delayed taking a verdict until the next day, the Commission stated, “there likely are instances where good cause exists for such delay. A judge attending a baseball game is not such an instance, however.”

The Commission stated this was “a serious dereliction of judicial duty . . . by which Judge Zellerbach jeopardized the verdict in a double homicide case and imposed hardship and additional stress on jurors, the families of the victim and the defendant, and on counsel and the defendant.” The Commission noted there was adverse local press coverage.

### Accepting tickets

Adopting the recommendation of the Judicial Tenure Commission, the Michigan Supreme Court publicly censured a judge for accepting in open court football tickets from an attorney appearing before him. *In re Haley* 720 N.W.2d 246 (Michigan 2006).

The judge presided over a plea proceeding in a criminal case involving a defendant who allegedly lost control

of her vehicle and destroyed a florist’s sign. The defendant and the prosecutor disagreed about the amount of restitution. After accepting a plea of guilty to the charge of using a vehicle with improper license plates, the judge stated that he would sentence the defendant at a future date. The defendant’s attorney, Richard Benedict approached the bench and placed two University of Michigan football tickets (worth \$92)

**The court noted that whether the attorney or the judge intended the tickets to be ordinary social hospitality was irrelevant but that the inquiry was how the reasonable observer would view the gift.**

on the bench. Benedict asked the judge to promise to go and said he did not need to get paid. After accepting the tickets, the judge reconsidered his earlier decision to postpone sentencing, stating to Benedict, “I’ll just sentence her right now and save you the trip back,” a reference to the approximately two-hour round trip from where Benedict has his office to the court. The judge then sentenced the defendant to a \$100 fine, court costs, a state fee, an undetermined amount of restitution, and six months of probation. He later set restitution at the full amount sought by the victim and the prosecutor.

The judge argued that the tickets fell within an exception to the prohibition against accepting gifts that allows a judge to accept ordinary social hospitality. The court noted that whether the attorney or the judge intended the ticket to be ordinary social hospitality

was irrelevant but that the inquiry was how the reasonable observer would view the gift.

Declining to define “ordinary social hospitality,” the court stated that, “simply from the plain meaning of the phrase,” social hospitality “requires a *social* context.” Here, the court concluded, the “context of respondent’s acceptance of the football tickets was not social, but rather a *judicial*, context.”

The singularizing fact of this case is that *respondent accepted a gift in open court in the course of executing his judicial duties*. That the gift of tickets might well be deemed “ordinary” in other contexts does not make its acceptance in a nonsocial setting consonant with the canon. It would not have mattered, for example, that

Benedict and respondent had a longstanding tradition of giving and receiving football tickets. The fact that the gift was offered in open court by a litigant in a pending case excludes the possibility that the event can objectively be characterized as “*social* hospitality.” We do not believe that a reasonable observer would conclude that “ordinary social hospitality” fairly describes an exchange of gifts in open court between a litigant in an immediately pending case and a judge in that same case.

*See also Inquiry Concerning Luzzo*, 756 So. 2d 76 (Florida 2000) (on 15 to 17 occasions from 1994 through 1997, accepted free tickets, with a face value \$16 to \$18 apiece, to Florida Marlins’ baseball games from two members of a law firm that included lawyers who were likely to appear before the judge and actually were before him in at least two cases); *Office of Disciplinary Counsel v. Lisotto*, 761 N.E.2d 1037

(Ohio 2002) (accepted 8 tickets, two tickets in each of four years, to attend Pittsburgh Steelers football games from an attorney who appeared in numerous cases before judge); *In re Dagher*, 657 A.2d 1032 (Pennsylvania Court of Judicial Discipline 1995) (accepted and used 4 tickets to a college football game from a husband involved in divorce proceedings pending before the judge); *In the Matter of Gaddis*, Stipulation, Agreement and Order (Washington State Commission on Judicial Conduct December 10, 2004) ([www.cjc.state.wa.us](http://www.cjc.state.wa.us)) (accepted tickets to Seattle Mariner's baseball games and meal from attorney who frequently appeared before judge).

### Leading a cheer

The Washington State Commission on Judicial Conduct publicly admonished a judge for urging those present in the courtroom for a sentencing hearing to cheer for the Seahawks. *In the Matter of Grant* (August 4, 2006) ([www.cjc.state.wa.us](http://www.cjc.state.wa.us)). The sanction was based on a stipulation and the judge's agreement.

A defendant had pled guilty to manslaughter and unlawful possession of a firearm stemming from his having

shot and killed a man during a struggle outside a tavern on February 5, 2005. Approximately 100 people, mostly family and friends of the defendant and decedent, were present at a sentencing hearing on February 3, 2006, the Friday before the Sunday on which the Seattle Seahawks were to play in the Superbowl. After she entered the courtroom, the judge stated:

Good afternoon, everyone. Before you sit down and I know this is rather unusual, but we have a great football team today and I just wanted you to give one holler for the Seahawks. So let's just say, "Go Seahawks." I am going to say on one, two, three: "Go Seahawks." You can do better than that. Let's try it again. One, two, three: "Go Seahawks."

The stipulation noted that the judge's comments received widespread media attention across the country and the globe. On the following Monday, the judge issued a public apology. The judge self-reported the incident to the Commission. She explained that the courtroom had been extremely tense and she was afraid of a violent disruption and had intended to "diffuse the courtroom situation . . . to get the people

to find a way of releasing their tensions without taking it out on each other."

The order noted that "ordinarily, a spontaneous, well-intentioned and intrinsically innocuous comment made by a judge from the bench – even though misplaced – would not by itself amount to judicial misconduct deserving of public sanctions," stating "to preserve and respect judicial independence, judges should be afforded some measure of human fallibility." Distinguishing the judge's actions from "the ordinary, perhaps excusable, lapse of judgment that typically accompanies misguided courtroom levity," the order stated that the hearing concerned a serious sentencing that profoundly affected most of the people in the crowded courtroom and that the tragic events that brought about the hearing occurred on the preceding Super Bowl Sunday. "Inviting the family and friends of the decedent and the defendant to celebrate the forthcoming Super Bowl, a game to be played on the anniversary of the fatal incident," the Commission concluded, "showed an unacceptable indifference to these circumstances and toward those who were present." 

## Continuing Legal Education Reporting: Recent Cases *(continued from page 3)*

amounts advanced to her, prepaid by the court, or charged to the court's credit card.

The judge's failure to file timely reports resulted in several negative audit findings by the legislative auditor. The auditor found that the judge received duplicate payments of \$8,456 but did not reimburse the court until 30 to 660 days after the trip, with 10 of the repayments occurring more than 180 days after the trip. The stipulation noted that the judge's failure to timely reimburse the court and to timely file her travel reports were the subject of negative media attention in at least 23 newspaper articles and six broadcast

news items.

The court noted the Commission finding:

At best, citizens will perceive that judges can neglect their administrative responsibilities. At worst, the impression may be that there was a selfish or sinister motive for Judge Lee to retain the unused travel funds in her office for an extended period. Even those persons who do not suspect anything untoward as to Judge Lee's motives will nevertheless realize that sorely needed public funds were tied up, and not available for public usage.

The court found that the judge's testimony at the hearing that she had

actually repaid the court immediately because she put the monies owed in her office safe was "ridiculous" and "highly suspect." Noting it had "long ago rejected this so-called 'black box defense' in attorney discipline cases involving improper use of client funds," the court stated:

The delays for returning and accounting for the public funds in this case are far from reasonable. . . . [O]btaining advances for travel expenses, then charging the same expenses to the court credit card, and, most incredibly, waiting months or even years to return the unused money is completely unacceptable. 

## Campaign Speech Developments *(continued from page 4)*

Granting a preliminary injunction, a judge sitting in the United States District Court for the District of Kansas found that the plaintiffs were substantially likely to succeed on the merits of their claim that the pledges and promises and commits clauses are overbroad and unconstitutionally chill a real and substantial amount of protected speech. *Kansas Judicial Watch v. Stout* (July 19, 2006). The court concluded:

None of the statements on the Questionnaire in this case require the candidate to pledge, promise, or commit to any position in contravention of the pledges and promises and commit clauses. These statements merely require the candidates to announce their views on disputed legal and political issues. Prohibiting judicial candidates from announcing their views on disputed legal and political issues is in contravention of the Supreme Court's holding in *Republican Party of Minnesota v. White*.

The court also found that that plaintiffs were substantially likely to show that the solicitation clause is under-inclusive and fails to address problems of partiality that are inherent in a system of judicial elections. However, the court rejected the plaintiffs' challenge to the recusal canon.

First, it is narrowly tailored to serve the interest of removing bias against parties. The purpose of the recusal canon is to guarantee to litigants that the judge will apply the law to them in the same way. When a judge is biased for or against a party, or it appears that the judge is biased for or against a party, the recusal statute requires the judge to remove himself or herself from the case. The recusal Canon is also narrowly tailored to serve the compelling government interest in open-mindedness. The recusal Canon requires a judge to recuse if he or she is unable to maintain an open mind about the results of

a particular case until all of the evidence and arguments have been presented. The standard of impartiality required to warrant recusal has been well established in Kansas.

In a note appended to *Kansas Advisory Opinion JE-139* (2006) in August 2006, the Kansas Commission on Judicial Qualifications stated that it "respectfully rejects" the advisory panel's conclusion that judicial candidates may not answer the questionnaire distributed by Kansas Judicial Watch, citing *Republican Party of Minnesota v. White*. The Commission noted that it is not bound by advisory opinions.

The Florida Judicial Ethics Advisory Committee released an opinion stating that a judicial candidate is not per se barred from responding to questionnaires from the Florida Family Policy Council that cover such subjects as same-sex marriage, parental notification, and school vouchers and whether the candidate agrees with recent court decisions as long as the candidate clearly indicates that the candidate pledges only to follow binding legal precedent and that the answers do not constitute a promise that the candidate will rule a certain way in a case. *Florida Advisory Opinion 06-18*. The committee cautioned that the line between "announcing" and "promising" can be a thin one.

The committee also noted that questionnaires do not leave much room for any candidate wishing to elaborate upon any question and essentially call for "yes or no" answers to questions on substantive law but stated it was leaving "to the candidates' professional judgment whether such brevity is sufficient." The committee noted that a candidate's comments on past decisions should be analytical, informed, respectful, and dignified. Finally, the

opinion warned that "despite the fact a judicial candidate's pronouncements may be constitutionally protected speech and in compliance with ethical canons, the dispositive question is still whether the individual 'beholder's' fear of partiality is reasonable, reasonableness being determined by a neutral and objective standard."

Four Committee members, while concurring in the Committee's opinion, expressed the further view that candidates should ascertain the uses to which the answers to questionnaires are to be put and that, where the answers will be used to misstate or mischaracterize the obligations of judicial office or candidates' qualifications for judicial office, a candidate should decline to answer a questionnaire (or some of the questions on a questionnaire).

In late August, the Florida Family Policy Council filed a federal lawsuit challenging, not the campaign speech provisions, but a provision in the Florida code of judicial conduct (Canon 3E(1)(f), modeled after changes made by the ABA in 2003) requiring a judge to disqualify himself or herself 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: (i) parties or classes of parties in the proceeding; (ii) an issue in the proceeding; or (iii) the controversy in the proceeding" as well as the provision requiring disqualification when a judge's impartiality might reasonably be questioned. Twenty-five of the 53 candidates who had responded to the council's questionnaire had chosen the option that indicated "I would answer this question, but believe that if I did so, then I would be required to recuse myself as a judge in any proceeding concerning this answer because of Florida Canons 3E(1) and

3E(1)(f) . . . . In this regard, my opinion is informed by Florida Supreme Court Judicial Ethics Advisory Committee Opinion No. 06-18 (Aug. 7, 2006) . . . .” The lawsuit argues that “Canon 3E(1)(f)’s commits clause is on its face unconstitutionally vague and overbroad, prohibiting and chilling judicial candidates’ protected political speech and impinging on plaintiff’s freedom of speech and association” and that the recusal requirement is unconstitutional as applied to the questionnaires.

The National Ad Hoc Advisory Committee on Judicial Campaign

Oversight (formed by the National Center for State Courts) has issued an advisory memorandum on how judicial candidates should respond to questionnaires ([http://www.judicial-campaignconduct.org/Advice\\_on\\_Questionnaires-Final.pdf](http://www.judicial-campaignconduct.org/Advice_on_Questionnaires-Final.pdf)). The memo notes that questionnaires from interest groups to candidates for election or re-election to the bench are proliferating and becoming more pointed and more loaded. The memo concludes that there is no simple right answer on how to respond because of variations in local circumstances and candidates’ own preferences and recommends that

judicial candidates research the law in their jurisdiction, consult with local judicial campaign committees, and confer with other candidates. The memo also advises: “1. Do not be rushed in deciding how to handle the questionnaire. 2. Never use the pre-printed answers provided on the questionnaire. 3. Consider responding with a letter. 4. Never use a judicial Canon to justify a decision not to respond. 5. Distinguish general-interest, non-advocacy groups from special interest advocacy groups—and be consistent.” 

## Providing Help for Judges in Distress *(continued from page 4)*

ments to cover the time-sensitive matters on the judge’s docket. The judge failed to inform the chief judge and court administrator or explain his absence from April 17 through April 26. The judge had been drinking continuously from at least April 15, which resulted in his being impaired and other health conditions.

The judge’s return to the bench was conditioned upon his successful completion of a 30-day in-patient treatment program and a 30-day follow-up treatment program, and he was absolutely prohibited from using or possessing alcohol or illicit drugs or entering a bar or lounge where alcohol is sold. He was placed on permanent supervised probation that will include monitoring by an employee of a drug court compliance program, participation in and attendance at meetings of a 12-step program, and random drug and alcohol testing. The judge agreed that any infraction or violation of any term of the agreement “no matter how minor” will constitute grounds for summary and permanent removal.

The Ohio Supreme Court suspended for two years a judge who deceived several doctors into over-prescribing painkillers to which the judge was addicted; the suspension was stayed on the conditions that the judge serve a two-year probation and comply with a two-year OLAP recovery contract. If the judge fails to comply with the conditions of the stay, the stay will be lifted, and the judge will serve the entire two-year suspension. *Disciplinary Counsel v. Ault*, 852 N.E.2d 727 (Ohio 2006).

The judge began using painkillers in November 1999 for help in managing pain caused by the judge’s osteoarthritis and other debilitating conditions. During the relevant period, he obtained 1,432 pills and 20 patches containing 10 different narcotic painkillers from six doctors. He managed to acquire some of this supply by not disclosing to the doctors that they were replicating each other’s efforts. For example, the judge would tell Dr. Massie that Dr. Chung was not available to provide a prescription for his

pain, concealing from Dr. Massie that he had already obtained a painkilling prescription from another doctor. The judge’s duplicity resulted in his being prescribed medication far in excess of what any one of these physicians would have authorized.

Representatives of the Ohio Lawyers Assistance Program confronted the judge about his drug use, and he was admitted to an in-patient treatment program for alcohol abuse and drug addiction. He entered into a two-year recovery and monitoring contract with OLAP, which he successfully completed. On December 19, 2003, the judge pleaded no contest to two counts of attempting to obtain a dangerous drug by deception, misdemeanors of the first degree. The judge received a suspended 120-day jail sentence, was fined \$1,000, and was ordered to serve a two-year probation period under strict conditions to assist in his recovery. 



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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>.