Judicial Conduct Information Service

July and August 2010

Inquiry Concerning Nolan, Judgment and Order (Arizona Supreme Court June 30, 2010)

Granting the recommendation of the Commission on Judicial Conduct based on a stipulation and the judge's agreement to resign, the Arizona Supreme Court censured a judge for failing to timely issue warrants and judgments, failing to timely set hearings or trials, failing to timely issue rulings, and, on at least 1 occasion, submitting a declaration indicating no cases were under advisement when 1 or more cases were under advisement.

Wolfson v. Brammer, 616 F.3d 1045 (9th Circuit 2010)

Reversing the district court's dismissal, the U.S. Court of Appeals for the 9th Circuit held that a challenge to several canons in the Arizona code of judicial conduct was not moot and the challenge to the solicitation, endorsement, and campaigning prohibitions was ripe, but that the challenge to the pledges and promises clause was not ripe.

While a candidate for judicial office, the plaintiff filed a lawsuit against the members of the Commission on Judicial Conduct, the members of the Disciplinary Commission, and the Chief Bar Counsel, challenging the prohibitions on personal solicitation of campaign contributions (he wanted to solicit contributions at live appearances and speaking engagements, by making phone calls, and by signing his name to letters seeking donations) and on endorsing other candidates and supporting their campaigns and alleging that the pledges and promises clause prohibited him from answering questions from voters and making presentations on his views on disputed legal and political issues. After the plaintiff lost the election, the district court concluded the action was moot.

Noting the exception to the mootness doctrine for an action that is too short to be fully litigated prior to its cessation or expiration when there is a reasonable expectation that the same complaining party would be subjected to the same action again, the 9th Circuit stated that the "'election cases often fall within this exception, because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits.' Indeed, this is precisely the situation Wolfson has encountered: being unable to complete the litigation of his claims within the brief time frame of his campaign for judicial office." The 9th Circuit held that the district court's finding that the plaintiff did not intend to seek judicial office in any other future election was clearly erroneous.

> The district court asked Wolfson if he would seek office "in the next election," and Wolfson replied that he currently did not intend to be a candidate for judicial office in 2010. The district court asked a narrow question: whether Wolfson intended to seek office in the "next" election. Wolfson responded that he did not. The district court did not order Wolfson to declare his intentions more generally. . . .

> Wolfson's complaint expresses an intention to seek judicial office in the future, and a desire to engage in prohibited conduct "both in the 2008 judicial election and in future judicial elections." Furthermore, eliminating any doubts regarding the record, Wolfson has represented in the present appeal that he intends to seek judicial office in a future election . . . and declared his desire, in connection with any future campaign, to engage in the same activities that are the subject of the complaint in this action. These expressions of intent are sufficient to establish a "reasonable expectation" that this action is "capable of repetition."

The 9th Circuit also rejected the defendants' argument that the plaintiff failed to state a claim for relief because they have no legal authority to change the code, which is reserved to the Arizona Supreme Court. Noting the defendants have the power to discipline the plaintiff, the 9th Circuit concluded that "without a possibility of the challenged canons being enforced, those canons will no longer have a chilling effect on speech. Wolfson will thus be able to engage in the political speech and campaign activities he desires. It is true that Wolfson cannot obtain revision of the Code from these defendants, but Wolfson may nevertheless obtain a form of effective redress in this action."

The 9th Circuit also rejected the defendants' argument that the plaintiff's claims are not ripe. The 9th Circuit concluded that the plaintiff "has established an intent to violate the law that is more than hypothetical" by expressing a desire to engage in 2 kinds of campaign-related conduct (personally soliciting campaign contributions and endorsing other candidates) that is likely to be prohibited by the code. The 9th Circuit held that the plaintiff's "claim is fit for decision, because it is primarily legal and does not require substantial further factual development" and he "has alleged a hardship through the constitutionally-recognized injury of self-censorship." Rejecting the defendants' argument that the plaintiff's "claims should be adjudicated in the future, if and when he is again a candidate for judicial office and subject to enforcement proceedings," the 9th Circuit stated "defendants ask too much."

> Defendants' approach would effectively relegate Wolfson to self-censorship in a third election: as Wolfson's two electoral bids and two actions demonstrate, it is unlikely that this litigation will be completed in the short time frame of an election. Even further, defendants would have any action by Wolfson deferred until an enforcement proceeding is brought. But an enforcement proceeding is not likely, given Wolfson's statement that he will self-censor to comply with the Code. Wolfson's compliance with his duties under the Code should not bar this action, because the principle that "one should not have to risk prosecution to challenge a statute is especially true in First Amendment cases." Requiring Wolfson to violate the Code as a precondition to bringing suit would, furthermore, "turn respect for the law on its head."

However, the 9th Circuit concluded that the plaintiff's challenge to the pledges and promises clause was not ripe because he did not intend to violate the law, enforcement proceedings have not been threatened, and the enforcement history of the challenged statute did not corroborate a genuine threat. The complaint declared that the

plaintiff "does not wish to pledge or promise certain results in particular cases or classes of cases," and the Arizona Judicial Ethics Advisory Committee has issued opinions to the plaintiff stating that "a judicial candidate may publicly discuss his or her personal opinions on any subject under . . . [the pledges and promises clause] because a candidate may express views on any disputed issue." Finding that the pledges and promises clause does not unambiguously reach his proposed conduct, the 9th Circuit concluded that the plaintiff does not face a "genuine threat of imminent prosecution."

> In effect, Wolfson's fear is that the pledges and promises clause might be construed in a particular manner. This falls short of "a credible threat" that the pledges and promises clause will be enforced against him. Wolfson's fear concerns a possibility, and is insufficient to satisfy the constitutional component of ripeness.

Rejecting the plaintiff's argument that the advisory opinions he had received "have not only failed to dispel the chilling effect of the pledges and promises clause, but actually heightened it," the 9th Circuit stated that "the opinions may not have provided Wolfson with the level of clarity he desired, but there is no basis on which to conclude they chilled his speech. Wolfson's conclusory assertion of chilling is therefore insufficient."

1 judge dissented in part and would have held that the plaintiff's claims against the members of Commission on Judicial Conduct were not ripe because the Commission "will have disciplinary jurisdiction over Plaintiff only if he runs for judicial office and wins. The . . . possibility of that occurring remains purely speculative."

Bauer v. Shepard, 620 F.3d 704 (7th Circuit 2010)

In a First Amendment challenge to provisions in the Indiana code of judicial conduct, the U.S. Court of Appeals for the 7th Circuit upheld the personal solicitation clause, the partisan activities clause, the commits clause, and the recusal clause.

(1) The personal solicitation clause provides that a judge or judicial candidate shall not "personally solicit or accept campaign contributions other than through a campaign committee." The Indiana code defines personal solicitation as "a direct request made by a judge or a judicial candidate for financial support or in-kind services, whether made by letter, telephone, or any other means of communication."

In June, the 7th Circuit had upheld the solicitation clause in the Wisconsin code of judicial conduct in Siefert v. Alexander, 608 F.3d 974 (7th Circuit 2010). In the Indiana challenge, the plaintiffs acknowledged that the rule in Indiana is fundamentally the same as the rule in Wisconsin but contended that the Indiana situation differs because one of the plaintiffs (Judge Certo, a sitting judge) wanted to raise money from family members and former classmates at college and law school, as well as the general public and lawyers at large. The 7th Circuit concluded:

> For the purpose of a personal-solicitation rule such as this, the fact that the judge went to law school at the same time as a potential donor cannot make a difference. The potential for actual or perceived mutual back scratching, or for retaliation against attorneys who decline to donate, discussed in Siefert, is the same whether

> or not the judge knows the potential donor's first name. Asking family members for support poses less of this risk—unless the judge plans to ask distant as well as immediate relatives. Laws need not contain exceptions for every possible situation in which the reasons for their enactment are not present. It is the nature of rules to be broader than necessary in some respects. Siefert shows that Indiana's rules are not facially unconstitutional. Indiana may well be willing to make exceptions for close relatives . . . . A federal court should not assume that a state will act unreasonably. [The plaintiff] should follow Indiana's procedures for obtaining advice with respect to contributions from family members.

In July, the 6th Circuit had held that the personal solicitation clause in the Kentucky code of judicial conduct was unconstitutional. Carey v. Wolnitzek (6th Circuit July 13, 2010). That decision, the 7th Circuit noted, "did not question the propriety of limits on in-person solicitation, where the possibility of reward or retaliation is greatest, but concluded that Kentucky's rule is substantially overbroad because it covers solicitation by mass mailing. A machine-generated letter with the judge's machine-generated signature is not materially different from a machine-generated letter with a campaign committee's imprimatur, the court concluded." The 7th Circuit stated that because Judge Certo had "not made anything of the fact that the definition of 'personally solicit' in Indiana's Code includes letters," it was "unnecessary to address the distinction drawn in Carey between in-person and written solicitations." The 7th Circuit also noted that, because there was a conflict among the circuits before Siefert, it could not do anything "to create harmony among the circuits, so there is no reason to depart from the approach taken so recently in this circuit."

(2) The challenged partisan activities rules in the Indiana code of judicial conduct provide that "a judge or a judicial candidate shall not: (1) act as a leader in or hold an office in a political organization; [and] (2) make speeches on behalf of a political organization . . . ." Judge Certo wanted to serve as a delegate at the state Republican Convention, speak at political clubs on behalf of Republican candidates for judicial office, speak to students on behalf of the Republican Party in general, and encourage the public to donate money to the Republican Party.

Although the Indiana plaintiffs did not challenge the endorsement clause, the 7th Circuit noted that Siefert had held that Wisconsin's equivalent of the endorsement clause was constitutional and concluded that, "although Siefert did not address limits on leadership roles in political parties or making speeches on behalf of political organizations, the way in which it analyzed public endorsements establishes" that the leadership and speeches clauses are valid. The 7th Circuit noted that in Siefert it had applied a balancing approached because the clauses covered electoral activity on behalf of third parties, citing Pickering v. Board of Education, 391 U.S. 563 (1968), Civil Service Commission v. Letter Carriers, 413 U.S. 548 (1973), and Broadrick v. Oklahoma, 413 U.S. 601 (1973), which held that the Hatch Act and comparable state laws with limits on public employees' political conduct are compatible with the First Amendment.

> Siefert holds that similar limitations for judges are valid, for three principal reasons: first, judges no less than FBI agents must be seen as impartial if judicial decisions are to be accepted by the public, and participation in politics

> undermines the appearance of impartiality; second, judges are not entitled to lend the prestige of office (which after all belongs to the people, not to the temporary occupant) to some other goal; third, states have a compelling interest in "preventing judges from becoming party bosses or power-brokers," something that would undermine actual impartiality, as well as its appearance. Those considerations support limits on political leadership and speechifying as fully as they support limits on partisan endorsements (the subject of Siefert).
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> Rule 4.1(A)(2) says that judges cannot make speeches "on behalf of" political organizations. This probably equates to acting as a party's representative; it is therefore doubtful that this rule forbids all of the activity in which Judge Certo wishes to engage (though Rule 4.1(A)(1) assuredly forbids him from attending a political convention as a delegate). Kentucky's political activity rule, held invalid in Carey, is much broader than Indiana's, forbidding a judge even to reveal his political affiliation. (Siefert held that such a rule in Wisconsin violates the first amendment.)

The 7th Circuit added that Judge Certo should ask for an advisory opinion to the extent it was unclear what speaking "on behalf of" a political organization means, noting the Commission already had issued several clarifying advisory opinions. "For current purposes," the Court held, "it is enough to say that the principal applications of subsections 4.1(A)(1) and (2) are valid, which means that they cannot be enjoined across the board." The 7th Circuit noted that "the desire to prevent judges from using the prestige of office for other ends underlies a great deal of the Code of Judicial Conduct for United States Judges."

> If subsections 4.1(A)(1) and (2) of Indiana's Code are unconstitutional, so are Canons 4 and 5 of the federal judges' Code. We very much doubt that White I licenses federal and state judges to give stump speeches for candidates running for President, senator, governor, or mayor, or act as leaders of political parties.

The 7th Circuit rejected the plaintiffs' argument "that a judge who does not identify himself as a judge when making a political speech, or serving as an officer or delegate in a political party, has not misused the prestige of the office and does not imperil the public's belief in the impartiality of the judiciary," noting "the audience (or at least the reporters covering the speech) knows who is on the bench and thus might think that the judiciary is behind the endorsement, or implicitly threatening retaliation against those who do not accept the judge's recommendation." The 7th Circuit also concluded that recusal was "not an answer to this concern."

> Many a case presents political issues without involving a politician. Political platforms, and candidates, take strong positions on health care, torts, labor relations, crime, immigration, abortion, taxes, and a hundred more contentious issues. Unless a judge who speaks on behalf of a party, or serves as a party's officer, recuses in all of these cases—which is to say, almost every case that comes before a court—the public would have good reason to believe that the

> judge is deciding according to the party's platform rather than the rule of law. Allowing judges to participate in politics would poison the reputation of the whole judiciary and seriously impair public confidence, without which the judiciary cannot function. Preserving that confidence is a compelling interest. No one could contemplate with equanimity the prospect of a state's chief justice also being the head of a political party and doling out favors or patronage, or deciding who runs for legislative office. States are entitled to ensure not only that judges behave in office with probity and dignity, but also that their conduct makes it possible for them to serve impartially. But the politician-judge will be disqualified so often that he will have the equivalent of a paid vacation, while other judges must work extra to protect litigants' entitlement to expeditious decisions.
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> Letter Carriers said that it is constitutional to curtail bureaucrats' political activity to ensure public confidence that civil servants "administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party." Exactly the same can be said about judges and the judiciary. When a state requires judges to stand for office, it cannot insist that candidates remain silent about why they rather than someone else should be elected. That's the holding of White I. But the rationale of Letter Carriers remains, and is not undercut by White I, for political races other than the judge's own.

In July, the 8th Circuit overturned that Minnesota's equivalents of the no-endorsement rule and the solicitation limits. However, the 7th Circuit noted that the 8th Circuit did not discuss (or even cite) any of the Supreme Court's decisions concerning restrictions on public employees' political activities because it had concluded "its en banc decision in White II requires the application of strict scrutiny to all ethical rules that affect either judicial campaigns or judges' participation in campaigns for other offices." The 7th Circuit was "unpersuaded" and decided to "stick with Siefert's analysis, which differentiates what judges can do in their own campaigns (the subject of White I) from how judges can participate in other persons' campaigns (the subject of Letter Carriers and similar decisions)."

(3) The commits clause provides that a judge or judicial candidate "shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office." The plaintiffs challenged the commits clause in both Canon 2, applying to sitting judges, and in Canon 4, applying to candidates. The individual plaintiffs argued that the commit clause discouraged them from answering Indiana Right to Life's questionnaire, and Indiana Right to Life related "that most judges who have replied have said the same thing; only a handful of judges and judicial candidates in Indiana have stated their positions on all of the nine questions." The 7th Circuit noted that "some, perhaps many, of the state's judges and judicial candidates may be using the commits clauses as a pretext to keep out of a political minefield. For no matter what a person says in response to Indiana Right to Life's questionnaire, some readers are going to be unhappy and will vote against the candidate as a result."

Moreover, the 7th Circuit concluded:

> It is hard to see how judges and candidates could have a substantial fear of adverse consequences under the current version of Indiana's Code. None of the nine questions calls for a "commitment" or "promise" on any issue. A judge who answers yes to the first proposition ("I believe that the unborn child is biologically human and alive and that the right to life of human beings should be respected at every stage of their biological development") has not committed to defying Roe v. Wade and its sequels. The proposition concerns morals, not conduct in office. Statements of views on moral and legal subjects do not imply that the speaker will act in accord with his preferences rather than the law. Every judge enforces laws and applies judicial decisions for which he would not have voted.
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> Similarly, a judge who states that he thinks Roe v. Wade wrongly decided has not committed to disregard that decision. Justices White and Rehnquist dissented in Roe itself, explaining at length why they thought the majority mistaken. But this did not commit them to any particular outcome in a future dispute about abortion. Many a judge dissents in one case but later follows the majority decision on the basis of stare decisis—and occasionally a judge who has written a decision, and thus commits to its correctness, writes a decision overruling his earlier opinion after concluding that he erred.
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> A judge whose mind is open to new evidence and arguments is not "committed" to any outcome in tomorrow's litigation. White I holds that judges and judicial candidates are entitled to announce their views on legal and political subjects that will come before them as judges. That's all Indiana Right to Life's questionnaire asks them to do. Defendants observe that some judges do answer the questionnaire, and that, even under the pre-2009 version of the Code, none has been charged by the Commission with misconduct. Most judges and judicial candidates have views on issues such as those the questionnaire poses, and are entitled to have them. Making these views known does not call their impartiality into question. "[S]ince avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the 'appearance' of that type of impartiality can hardly be a compelling state interest."

Assuming that the plaintiffs' fear of sanctions if they answered the questions was real, even if exaggerated, the 7th Circuit rejected the plaintiffs' argument that the commits clause was unconstitutionally overbroad and vague.

> It is not clear to us that any speech covered by the commits clauses is constitutionally protected, as White I understands the first amendment. How could it be permissible to "make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office"? . . .

Although the Court held in White I that judges may state their views on contestable and controversial subjects—such as whether the exclusionary rule is wise policy, or whether mandatory minimum sentences should be repealed—it did not hold that judges may make commitments or promises about behavior in office. Imagine a judge or judicial candidate who said: "I will issue a search warrant every time the police ask me to." That speaker is promising to defy the judicial oath of office. Or imagine the statement: "I will always rule in favor of the litigant whose income is lower, so that wealth can be redistributed according to the principles of communism." (More plausibly, a candidate might say that he will award damages against drug companies, whether or not the drug has been negligently designed or tested, because they charge "too much" for their products.) Again that person is promising to disobey the law and disregard the litigants' entitlements. Nothing in White I deals with statements of this flavor, or any other promise to act on the bench as a partisan of a political agenda.

But it is unnecessary to decide whether some protected speech might come within the scope of the commits clauses. For when the Supreme Court speaks of overbreadth, it does not mean a statute or rule that catches the occasional protected tidbit. All rules are overbroad in that sense. "Overbreadth" in the Supreme Court's jurisprudence has to do with substantial amounts of protected speech. A law is unconstitutionally overbroad when "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." Plaintiffs do not seriously contend that the commits clauses are overbroad in that sense.

Under Indiana's language, judges and candidates can tell the electorate not only their general stance ("tough on crime" or "tough on drug companies") but also their legal conclusions ("I would have joined Justice White's dissent in Roe" or "the death penalty should be treated as cruel and unusual punishment" or "I am a textualist and will not resort to legislative history" or "I will follow stare decisis" or "I am a progressive who will use a living-constitution approach"). Judges who have announced these views, on or off the bench, sit every day without being thought to have abandoned impartiality. Indeed, judges who have announced legal views in exceptional detail, by writing a treatise about some subject (Weinstein on Evidence, or Martin on Bankruptcy) have not made an improper "commitment," even though a litigant can look up in the treatise exactly how the judge is apt to resolve many disputes. A judge who promises to ignore the facts and the law to pursue his (or his constituents') ideas about wise policy is problematic in a way that a judge who has announced considered views on legal subjects is not. The commits clauses condemn the former and allow the latter. That's because they are limited to commitments that are inconsistent with impartial adjudication and thus differ considerably from the rule at issue in Carey, where the sixth circuit expressed concern that limiting all commitments on "issues" would prevent a judicial candidate from declaring support for the rule of law or adherence to stare decisis.

As plaintiffs see things, however, the phrase "inconsistent with the impartial performance of the adjudicative duties of judicial office" saves the commits clauses from a first amendment challenge by making them so vague that they violate the due process clauses. For what promises are "inconsistent with the impartial performance of the adjudicative duties of judicial office"? Neither the commits clauses nor the Code's definitions pin the meaning down. We have given a few examples, such as a promise to issue search warrants without bothering to read the affidavits, but the principle is clear only in these extremes. A candidate who says that he will never let a prisoner off on a "technicality" could be promising to ignore the fourth amendment (if in his view the rule against unreasonable searches and seizures is a "technicality") but could mean instead only that he plans to enforce the harmless-error and plain-error doctrines, . . . under which errors that don't impair a defendant's substantial rights do not justify setting aside a jury's verdict.

Context may help to disambiguate a statement, but there is an irreducible risk that a promise may be misunderstood—or that the Commission and the Supreme Court of Indiana may treat as "inconsistent with the impartial performance of the adjudicative duties of judicial office" even the sort of statements that are squarely protected by White. We think that statements such as "judges have been too ready to find antitrust problems with mergers" or "mandatory minimum sentences are unjust, and I will read those statutes narrowly" or "drunk drivers are a menace and should be dealt with severely" or "abortion should be freely available, and I will grant a minor's application for bypass of parental consent when a statute gives me that discretion" are outside the scope of the commits clauses. But will the Commission and the state judiciary agree?

The best way to find out is to wait and see. The Commission issues advisory opinions that reduce uncertainty, and when the Commission brings a proceeding the state judiciary will issue an opinion that makes the rule more concrete. Plaintiffs want us to deem the law vague by identifying situations in which state officials might take an untenably broad reading of the commits clauses, and then predicting that they will do so. It is far preferable, however, and more respectful of our judicial colleagues in Indiana, to assume that they will act sensibly and resolve the open questions in a way that honors candidates' rights under the first amendment.

When a statute is accompanied by an administrative system that can flesh out details, the due process clause permits those details to be left to that system. . . . The Justices have been chary of holding laws unconstitutional "on their face" precisely because they have recognized that vagueness will be reduced through a process of interpretation. . . . Advisory opinions under the Code of Judicial Conduct are a more appropriate procedure than summary condemnation by a federal court before the Commission has an opportunity to tackle the ambiguities in the 2009 version of the Code. . . .

> It is not as if Indiana could make everything clear by changing a few words. The main source of ambiguity in the commits clauses is the protean word "impartial." It has been around for a long time and has resisted precise definition. It is easy to say that a judge who has a financial stake in the outcome is not impartial. But how about a judge who receives a campaign contribution from one side? A big campaign contribution? A whopping campaign contribution? . . . . A judge who has promised constituents to use tort law to soak out-of-state manufacturers for the benefit of instate plaintiffs? Plaintiffs have not suggested any revised wording that would be more specific but achieve the state's objective. Courts and administrative bodies provide greater certainty by examples (advisory opinions stating that such-and-such behavior is, or is not, compatible with "the impartial performance of the adjudicative duties of judicial office").
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> Plaintiffs contend that the Commission has its mind made up on many subjects and therefore is not a suitable body to disambiguate the Code. Yet declarations by the Commission (more often, by its staff rather than its members) that the body views one or another kind of statement "with disfavor" (or some similar phrase) does not call the administrative process into question. . . . People may not always like the information they receive, but these examples curtail ambiguity. Anyway, the Commission is a prosecutorial body in Indiana; final decisions are made by the state's Supreme Court. . . . Just so in Indiana. The Commission's prosecutorial role sets in motion a process that yields greater certainty.

(4) The recusal clause provides: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: . . . the judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy."

The 7th Circuit held that "the recusal clause does not present a constitutional issue at all."

> The recusal clause applies to a judge in his role as public employee, not his role as candidate. It specifies how a public employee will perform official duties (or, rather, which public employee will be assigned to which duties). . . . The state, as employer, may control how its employees perform their work, even when that work includes speech (as a judge's job does). Rule 2.11(A)(5) represents a decision by the State of Indiana to assign to each lawsuit a judge who has not made any statement "that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy." That decision is unexceptionable.
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> No public employee is entitled to do any particular task; a state may select the employee who can best do the job. . . . Likewise a state may decide to assign each case to a judge whose impartiality is not in question. All Rule 2.11(A)(5) does is allocate cases among judges, just as 28 U.S.C. §455(a) does for federal judges.

> States are entitled to protect litigants by assigning impartial judges before the fact, as well as by removing partial judges afterward.

The district court had dismissed as moot the plaintiffs' challenge to a previous, broader version of the commits clause. One of the plaintiffs, a former candidate who was not a judge, had answered Indiana Right to Life's questionnaire in 2008 when the previous version was in effect and expressed concern that his 2008 answers may come back to haunt him should he be elected. The 7th Circuit held that that challenge should be dismissed, not because it was moot, but because it was unripe.

> Before Bauer can face any consequence for his answers in 2008, a series of events must happen: (a) he must be elected to the state judiciary; (b) the Commission must decide to prosecute, even though an injunction was outstanding when Bauer gave his answers, and even though the Commission has never prosecuted any judge who answered the questionnaire (as about 10 judges or candidates did in full in 2008; about 20 more answered some questions); and (c) the Supreme Court of Indiana must impose discipline. That's too many unlikely steps to justify constitutional adjudication.

Gormley v. Judicial Conduct Commission, 332 S.W.3d 717 (Kentucky 2010)

In consolidated appeals, the Kentucky Supreme Court affirmed 2 decisions of the Judicial Conduct Commission (1) reprimanding a judge and suspending her for 45 days without pay for (a) summarily holding a husband in contempt of court for actions that occurred outside of her perception and (b) entering a order changing custody that denied the father due process and (2) reprimanding her for a "standing order" that prohibited child support modifications for Toyota employees.

(1)(a) The judge held a hearing to consider a wife's pro se motion for a modification of the no contact provision of the domestic violence order against her husband. Although both parties had counsel of record, both parties appeared that morning without their lawyers. A bailiff informed the judge that witnesses had reported that the husband had contact with the wife while they were waiting in the hallway and had attempted to convince her to leave the courthouse. The judge interviewed 2 of the witnesses before the hearing and also heard that the previous night, the husband, at the wife's invitation, had visited the wife at her home. Without notice to the husband, the judge held an impromptu summary criminal contempt of court hearing without advising the husband that he had the right to counsel, that he did not have to respond to questions by the Court, and that his answers might be used to subject him to criminal contempt sanctions. The judge called 1 witness for questioning about what happened in the courthouse hallway, did not allow the husband to question this witness, and denied his request to review security tapes from the hallway cameras. The judge questioned the husband under oath and learned that he had contact with his wife the night before and again that day in the hallway.

Based on the ex parte information she had obtained from the 2 witnesses and the bailiff, and the information obtained from the husband in her questioning, the judge found the husband in contempt of court and sentenced him to 6 months in jail for criminal

contempt. On appeal, the Court of Appeals reversed the judge's contempt finding and remanded the matter "for an appropriate evidentiary hearing concerning all the allegations of contempt."

Finding that the judge clearly erred in holding a summary criminal contempt proceeding for indirect criminal contempt, the Court noted this "is only the first half of the analysis."

> To err is human. Our present Kentucky Constitution, Section 115, recognizes that a judge may err, by providing most judgments are subject to at least one appeal. A party that believes the judge erred has the right to appellate review to seek a change in the judgment -- that is judicial review. If the judge erred, the judgment can be corrected. Incompetent judges can be eliminated at the ballot box.
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> Judicial misconduct is different. The Judicial Conduct Commission's review is not focused merely on the judge's findings, conclusions, and ultimate judgment, but on the judge's demeanor, motivation, or conduct in following (or in not following) the law. . . . We believe Judge Gormley's handling of the matter, together with the egregious rulings, displayed a bias or preconception or a predetermined view against the husband so as to impugn the impartiality and open-mindedness necessary to make correct and sound rulings in the case. A Family Court judge must not only graduate from law school, but pass the bar examination, and have practiced law for at least eight years before becoming a Family Court judge. All Kentucky judges are provided with computers and a subscription for online legal research. Most, if not all, Family Court judges are given support staff, one of whom is a licensed attorney. Judge Gormley knew, or should have known, that she was acting erroneously in this case, but proceeded to plow forward without regard for fundamental rights and with a disregard for the law. Judge Gormley was on a mission and nothing was going to stop her, not the law or anybody/anything else. Section 121 of the Kentucky Constitution recognizes the reality of rogue judges and authorizes the Commission as a way to deal with the situation.

(1)(b) On July 15, 2008, a former wife visited the circuit clerk in Woodford County seeking custody of her 2 children for whom their father had been designated primary custodian in 1998. Shortly after the divorce, the husband had moved to Rowan County with the children, and the wife moved to Franklin County. On a blank motion form, the former wife wrote: "Emergency temporary custody order. Evaluation and Assessment for children for emotional, verbal and physical abuse. Medical and psychological assessments." After the wife signed the unverified form, it was filed with the divorce case number. The wife visited the judge the same date and requested emergency ex parte relief, stating that her daughter, now 14, had recently stated that her father had yanked her out of bed by her hair and that, when she recently picked up her daughter from the husband's to attend a church event, her daughter stated that she did not want to go back to her father's house because she did not feel safe. Based on these oral statements, the judge converted the motion for a change of custody in the divorce case to a petition for an emergency protective order with a new case number. She issued an

emergency protective order and noticed the husband for a hearing on July 24 to consider a domestic violence order.

The husband appeared with his attorney, who was a bit confused as to why the husband had been summoned because there was no petition for an emergency protective order on file. The judge denied counsel's motions to dismiss or to transfer to Rowan County. She did continue the case until August 14, to give the attorney time to prepare.

On that date, the husband, through counsel, renewed his motion to dismiss or to transfer the case to Rowan County. After summarily denying the motion, the judge announced that she was ready to go forward on the domestic violence order but would rather get an agreement from everybody for a modification of custody in the divorce case. She explained that, if there were an agreed order, she would convert the domestic violence order to a restraining order, dismiss the domestic violence order, and take it out of the court's electronic database. She would then give the wife primary custody of her daughter with certain conditions for visitation with the father, such as counseling. The father's counsel resisted an agreed order, informing the judge that if that was going to be the order, to enter it as the court's order. The judge was irritated, insisting that it had to be an agreed order with no right to appeal and that it had to be settled that day, once and for all. When counsel again declined to agree, the judge addressed the husband directly, informing him there would be an agreed order in the divorce case changing custody to the mother with visitation under certain conditions, with no appeal or she would enter a domestic violence order with no contact between the father and his daughter. Quickly consenting to an agreed order, the father explained to the judge that "you're all talking a lot of things I don't understand," but that he would agree to whatever it took to get visitation with his daughter. The judge then had the daughter brought into the courtroom and worked out the conditions of visitation and related matters.

On September 2, 2008, the Woodford County Attorney made a motion to transfer the case to Rowan County to determine the mother's child support arrearages. The judge denied the motion and sua sponte suspended support payments for the daughter. Sometime after the September 2 hearing, the judge learned that the mother had been arrested on a flagrant non-support warrant and was still in jail. The judge sua sponte scheduled a hearing on custody for September 11. At that hearing, counsel for the father asked the judge what the purpose of the hearing was. The judge explained that she was upset that the father had started the non-support action because he had lost custody and that she was going to have the father's relationship with his son investigated because she believed the father should not have custody of the son. When the County Attorney explained that the non-support case started long before the change of custody hearing, the judge put the father under oath and demanded to know what actions he took concerning the non-support before and after the custody hearing. The judge ordered a "home evaluation of [the father's] home re: safety and well being of son," and, because the mother was in jail, transferred custody of the daughter to friends of the mother with a provision of no contact with the father until further order of the court.

The father's attorney received an emergency stay and eventually a writ of prohibition from the Court of Appeals (which the Supreme Court affirmed), prohibiting the Woodford County Family Court from enforcing its orders and from any further action stemming from the motion for a change of custody. The daughter was ordered returned to her father's custody immediately.

The Court agreed with the Commission that the judge's ruling was not a good faith erroneous ruling on the law and had denied the father "even the most basic elements of procedural due process. She acted without assuring him notice and an opportunity to be heard."

> When the father's counsel would not be bullied into going along with Judge Gormley's attempts to circumvent procedures and the law, she excluded the attorney and dealt directly with the father, threatening him with the loss of custody of his other child unless he accepted Judge Gormley's "agreed" order. Judge Gormley knew, or should have known, that she was acting erroneously, but pushed on.

(2) Based on a rumor that a semi-annual bonus was not going to be paid by Toyota that year, the Scott County Attorney's child support office staff was afraid of being inundated with requests by Toyota workers for child support modifications. The Scott County Attorney requested a written order providing no modification of child support would be considered for Toyota employees until after December 31, 2009. The judge signed an order on May 8, 2009, that was entered in 3 circuit court clerks' offices. The order, styled "STANDING ORDER RE: TOYOTA CHILD SUPPORT MODIFICATION" provided:

> IT IS HEREBY ORDERED that no modifications of child support shall be considered until December 31, 2009 for employees of Toyota Motor Manufacturing. If at that time the statutory 15% has been met then the Court may consider modification at that time.

The Court noted that the "Order was an outright prohibition on child support modifications. Even though the original concern was with the anticipated increase in filings due to the possibility of no semi-annual bonuses, the Order contained no reference to said bonus issue nor did the Order exempt modification for other reasons, such as salary increases, medical expenses, or other changes in circumstances which are normally considered by a court."

Within days of the order being entered, Toyota announced that it would be paying bonuses. Near the end of May 2009, the Executive Secretary of the Commission notified the judge of the Commission's concern over the order. Nevertheless, the judge waited approximately 6 weeks, until July 13, to rescind the order.

The Court held that there is no doubt that it was error for the judge to promulgate the standing order.

> That being said, did the judicial error cross over to judicial misconduct? . . . Judge Gormley offered no explanation for her delay in rescinding the Order. . . . Had the questionable Order been rescinded immediately after the announcement of the bonuses (or shortly thereafter), or within a reasonable time after the Commission expressed its concerns to Judge Gormley, we would be more sympathetic to the "good faith" argument. But when a judge waits, without explanation, another six weeks to rescind a highly questionable order, an order

> that was based on a rumored (and now moot) fear, we can only conclude that the Commission did not err by concluding that Judge Gormley's actions in Count V crossed over to judicial misconduct.

The Court stated that, although a public reprimand seems light, it would defer to the Commission.

Carey v. Wolnitzek, 614 F.3d 189 (6th Circuit 2010)

In a challenge to provisions in the Kentucky code of judicial conduct, the U.S. Court of Appeals for the 6th Circuit held that the personal solicitation clause and the party affiliation clause were unconstitutional; it also held that the Kentucky version of the commits clause was constitutional insofar as it prohibits a judge or judicial candidate from "intentionally or recklessly make a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way in a case [or] controversy" but that insofar as the clause prohibited commitments with respect to an "issue that is likely to come before the court," it contained "a material ambiguity, which requires further consideration by the district court."

The Court applied strict scrutiny to the three clauses. The Court noted:

> As sitting judges ourselves, we have considerable sympathy for the concerns that prompted the canon, so much so that we embrace a central premise of it: Judicial elections differ from legislative elections, and the Kentucky Supreme Court has a compelling interest in regulating judicial campaign speech to ensure the reality and appearance of an impartial judiciary.

(1) The party affiliation clause in the Kentucky code of judicial conduct provides: "A judge or candidate shall not identify himself or herself as a member of a political party in any form of advertising, or when speaking to a gathering. If not initiated by the judge or candidate for such office, and only in answer to a direct question, the judge or candidate may identify himself or herself as a member of a particular political party."

The Court agreed that the clause advances at least 2 compelling interests: the Commonwealth's goal of having a judiciary that is neither biased in fact nor in appearance and its interest in diminishing reliance on political parties in judicial selection, a policy grounded in the Kentucky Constitution's requirement that judicial elections be non-partisan. But, the Court concluded, the canon does both too much and too little to advance the government's objectives. It does too much by prohibiting candidates from announcing their position "on one issue of potential importance to voters: the party they support" and "on many issues of potential importance to voters: the party platform with which they affiliate," which, the court stated, was "a shorthand way of announcing one's views on many topics of the day." The canon does too little, the Court held, because it does not prohibit a candidate from disclosing party affiliation when asked by a voter "in a one-on-one setting or in a small gathering, the candidate is free to say what she wants."

> That reality undermines the suggestion that a candidate deals a fatal blow to judicial impartiality by revealing her party affiliations. And of course, once that information is disclosed, whether in answer to a question or based on prior publicly known affiliations (including holding other elected offices), nothing in the canon prohibits others, whether newspapers or political parties or interest groups, from disclosing to the world the candidate's party affiliation.

The Court concluded that the "clause undershoots its target in another respect" by allowing candidates to "discuss their membership in, affiliation with or support of any other type of organization, including organizations that take positions on judges and judicial philosophy.

> Although the two major political parties take positions on a wide array of issues, many interest groups advance a narrower set of positions and often do so more vocally, particularly with respect to judges. By identifying themselves with such groups, candidates can communicate more about their political and judicial convictions than they ever could by carrying a party membership card—and, in the process, may do as much to call judicial open-mindedness into question as any party affiliation ever would.

Finally, the Court noted that the canon "prohibits only disclosure of a candidate's party membership, not party membership itself."

> Yet the appearance of judicial closed-mindedness is part and parcel of its reality, not a device designed to disguise reality. If concern over judicial partisanship and the influence of political parties on judging truly underlies the clause, the authorization to belong (secretly) to a political party amounts to a gaping omission. A party's undisclosed potential influence on candidates is far worse than its disclosed influence, as the one allows a full airing of the issue before the voters while the other helps to shield it from public view.

The Court rejected the defendants' argument that the restriction supports the Kentucky Constitution's requirement that judicial elections be nonpartisan.

> Most States have not made the choice Kentucky did. Fifteen States choose their Supreme Court justices in contested, "nonpartisan" elections, and only five, including Kentucky, prohibit candidates in those elections from revealing their partisan affiliations. And two of these five canons—this one and Wisconsin's—have been invalidated. That a majority of the States with nonpartisan Supreme Court elections have opted not to censor their candidates in this way of course does not establish the invalidity of the clause, but it does call into question the necessity of implementing Kentucky's nonpartisan judicial election system in this way and whether it amounts to the "least restrictive means" of protecting the Commonwealth's interests.

The Court agreed with "one of the premises of the canon—that party affiliation may not be a reliable indicator of the qualities that make a good judge, but stated "informational bans premised on the fear that voters cannot handle the disclosure have a long history of being legislatively tried and judicially struck, whether in the election setting or elsewhere."

> Voters often resort to a variety of proxies in selecting judges and other office holders, some good, some bad. And while political identification may be an unhelpful way to pick judges, it assuredly beats other grounds, such as the all-too familiar formula of running candidates with familiar or popular last names. In that respect, this informational ban increases the likelihood that one of the least relevant grounds for judicial selection—the fortuity of one's surname—is all that the voters will have to go on.

(2) The solicitation clause provides: "A judge or a candidate for judicial office shall not solicit campaign funds, but may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support for the candidacy."

The 6th Circuit stated it did "not doubt the bona fides of the solicitation clause: that it serves Kentucky's compelling interest in an impartial judiciary." Moreover, the Court stated, prohibitions on "face-to-face solicitations, particularly by sitting judges, and solicitations of individuals with cases pending in front of the court" might be valid. However, it noted the solicitation clause goes well beyond those limited restrictions.

> The canon prohibits a range of other solicitations, including speeches to large groups and signed mass mailings. Such indirect methods of solicitation present little or no risk of undue pressure or the appearance of a quid pro quo. No one could reasonably believe that a failure to respond to a signed mass mailing asking for donations would result in unfair treatment in future dealings with the judge. Nor would a speech requesting donations from a large gathering have a "coercive effect" on reasonable attendees.

Further, the Court concluded that the restriction does too little to protect Kentucky's interests because a committee member may solicit donations in person.

> That leaves a rule preventing a candidate from sending a signed mass mailing to every voter in the district but permitting the candidate's best friend to ask for a donation directly from an attorney who frequently practices before the court. Are not the risks of coercion and undue appearance far less with the first (prohibited) solicitation than the second (permitted) one?
>
> Although the clause prevents judicial candidates from saying "please, give me a donation," it does not prevent them from saying "thank you" for a donation given. The clause bars any solicitation, whether in a large group or small one, whether by letter or one on one, but it does not bar the candidate from learning how individuals responded to the committee's solicitations. That omission suggests

> that the only interest at play is the impolitic interpersonal dynamics of a candidate's request for money, not the more corrosive reality of who gives and how much. If the purported risk addressed by the clause is that the judge or candidate will treat donors and non-donors differently, it is knowing who contributed and who balked that makes the difference, not who asked for the contribution.

The Court rejected the defendants' argument that the solicitation clause must be constitutional because most other states with judicial elections also prevent candidates from soliciting funds.

> By our count, twenty-two States currently elect judges to their highest courts in contested elections. Of these twenty-two States, thirteen, including Kentucky, prohibit candidates from soliciting campaign contributions. Yet this bare majority is no more dispositive here than it was in White, where twenty-six States had some form of announce clause.

(3) Kentucky has a unique version of the commits clause: "A judge or candidate for election to judicial office . . . shall not intentionally or recklessly make a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way in a case, controversy, or issue that is likely to come before the court . . . ." The Court stated that the clause "in what seems to be its core sense, . . . found in one form or another in 39 States, runs the gauntlet of strict scrutiny. By preventing candidates from making 'statement[s]' that 'commit[]' them 'to rule a certain way in a case [or] controversy,' the clause secures a basic objective of the judiciary, one so basic that due process requires it: that litigants have a right to air their disputes before judges who have not committed to rule against them before the opening brief is read. Whatever else a fair adjudication requires, it demands that judges decide cases based on the law and facts before them, not based on 'express . . . commitments that they may have made to their campaign supporters.'" However, with respect to the prohibition on candidates making commitments about "issues," the Court concluded "the clause contains a serious level-of-generality problem."

> At the broadest level of meaning, it would seem to cover issue-related promises like these: "I commit to follow stare decisis"; "I commit to follow an originalist theory of constitutional interpretation" or for that matter "a living constitutionalist theory"; "I commit to a purposive method of statutory interpretation" or for that matter a "textual" one; "I commit to use (or not to use) legislative history"; or "I commit to be a rule-of-law judge." One might reasonably say that the clause covers all of these statements, as they all relate to "issues" likely to come before a court and they all create an "appearance" of commitment. Yet if that is what the clause means, it is hard to square with the Constitution. A restriction on such promises does nothing to prevent the kind of "impartiality" that the States have an interest in securing—defined as bias (or the appearance of bias) toward particular parties or cases.

> In a narrower sense, however, the "issues" prohibition may serve that interest. In White itself, the Court contemplated that a State could prevent a candidate from highlighting an "unbroken record of affirming convictions for rape" because such statements would "exhibit a bias against parties," namely against these types of criminal defendants and in favor of the prosecutor in these types of appeals. An interpretation of the clause confined to these kinds of statements thus might advance a compelling state interest and do so narrowly. In a facial challenge like this one, the ultimate question is one of overbreadth: Does the law "prohibit[] a substantial amount of protected speech both in an absolute sense and relative to [the canons'] plainly legitimate sweep"? To determine the extent of a law's illegitimate reach, one needs to know what it means, as "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers."

The Court noted that he district court had not explored "the clause's applicability to 'issues,' the array of settings in which that part of the clause and commentary may apply and the tension of several of them with White."

> If we remand this aspect of the case to the district court, the court will have that chance. So too will the parties—particularly the state defendants, who retain considerable authority over shaping the clause and the commentary that goes with it. The state defendants may be able to obtain authority to remove the "issues" language; they may be able to identify an acceptable narrowing construction of the "issues" language along with a modification to the commentary; or they may suggest certification to the Kentucky Supreme Court. Any of these options may spare the federal courts the task of resolving a difficult constitutional question, and at a minimum they will give the Commonwealth a first shot at addressing the question.

1 judge concurred in part but dissented from the remand and would have upheld the entire commits clause, including the issues portion.

In the Matter of Nalley, 999 A.2d 182 (Maryland 2010)

Based on an agreement for discipline by consent, the Maryland Court of Appeals suspended a judge for 5 work days without pay for deflating the tire of an automobile parked in the parking space reserved for him at the courthouse. 1 judge would have publicly reprimanded the judge. The Court's order does not describe the judge's conduct; this summary is based on the agreement and other pleadings with the Commission (www.mdcourts.gov/cjd/publicactions.html).

On August 10, 2009, the judge returned to the courthouse in the afternoon in his vehicle and determined that someone unknown to him had parked their vehicle in the space that was reserved for him. Using a pen or other sharp object, the judge deflated the tire of the vehicle by letting air out through the valve system. The vehicle belonged to a part-time maintenance employee at the courthouse. The judge entered a plea of guilty to the misdemeanor charge of tampering with a motor vehicle; he was fined $500, ordered

to provide an apology to the owner of the motor vehicle, and placed on 6 months of unsupervised probation before judgment. He has met the conditions of his probation.

In aggravation, the agreement noted that the judge also admitted that he had let the air out of someone's tire approximately 10 years ago, although he was not charged and convicted of such offense; his conduct raised a serious safety issue for the other driver who might have driven the vehicle without realizing the tire was flat; and the judge was county administrative judge at the time of the conduct. In mitigation, the agreement notes that the judge had privately apologized to the owner of the vehicle and the citizens of Maryland; has never denied his conduct, has accepted full responsibility; is extremely remorseful that his actions brought unflattering attention to a member of the Maryland judiciary, embarrassing his colleagues; and has more than 38 years of distinguished and exemplary public service, 8 and 1/2 years as a prosecutor and 30 years as a judge.

In re Logan, 783 N.W.2d 705 (Michigan 2010)

Accepting the recommendation of the Judicial Tenure Commission, to which the judge consented, the Michigan Supreme Court censured a judge for creating the appearance of impropriety by releasing a county commissioner on his own recognizance on a day he was not scheduled to do arraignments and following a series of calls from another county commissioner.

On June 17, 2008, Kent County Commissioner James Vaughn was arrested on a probable cause charge of aggravated domestic assault and taken to the county correctional facility. He was booked at approximately 9:26 a.m. A few hours later, County Commissioner Paul Mayhue visited Vaughn at the correctional facility. Mayhue then engaged in a series of 7 telephone calls with the judge. Telephone company records reflect that most of the calls lasted a minute or less and resulted in voice mail messages being left or in no contact at all -- except that a call from Mayhue to the judge at 2:08 p.m. lasted approximately 15 minutes.

Although the judge was not handling arraignments, at approximately 2:30 p.m., at the judge's direction, a fax was sent informing the correctional facility that he had set a personal recognizance bond for Vaughn for $5,000 with conditions. The judge did not contact the police for additional information, but relied on the initial investigation report in determining to authorize the bond. At 2:50 p.m., Vaughn was released from the correctional facility upon agreeing to the terms of the bond set by the judge. (Vaughn was subsequently charged with and convicted of aggravated assault and domestic violence by a jury and sentenced to a term of incarceration in the county jail.)

The Court adopted the Commission's finding that the judge's conduct created the appearance of impropriety.

The settlement agreement made no findings about the 15-minute call between the judge's phone and Mayhue's phone reflected in telephony company records. The judge denied any conversation with Mayhue on June 17. After the Commission submitted its recommendation, the Court had directed the Commission to explain: "(1) whether it has determined that the respondent did not lie to the Commission, despite the allegations in Count II of the complaint; and (2) if the respondent did not lie to the JTC, then how does the respondent explain his admitted 15-minute phone call received from Mayhue in light of his multiple denials of having any conversations with Mayhue on the date in

question?" The Court's opinion merely noted that the Court had reviewed the Commission's letter.

1 justice wrote a opinion concurring in part and dissenting in part, in which 2 other justices concurred. The opinion described the Commission's response to the Court's direction for further explanation:

> By letter of May 3, 2010, the Chairperson of the JTC informed this Court that the JTC had not determined whether respondent testified falsely because that count was effectively dismissed as a result of the settlement agreement, and that she could not provide this Court with any further information because this would be outside the scope of the stipulated facts provided to the JTC, citing Dana Corp. v. Employment Security Com'n, 371 Mich. 107 (1963). Although Dana held that stipulated facts are "sacrosanct" and cannot be "alter[ed]," it further held that a court can, of course, "reject any offered stipulation as incomplete...." Id. at 110-111. Here, the offered stipulation is incomplete because it does not address whether respondent testified falsely in the course of the JTC investigation, i.e., it does not address the apparent inconsistency between the stipulated fact that respondent received a phone call from a particular individual that lasted approximately 15 minutes and respondent's multiple denials of having any such conversations on the date in question. Therefore, I would direct the JTC to hold an evidentiary hearing, and take any other action it deems necessary, to answer sufficiently and completely the questions raised in this statement. That is, I would direct the JTC to determine whether respondent testified falsely to the JTC in the course of its investigation, and, if not, how respondent's 15-minute phone call can be reconciled with respondent's multiple denials of having any such conversations on the date in question.

The concurring/dissenting opinion also argued:

> I am also deeply troubled by the message that is being sent by the Court in this and in other recent cases of judicial misconduct. In particular, I believe that the wrong message is being communicated as to this Court's resolve in severely sanctioning false judicial statements. In In re Servaas, 484 Mich. 634 (2009), decided last year, this Court, contrary to the recommendation of the Judicial Tenure Commission to remove the respondent judge from office for testifying falsely, imposed only a public censure. In that case, there was substantial evidence that the judge had moved outside of the district from which he was elected in direct violation of the Michigan Constitution, and then engaged in a pattern and practice of actions to conceal this misconduct, including providing false testimony under oath. Moreover, in the accompanying case of In re Halloran, --- Mich. ---- (Docket No. 139830, order entered July 2, 2010), the Court imposed only a public censure and a 14-day suspension, despite the respondent judge's admission that he dismissed 30 cases in order to avoid the disclosure of the fact that he had failed to timely adjudicate those cases. In addition, the fact that, in many of these cases, the parties simply continued to litigate as if nothing happened, raises concerns about whether the respondent

> judge was forthright with the parties about the dismissals. As in this case, the Court was unwilling to remand to the JTC for further investigation concerning respondent's honesty. Finally, in the instant case, the Court imposes only a public censure, despite the fact that respondent appears to have testified falsely to the JTC.
>
> As the leadership court within our state's judiciary, we communicate in these cases either that we do not take seriously false statements made in the course of a judge's exercise of duties, or that we believe we lack the authority to require the JTC to address such matters. Either of these propositions is alarming, and very much inconsistent with the leadership traditionally exercised by this Court in preserving and maintaining a judiciary of the highest professional and ethical standards. Because I strongly disagree with each of these propositions, and because I believe this Court must exercise a more responsible stewardship of the judicial branch, I would direct the JTC to investigate the instant matter further.

In re Halloran, 783 N.W.2d 709 (Michigan 2010)

Adopting the findings of the Judicial Tenure Commission, the Michigan Supreme Court suspended a judge for 14 days without pay and censured him for dismissing 30 family law cases as the time guidelines threshold approached to avoid those cases being identified as out of compliance, while continuing to work on the cases. The Commission had recommended censure with 2 members dissenting and arguing a 14-day suspension was the appropriate sanction; the judge had consented to a sanction no greater than a public censure and a 14-day suspension without pay.

The judge failed to timely adjudicate at least 30 family law cases within the 364-day deadline set by a supreme court administrative order. The judge dismissed 30 cases as the guidelines threshold approached to avoid those cases being identified as being out of compliance but continued to work on those cases.

In March, the Court had remanded the recommendation to the Commission "for further explication." 1 justice wrote an opinion concurring in part and dissenting in part, in which 2 other justices concurred. The opinion described the Commission's response to the Court's direction for further explanation:

> By letter of May 3, 2010, the Chairperson of the JTC informed this Court that the JTC could not provide the information requested in this Court's prior order because such information was outside of the scope of the stipulated facts provided to the JTC, citing Dana Corp. v. Employment Security Com'n, 371 Mich. 107 (1963). Although Dana held that stipulated facts are "sacrosanct" and cannot be "alter[ed]," it further held that a court can, of course, "reject any offered stipulation as incomplete...." Id. at 110-111. Although Dana held that stipulated facts are "sacrosanct" and cannot be "alter[ed]," it further held that a court can, of course, "reject any offered stipulation as incomplete...." Id. at 110-111. Here, the offered stipulation, in our judgment, is incomplete because it does not address the issues and questions raised in this statement. Therefore, I would direct the JTC to hold an evidentiary hearing, and take any other action it deems necessary, to

answer sufficiently and completely the questions raised in such statement. That is, I would direct the JTC to indicate: (1) the substance of the allegations contained in the request for investigation that was dismissed as part of the settlement agreement; (2) how that matter and the cases referred to in paragraphs 14a-14dd of the settlement agreement were brought to the attention of the JTC; (3) with respect to each case referred to in the settlement agreement, whether the parties or their attorneys were contemporaneously notified of the dismissal of the case; (4) if so, whether they complained or otherwise indicated objection; and (5) whether any dismissal or action by respondent subordinated the substantive legal merits of any case to respondent's determination to mislead the State Court Administrative Office.

I am also deeply troubled by the message that is being sent by the Court in this and in other recent cases of judicial misconduct. In particular, I believe that the wrong message is being communicated as to this Court's resolve in severely sanctioning false judicial statements. In In re Servaas, 484 Mich. 634 (2009), decided last year, this Court, contrary to the recommendation of the JTC to remove the respondent judge from office for testifying falsely, imposed only a public censure. In that case, there was overwhelming evidence that the judge had moved outside of the district from which he was elected in direct violation of the Michigan Constitution, and then engaged in a pattern and practice of actions to conceal this misconduct, including providing false testimony under oath. Moreover, in the accompanying case of In re Logan, ---Mich. ---- (Docket No. 139546, order entered July 2, 2010), the Court again imposed only a public censure, despite the fact that the respondent judge appears to have testified falsely to the JTC -- the stipulated facts indicate that he engaged in a telephone call with an individual that lasted approximately 15 minutes, despite having repeatedly denied having any telephone conversations with that same individual on the date in question. As in this case, the Court was unwilling to remand to the JTC for further investigation concerning whether respondent testified falsely. Finally, in the instant case, the Court again imposes only a public censure and a 14-day suspension, despite respondent's admission that he dismissed 30 cases in order to avoid disclosure of the fact that he had failed to timely adjudicate those cases. In addition, the fact that, in many of these cases, the parties simply continued to litigate as if nothing happened, raises concerns about whether respondent had been forthright with the parties concerning such dismissals. Moreover, this is not the first time that respondent has been subject to discipline by the JTC. See In re Halloran, 466 Mich. 1219 (2002).

As the leadership court within our state's judiciary, we communicate here either that we do not take false statements made in the course of a judge's exercise of duties seriously, or we believe that we lack the authority to require the JTC to address such matters. Either of these propositions is alarming, and very much inconsistent with the leadership traditionally exercised by this Court in preserving and maintaining a judiciary of the highest professional and ethical standards. Because I strongly disagree with each of these propositions, and because I believe

> this Court must exercise a more responsible stewardship of the judicial branch, I would direct the JTC to investigate the instant matter further.

Wersal v. Sexton, 613 F.3d 821 (8th Circuit 2010)

Reversing the decision of the district court in a challenge to 3 clauses in the Minnesota code of judicial conduct by a former and current candidate for the Minnesota Supreme Court, the U.S. Court of Appeals for the 8th Circuit held that (1) the endorsement clause was unconstitutional, (2) the personal solicitation clause was unconstitutional as applied to the plaintiff's desire to solicit contributions door-to-door from non-attorneys when the plaintiff represents that he would recuse himself from any proceeding in which a contributor is a party, and (3) the solicitation for a political organization or candidate clause was unconstitutional to the extent it prevents the plaintiff from soliciting funds for his own campaign. The 8th Circuit noted it was reviewing the constitutionality of the 3 clauses only as they applied to judicial candidates who are not sitting judges. 1 judge on the 3-judge panel dissented.

(1) The endorsement clause prohibits a judicial candidate from "publicly endors[ing] or, except for the judge or candidate's opponent, publicly oppos[ing] another candidate for public office." The 8th Circuit applied a strict scrutiny test, finding that the restriction effects core political speech and is based on the subject of the speech because "candidates are not barred from talking about other candidates for any purpose other than endorsing or opposing them" and "impairs a candidate's ability to vigorously advocate the election of other candidates, associate with like-minded candidates, and, thus, vigorously advocate his or her own campaign." The 8th Circuit noted the defendants' argument that endorsements are not necessary to run an effective campaign, but stated the "the inquiry is whether the infringed expression would communicate relevant information to the electorate."

Although the 8th Circuit conceded that the endorsement clause is "aimed at restricting speech for or against particular parties," not issues, it concluded that the clause was "overinclusive to meet this end, restricting more speech than is necessary to prevent a public display of favoritism."

> Although endorsements do indicate a particular connection between endorser and endorsee, a candidate may also use an endorsement as a proxy for expressing his or her views. Indeed, in some instances, endorsing a well-known candidate is a highly effective and efficient means of expressing one's own views on issues. For example, in 1984, much of the country was aware of Ronald Reagan's platform in his bid to serve a second term as President. A judicial candidate who agreed with President Reagan's well established views on, for instance, a strict interpretation of the Constitution or the need for judicial restraint, might have better and more effectively publicized his own subjective views by endorsing Mr. Reagan's candidacy, even though it was for a nonjudicial office. The same would likely have been true if it had involved President Bill Clinton's campaign for re-election in 1996. Thus, whether it may be wise or necessary for one candidate to endorse another, from one simple statement the judicial candidate can announce his or her own views on a myriad of matters.

The 8th Circuit also acknowledged the concern "that a judicial candidate could endorse candidates for sheriff and county attorney – persons who are likely to repeatedly appear as litigants or representatives of litigants in Minnesota courts." However, it stated the clause "prohibits endorsements regardless of the likelihood that the endorsee will ever appear as a party in the state's courts" and prohibits endorsement of "numerous candidates who are unlikely to ever personally appear as parties in Minnesota litigation, for instance the President of the United States or any Governor, Congressman or Senator from a state other than Minnesota."

In addition to finding that the endorsement clause was overinclusive, the 8th Circuit concluded it was underinclusive because it did not prevent a judicial candidate from endorsing a public official or a potential candidate who has not yet officially filed for office or from endorsing "the acts and policies of non-candidates no matter the likelihood of their becoming litigants in a case before the court – that is businesses, labor unions, the ACLU or any public officials not running for office."

Finally, the 8th Circuit held that recusal was a less restrictive means of limiting party bias or its appearance than a categorical ban on endorsements. The 8th Circuit rejected the defendants' argument "that if the state required a judge to recuse from all cases where a party to the litigation was previously endorsed by that judge, they would be forced to recuse themselves from a great number of cases, or at least from a great number of important cases."

> First, even if a judge felt compelled to recuse himself from those cases in which he had previously endorsed a party to a lawsuit, it would seemingly be an ineffective campaign strategy for a judicial candidate to endorse persons almost certain to be future litigants. That is to say, to the extent the state is concerned about a judge endorsing the local sheriff and then having to recuse from all cases in which the sheriff is involved (whether as a party or material witness), it would be foolish as a matter of campaign strategy for a judicial candidate to follow such a course of action. It is almost certain that the electorate, especially if notified by a campaign opponent, would reject this tactic. Thus, we believe the electoral marketplace will adequately guard against the "parade of horribles" the appellees advance.

The 8th Circuit noted that the decision in Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009), "does not require that a judge refuse to speak during his or her campaign, only that due process demands that certain actions which occur during a judicial campaign may later require recusal," adding, "to the extent a judge remains reluctant to recuse from cases post-Caperton, Minnesota 'remain[s] free to impose more rigorous standards for judicial disqualification' than due process requires."

The 8th Circuit also rejected the defendants' argument that the endorsement clause was designed to prevent a judicial candidate from abusing the prestige of office and to protect the political independence of the judiciary. The endorsement clause is not narrowly tailored to address an interest in preventing abuse of the prestige of office, the 8th Circuit stated, "because it prevents both judicial candidates who are currently judges – those who could abuse the office – and candidates who are not currently judges –

persons who cannot abuse any office because they currently hold no office – from making endorsements." The 8th Circuit also stated that "how an interest in 'protecting the political independence of the judiciary' is any different from an interest in preserving impartiality eludes us."

The dissent argued that "the act of endorsement directly undercuts the state's interest in maintaining the appearance or impartiality."

> By moving past the role of mere participant in the political system to the role of political power broker trading on the currency of his position, a judge who gives political endorsements creates the perception of a judicial branch beholden to political interests. By placing political pressures on the endorsing judge, the endorsement effectively erodes the appearance of judicial impartiality.

The dissent stated that "the majority's point that speech can and does serve as a proxy for other, underlying ideas is well taken," but argued "under the lens of strict scrutiny, our focus must remain on the speech that is regulated by reference to its content."

> With respect to a judicial candidate's views on strict interpretation of the Constitution, or abortion, or same-sex marriage, or any other idea the judicial candidate wishes to convey, the endorsement clause is entirely content-neutral. The candidate is free to state: "I support (or oppose) a strict interpretation of the Constitution." The candidate could even say "I support strict interpretation, as articulated by Ronald Reagan." The only idea the candidate is barred from expressing is the idea of endorsement itself – an idea that does not burden any other ideas or viewpoints on an unequal basis. . . .

The dissent argued that the majority's analysis "effectively renders pointless the idea/party distinction drawn in White I."

> Under the majority's analysis, even a speech restriction on statements showing bias against a party to a proceeding would fail strict scrutiny. Following the majority's reasoning, such a restriction would also necessarily limit the expression of secondary ideas conveyed by the statement of bias. For example, the statement "I am biased against plaintiff Smith" could also theoretically convey a judicial candidate's view that the court system is overburdened by frivolous lawsuits. If, as the majority suggests, we must take account in our strict scrutiny analysis of all possible secondary meanings of the statement of bias – even those not regulated by reference to their content – then even a ban on speech showing bias towards a party would be overinclusive with respect to a state's compelling interest in judicial impartiality. This is so because the ban on biased statements would impermissibly limit, according to the majority's analysis, the judicial candidate from expressing his views on frivolous lawsuits. In contrast to the majority's incorrect analytical approach, the Supreme Court has consistently confined its strict scrutiny overinclusiveness analysis to speech regulated by its content by the terms of the speech restriction itself.

The dissent also argued that recusal was not an adequate remedy in a judicial system where judges and judicial candidates are permitted to endorse each other and other candidates for public office. The dissent noted "that if a district court judge in a rural area endorsed the county sheriff and county attorney for reelection, the judge would be required to recuse himself in almost every criminal case – and few, if any, other judges would be available to take over the case load," that "if an appellate court judge endorsed a slate of district court judges, the appellate court judge would have to recuse himself in every appeal reviewing the judgment of any of the endorsed district court judges," and that a judicial candidate who endorsed prominent political figures in Minnesota would have to recuse from every case involving those figures "who are frequently parties to judicial proceedings."

> In short, a system of open endorsements would create a tangled web of conflicts that could not be solved by recusals. Perhaps more fundamentally, even if judges managed to recuse themselves whenever an endorsee was a party (or witness) to a proceeding, the recusals would do little to change the perception that the judiciary as a whole lacks impartiality. Perceptions of bias would be justified in cases involving not just endorsees, but also their friends, family, associates, supporters, opposing candidates, and their supporters. Some citizens might conclude, reasonably, that the judicial system is simply too compromised by partisan politics, and resolve their disputes through alternative means. Although recusals would undoubtably mitigate bias in some instances, they would not – in a climate of pervasive endorsements by judges and judicial candidates – protect Minnesota's interests in maintaining impartiality and the appearance of impartiality at even a tolerable level.

(2) The personal solicitation clause in the Minnesota code of judicial conduct provides that a judicial candidate shall not "personally solicit or accept campaign contributions" except to make a general request for campaign contributions when speaking to an audience of 20 or more people; sign letters, for distribution by the candidate's campaign committee, soliciting campaign contributions, if the letters direct contributions to be sent to the address of the candidate's campaign committee and not that of the candidate; and personally solicit campaign contributions from members of the judge's family, from a person with whom the judge has an intimate relationship, or from judges over whom the judge does not exercise supervisory or appellate authority. (The exceptions were created by the Minnesota Supreme Court following an earlier decision of the 8th Circuit in the remand of Republican Party of Minnesota v. White holding the personal solicitation prohibition without exceptions to be unconstitutional.) The 8th Circuit noted that the plaintiff asserted that he only wanted to personally solicit funds from non-attorneys, "apparently recognizing that solicitation from attorneys may well raise different issues, particularly in view of the 'very specific information about campaign contributions . . . publicly available, notably on the Internet.'" (According to the dissent, "nowhere in the record does [the plaintiff] state, or even imply, that he would limit his solicitation entirely to non-attorneys," and that, although the plaintiff states once in his brief that he wishes to personally solicit campaign contributions only from non-

attorneys, the court should not consider matters in a brief that are not part of the record on appeal. The dissent also noted that, although the plaintiff states he "'does not wish to solicit funds from those he knows to be attorneys,'" he undoubtedly would encounter persons whom he does not know to be attorneys during the door-to-door solicitation he proposes.)

The 8th Circuit concluded that the risk of impartiality due to campaign contributions comes "not in the mere solicitation – the 'ask'– but rather in the resulting contribution.

> As we noted in White II, the real due process harm comes not from the fundraising itself, but rather from a judicial candidate being able to trace contributions back to individual donors. Accordingly, restricting a candidate from personally soliciting funds does not address the state's interest in a non-biased judiciary. Indeed, the personal solicitation clause is underinclusive in addressing such an interest because the Canon permits the candidate's agent – the committee – to solicit funds, but prohibits the candidate from personally soliciting the same funds. Since the identity of the solicitor is irrelevant to the candidate's ultimate bias toward a party, Minnesota's rules on personal solicitation are not narrowly tailored to serve this interest.

The 8th Circuit rejected the defendants' argument "that soliciting door-to-door poses an acute risk because through such on-the-spot canvassing, a judicial candidate will be able to tell whether an individual is likely to contribute or not," noting it is "highly unlikely that after such a fleeting encounter, a candidate will remember which solicited person indicated a likelihood of contributing to the campaign or indicated a refusal to do so." The 8th Circuit stated that "Minnesota has already provided a less restrictive alternative that prevents the candidate from tracing funds by requiring that a judicial candidate "take reasonable measures to ensure that the candidate will not obtain any information identifying those who contribute or refuse to contribute to the candidate's campaign," prohibiting a candidate from personally accepting contributions, and prohibiting the campaign committee from disclosing the identity of contributors to the candidate. The plaintiff did not challenge these requirements and prohibitions. Finally, the 8th Circuit held that the least restrictive means of preventing personal solicitations from affecting the public's confidence in an unbiased judiciary was recusal "should the judge become aware of receipt of a litigant's campaign contribution (or of his or her refusal to do so)," noting that the plaintiff "represents that he would recuse himself from any proceeding in which a contributor is a party."

Arguing that "whether personal solicitation by judicial candidates impacts the appearance of impartiality is an empirical question," the dissent cited recent polls finding that 70% "of the public thinks raising money for their elections affects judges' rulings to a moderate or great extent." The dissent disagreed with the majority's conclusion that the risk of bias "comes not in the mere solicitation – the 'ask'– but rather in the resulting contribution."

> When a judge or judicial candidate asks for money, one-on-one, the potential donor is presented with an unseemly choice: contribute, and perpetuate the

> appearance of impartiality, or decline to contribute, and risk retribution. Contrary to the majority's assertion, it is precisely the act of asking for money one-on-one that creates the appearance of impartiality. And no matter what course of action the potential donor chooses, the appearance of judicial impartiality is diminished.

The dissent stated that the efficacy of the rule banning judicial candidates from learning the identity of donors "was greatly undermined without an operative solicitation clause" because "potential donors will often interrupt the pitch for money with an answer, or a door in the face. In other cases, verbal cues and body language by the potential donor will leave the judicial candidate with a strong impression of the potential donor's likelihood of making a contribution." The dissent argued that recusal was not an adequate alternative to the solicitation clause, citing Caperton "not for its legal holding, but rather as a cautionary tale illustrating two points."

> First, judges whose contributions give rise to the appearance of partiality may be reluctant to recuse themselves. Second, and most fundamentally, by the time a case rises to the level of egregiousness where the Due Process Clause, by its own force, requires recusal, the judiciary's appearance of impartiality has already been severely undermined. I would not force Minnesota to follow West Virginia's path. The state's interest in maintaining the appearance of impartiality in its judiciary goes far beyond protecting the absolute baseline of fundamental fairness required by due process.

(3) The solicitation for a political organization or candidate clause provides, in relevant part, that a judge or candidate shall not "solicit funds for a political organization or a candidate for public office." The district court had held that the plaintiff's challenge to the clause was not ripe because the rule was intended to restrict a candidate from soliciting funds for political parties and other candidates, not for the candidate himself. The 8th Circuit rejected that conclusion, stating "that the clause has never been applied to prohibit a candidate from soliciting contributions for his or her own campaign does not dispositively indicate that the provision would never be so applied" and that its reading is "neither absurd nor contrary to any other provision in the Code" even though it makes "the clause is similar to, if not redundant with, the personal solicitation clause." The 8th Circuit stated that the defendants "could very easily have drafted an advisory opinion in response to this litigation indicating that the clause would not be applied to a candidate's solicitation of funds for his own campaign," although, according to the dissent, after the district court ruled, but before the 8th Circuit heard the appeal, the Minnesota Supreme Court had amended the code to provide that "for purposes of this Code, the term [political organization] does not include a judicial candidate's campaign committee . . . ." The 8th Circuit incorporated its analysis of the personal solicitation clause to conclude that the solicitation for a political organization or candidate clause, to the extent it prohibits the plaintiff from soliciting funds for his own campaign from non-attorneys, fails strict scrutiny review.

The dissent noted that "nothing in the Rule – neither the ban on soliciting funds for 'a political organization' nor the ban on soliciting funds for 'a candidate for public office' –operates to prevent [the plaintiff] from soliciting funds for his campaign

committee, which is all [the plaintiff] seeks to do," concluding that the court was "reaching out to partially invalidate Rule 4.1(A)(4)" and striking down a provision of the code that "is simply not implicated in this case."

In general, emphasizing that "the Constitution favors stricter recusal standards and fewer speech restrictions," the 8th Circuit concluded that "Minnesota, by its current system, has itself created a politically motivated judiciary, bedeviling any claim it has in removing politics from the process" and "as long as Minnesota chooses to elect its judges using a system of private financing, it will be faced with the concern that contributions may impair at least the appearance of a judge's impartiality."

In contrast, the dissent concluded:

> With respect to Minnesota's asserted interest in promoting the appearance of impartiality, we have thus far provided little – too little – examination of the subject.
>
> Drawing from the "core" definition of impartiality recognized in White I, the appearance of impartiality, as the phrase is used in this dissent, means the perception of a judiciary made up of judges who lack bias for or against a particular party (or parties) to a given proceeding. To be sure, the concepts of actual and perceived impartiality are related, but they are not entirely coextensive. For example, a hypothetical judge who harbors a bias towards Catholics but shows no outward manifestations of her bias lacks impartiality (at least in a case where one party is Catholic), but may not create the appearance of impartiality. Likewise, a judge who uses disrespectful language when addressing criminal defendants will likely be perceived as lacking impartiality, even if the judge lacks an actual bias against any particular party. Two features serve to distinguish the concepts of actual impartiality and the appearance of impartiality. First, while the existence of actual impartiality turns on a particular judge's mental state, the appearance of impartiality springs from the perceptions of people who see, hear, read about, or otherwise interact with one or more judges in the judicial system. Second, while an examination of actual impartiality will use a narrow lens, usually focusing on an individual assessment of one particular judge, an inquiry into the appearance of impartiality will often focus on the aggregate: how the judiciary is perceived by the people it serves.
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> * * *
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> In parting ways with the court today, I note my increasing discomfort with the court's analytical approach. As I see it, the court's analysis, at the most basic level, amounts to an examination of whether a given speech restriction placed on judges is essential – in every case – to fully realize the protections of due process. Without prejudicing the outcome of future challenges, no speech restriction, whether it is imposed on judicial candidates or simply judges, is essential to due process in every case. The majority's approach, in my view, significantly discounts the role states play in maintaining a judicial system that serves its people with a higher standard of fairness and impartiality. Although the Constitution guarantees a minimum standard of fundamental fairness, Minnesota

> has endeavored to hold itself to a higher standard. Implicit in the majority's opinion is the notion that any effort to maintain judicial impartiality or its appearance beyond what the Constitution requires is nonessential and expendable. To be sure, White I counsels us to review restrictions on speech with exacting scrutiny. But where a state has crafted its restrictions carefully to maintain a fair and impartial judiciary, in both practice and appearance, as Minnesota has done here, the First Amendment must yield.

In re Florom, 784 N.W.2d 897 (Nebraska 2010)

Based on the recommendation of the Commission on Judicial Qualifications, the Nebraska Supreme Court removed a judge from office for interfering in a criminal case against a softball coach and a juvenile case involving a softball player. The facts were largely undisputed, and the judge admitted his conduct was improper, leaving what discipline should be imposed as the primary issue. The Court concluded that, because the judge's "course of conduct was clearly, repeatedly contrary to the rules of judicial conduct, and because suspension from office would be insufficient to correct the damage wrought by the respondent's behavior, we remove the respondent from his office as a judge."

(1) On February 9, 2008, Sharon Kramer, a North Platte school teacher and softball coach, asked the judge be an assistant coach for the youth softball team on which the judge's daughter played. He accepted. A few weeks later, after hearing a rumor that Kramer was about be arrested, the judge approached the county attorney, Rebecca Harling, to discuss the case. Harling explained that the charge involved theft from the high school booster club. The judge, assuming that it was a misdemeanor theft, asked Harling whether, if Kramer paid restitution, the victim would be satisfied. Conflicting evidence suggests that the judge may also have offered to persuade Kramer to pay restitution. Harling replied that Kramer's recordkeeping was so poor that the amount of restitution was unknown. The judge later explained that he had spoken to Harling because he wanted to find out about the allegations against Kramer and whether his daughter was in any jeopardy. The judge also claimed he had been aware of the amount of money involved in the softball team and had hoped it was not connected to the alleged crime and that his daughter's team would not be hurt by association with Kramer's arrest. Harling, however, said that the judge had expressed none of those concerns to her at the time they spoke.

On another occasion, Kramer's attorney, Russ Jones, and a prosecutor (not Harling) were in the judge's office on other business. They were discussing Kramer's case between themselves. Interjecting, the judge asked whether jail time was being sought for Kramer and whether the case would be dismissed if restitution was paid, saying he would pay the restitution. The judge told Jones to tell Harling that the judge would put her on "'double secret probation.'" Jones believed the judge was joking, but conveyed the message. The judge later admitted there had been "no good reason" for him to have interrupted the attorneys' conversation, but also said he had just been joking.

Kramer was eventually charged with misdemeanor theft, pursuant to a plea agreement. The judge recused himself from any official participation in the case. On the day the matter was set for a plea and sentencing, Jones told the judge that the charges had

become public and there was media interest. The judge suggested to Jones that Kramer could plead early, or plead by waiver, to avoid an appearance in open court. Harling rejected those options.

A few weeks after Kramer was sentenced, the judge asked Harling about subpoenas that had been issued to the school booster club, suggesting he had heard about the subpoenas from law enforcement. Harling realized that the judge was probably referring to subpoenas issued in connection with the revocation of Kramer's teaching license by the State Department of Education and that the judge had apparently discussed the case with a police department investigator.

In July 2008, the judge heard a rumor that Jim Paloucek, a member of the North Platte school board and a lawyer practicing in the judge's district, and another member of the board were planning to take some sort of official action against Kramer as a result of her conviction. The judge asked Jones, a close friend of Paloucek, to pass a message to Paloucek that if Paloucek took action against Kramer, Paloucek would be "'making an enemy'" he did not want to make. The judge later admitted that he was the "enemy" Paloucek would be making, that he had not been joking, and that he had been angry.

After hearing about the judge's threat, Paloucek and his law partners called the judge and asked him to confirm that he made the threat. The judge confirmed his threat, despite having been counseled by another judge that his actions could be construed as trying to influence a public official. Paloucek described the judge as "cool," calm, and "matter of fact." The judge said Paloucek would be making a mistake by taking action against Kramer. Paloucek and one of his partners also reported that the judge told Paloucek that "favors extended in the past would not be extended in the future," although the judge did not remember making that remark. Paloucek expressed a concern that the judge was using his judicial office to try to influence Paloucek's actions as an elected official. The judge replied that Paloucek should ask for recusal when appearing in front of him. Paloucek and his law partners have done so since.

On July 15, the judge wrote and signed a letter, on his judicial letterhead, that was intended to help Kramer keep her job with the school district. The letter stated, in relevant part:

> I have always felt Sharon Kramer was a person of integrity. No one was more surprised than I at her breach of public trust. As a judge, I see thousands of cases each year where people have violated the law. Never have I seen anyone step forward with the remorse and self-responsibility that I witnessed from Sharon Kramer.

The letter also commended Kramer's contrition and acceptance of responsibility, and recommended that Kramer remain employed by the school district.

The judge later explained that the letter had mistakenly been on judicial letterhead because his word processor defaulted to his judicial stationery. The judge said that the letter had been intended to be confidential to Kramer, her attorney, and her union representative. But on November 13, the judge wrote another letter on behalf of Kramer, this time to the Nebraska Professional Practices Commission, regarding Kramer's license to teach. That letter was on a personal letterhead, but was substantially the same, including the references to the judge's judicial office.

(2) In October 2007, the judge placed L.W., a juvenile, on probation. L.W. was prosecuted by Harling, and L.W.'s assigned caseworker was Megan Luebbe, of the Department of Health and Human Services. L.W. was a player on the softball team for which the judge had agreed to be assistant coach in February 2008. In March 2008, Harling filed a motion to revoke L.W.'s probation. The judge recused himself from the case. Nonetheless, when Luebbe appeared in the judge's court on another matter, the judge called Luebbe into his chambers, told her he was speaking to her "as a softball coach and not as a judge," and explained his interest in L.W.'s case, talking about her talent as a player and asking about her placement recommendations.

Later, to facilitate L.W.'s participation with the team, the judge and his wife served as her chaperones, which generally meant that, after L.W.'s father dropped her off at tournaments, the judge and his wife watched her. The judge had chaperoned other players in the past, although none had been involved in the juvenile court system. Ultimately, L.W. was allowed to participate in softball tournaments she would not have been able to attend had the judge not agreed to chaperone her.

While L.W.'s juvenile case was pending, the judge spoke to Harling several times about the case. On one occasion, the judge asked Harling to "'take care of [his] shortstop,'" although the judge later said he had just been teasing Harling. On other occasions, the judge asked Harling about L.W.'s whereabouts and whether she would be permitted to play softball and travel with the team. The judge also had several contacts with Luebbe regarding L.W.'s disposition. Although the judge handling the case advised Judge Florom that he would not discuss the case with Judge Florom, Judge Florom asked the assigned judge one morning, over coffee, whether L.W.'s case had proceeded to disposition.

The judge argued that removal was arbitrary and unwarranted under the circumstances and that a sanction short of removal was appropriate. He relied on 3 cases. In In re Complaint against Marcuzzo, 770 N.W.2d 591 (Nebraska 2009), the Court had suspended a judge for 4 months without pay for improperly involving himself in a criminal case against his nephew by personally requesting the prosecutor to keep open a plea agreement, telephoning and meeting with the nephew's attorney, and having an ex parte communication with another judge concerning the case; using expletives during a private conversation with a prosecutor concerning the scheduling of a case and stating that the defendant should have been "hammered" with other felony charges; and leaving a profane and threatening message on the prosecutor's telephone. In In re White, 651 N.W.2d 551 (Nebraska 2002), the Court had suspended a judge for 120 days without pay for ex parte communications and public comments after a sentence the judge had imposed was reversed on appeal by the district court in a case involving a domestic protection order. In In re Complaint Against Kneifl, 351 N N.W.2d 693 (Nebraska 1984), the Court had suspended for 3 months a judge who was arrested for driving under the influence, cursed at a police officer, and threatened other officers with reprisals and told a county attorney's partner that an acquaintance of the judge had been charged with driving under the influence and asked the partner or county attorney to see what could be done for the acquaintance.

The Court found that Judge Florom's conduct was more egregious than the conduct that resulted in suspensions in Marcuzzo, White, and Kneifl. The Court emphasized that in neither Marcuzzo nor White did a judge threaten a member of the

practicing bar with reprisal for acting against the judge's interests and that "neither alcoholism nor duress mitigates the respondent's conduct." The Court stated that Judge Florom "not only threatened members of the bar with abuse of judicial power, but repeated his threat, after ample time for reflection, and after having been dissuaded from doing so by the good advice of a fellow judge. There is no excuse for the respondent's conduct, and it is hard to imagine conduct that, coming from a judge, could be more damaging to the reputation of the judiciary."

> And while the respondent's threats to Paloucek are certainly the most troubling part of this record, they are far from the only cause for concern. The respondent repeatedly made his personal interest in the outcome of a case known to several lawyers, who appeared before him regularly and would have good cause to worry about displeasing him. The respondent's claim that he was just "joking" is not an excuse. . . .

The Court concluded:

> It is difficult to see how suspension would serve the interests of deterrence when the respondent was cautioned, repeatedly, about the impropriety of his conduct. To begin with, his conduct on several instances was unquestionably contrary to unambiguous provisions of the Code. And he was confronted, at various times, with the implications of his conduct, by Paloucek and other attorneys, and even by a fellow judge. A suspension may be used to impress the severity of misbehavior upon those subject to discipline, but the primary motivation for proper conduct by judges must always be respect for the law, not fear of punishment. In this case, the respondent should have known that his conduct was unethical. However, he ignored the Code. Then he was told that his conduct was unethical, more than once. But he ignored those warnings, and kept doing it anyway. He demonstrated a disregard for ethical rules that a suspension cannot overcome.

The Court noted the judge's general performance as a jurist may be a relevant factor in determining the appropriate discipline and that the judge had served on the bench for nearly 19 years, with nothing in the record to suggest that his performance has been unsatisfactory. The Court concluded:

> But the conduct evidenced here is a course of conduct, not an isolated incident. And there are several lawyers in the 11th Judicial District whose confidence in the respondent's fairness as a judge cannot, we believe, be restored. Therefore, we conclude that removal from office is necessary to preserve the integrity of the judicial system.

In the Matter of McArdle (Nebraska Commission on Judicial Qualifications August 18, 2010) (www.supremecourt.ne.gov/professional-ethics/judges/s-35-100003.pdf)

Pursuant to the judge's agreement, the Nebraska Commission on Judicial Qualifications publicly reprimanded a judge for accusing an attorney of publicly disparaging him and threatening the attorney with an ethics complaint if he did not apologize.

Police Officer Eric Mercier failed to appear at a hearing on a motion to suppress in a traffic case for a driver he had ticketed. Prior to the hearing, while in the judge's chambers, county attorney Steven Reisdorff and defense attorney Joseph Casson had informed the judge of Mercier's absence. After taking the bench, on the record, the judge noted that the officer had been subpoenaed and held him in contempt of court. The county attorney did not seek a warrant on the contempt charge. The traffic case was then dismissed, pursuant to the defense motion. Both Reisdorff and Casson have stated that they had no ex parte communications with the judge regarding dismissal of the case.

A personnel hearing regarding Mercier was held before the civil service commission. Jerry Pigsley represented the city, while Mercier was represented by Jane Burke and Douglas Peterson. Reisdorff was called by the city to testify about Mercier's failure to appear in the traffic matter and an incident in which Mercier posted potentially inappropriate material on his Facebook page. The judge had made Reisdorff aware of those postings. During his testimony, Reisdorff testified that he and Casson met with the judge in chambers to notify him that Mercier had not appeared, that the judge noted at that time that Mercier had been subpoenaed, and that the matter was disposed of on the record. Reisdorff was cross-examined on these issues by Burke. In his closing arguments, Peterson stated that Reisdorff was very comfortable sitting in the judge's chambers and going forward with a contempt charge against Mercier. Both Reisdorff and Pigsley have stated that each believed Peterson had "crossed the line" with this statement, as each believed the statement was not supported by the record.

Reisdorff informed the judge that Peterson had argued in the civil service commission hearing that Reisdorff and the judge had been in chambers discussing whether to find Mercier in contempt of court. The judge telephoned Peterson that afternoon and accused him of publicly disparaging him and violating a disciplinary rule prohibiting an attorney from knowingly making false accusations about a judge. The judge requested that Peterson make a public apology in the local newspaper or face an ethics complaint that the judge would initiate.

The Commission noted that the judge was cooperative and complied with the Commission during its investigation, had no history of prior discipline, had acknowledged that his behavior was not acceptable, and had apologized.

In the Matter of Boggia, 998 A.2d 949 (New Jersey 2010)

Dismissing a presentment filed by the Advisory Committee on Judicial Conduct, the New Jersey Supreme Court found that a part-time judge should not be disciplined for a political contribution made by his law firm. The Committee had recommended that the judge be publicly admonished. However, the Court stated, faced with similar facts in the future, a different outcome would be required. Further, the Court concluded that "political contributions made out of a firm's business account by a partner or associate of a municipal court judge, whether at a two-person firm or a far larger one, create an appearance of political involvement that must be avoided." Therefore, it ordered the

Professional Responsibility Rules Committee and the Advisory Committee on Extrajudicial Activity to develop appropriate rules to implement today's decision.

A member of the public filed a complaint with the Committee alleging that the judge had made political contributions. Attached to the complaint were records of the Edgewater Democratic Campaign Fund reporting 3 contributions from "Durkin & Boggia," the judge's law firm, from June 2004 to July 2005, totaling $1600. The checks were all drawn on the "ATTORNEY BUSINESS ACCOUNT" for "DURKIN & BOGGIA." That information appears on the upper-left portion of each check.

The judge testified that he was unaware of the contribution checks signed by his partner until he learned of them from the Committee. Although he had made political contributions as an attorney and knew of the firm's practice of doing so before January 30, 2004, the judge testified that, after he became a judge on January 30, 2004, he understood he "was no longer allowed to be involved in politics" and was "not allowed to make political contributions." He testified that, when he became a judge, he gave oral instructions to his law partner and office staff to stop making political donations from the firm's joint business account. After learning of the 4 checks, the judge reminded his partner not to make any more contributions out of the firm's account. In a certification, the judge's partner stated that the contributions "were drawn on ... the law firm's checking account by mistake and it was due to an inadvertence on my part."

Stating that the facts present a close case, the Court agreed with the Committee's conclusion that the circumstances created an undeniable appearance that the judge shared responsibility for the contributions and raised questions about his vulnerability to political influence.

> To be sure, judges must take adequate steps, to the best of their ability, to avoid an appearance of impropriety. Here, respondent was fully aware of the Firm's prior practice of making political contributions. He was also one of only two partners in a small law firm and had full access to all of the Firm's financial records. Only four people, including respondent, had the authority to write checks on the business account.
>
> When respondent became a judge, he took on an "implicit burden" to be "vigilant in detecting possible impropriety" as well as the appearance of impropriety. . . . In this context, that duty required that he take sufficient measures, to the best of his ability, to ensure that the Firm no longer made political contributions. To that end, respondent orally instructed his partner and staff not to issue any more political contributions. But according to the record, he took no additional steps and did not monitor whether his request was followed.
>
> Law firms routinely perform conflicts checks when they evaluate new clients. . . . Similar arrangements can be made to disallow political contributions and periodically check for them. To avoid the appearance of impropriety, judges and firms must fashion appropriate measures to stay away from what occurred here.
>
> That said, however, we recognize that respondent took some steps to try to avoid what happened, which in the end were ineffective. He also argues that Canon

> 7A(4) has not previously been applied to facts like those now before the Court. In addition, his law partner acknowledges that he was responsible for all of the political contributions made.

Given the nature of the facts in this case and a lack of clarity in the law, the Court declined to find a violation of the code of judicial conduct.

The Court noted that it did not need to address the judge's allusion to the First Amendment in light of the disposition of his case but that it agreed with the Committee's analysis.

> Law partners of municipal court judges remain free to exercise their First Amendment rights by contributing to political causes as individuals. To be clear, this opinion addresses contributions from a law firm's business account, not a partner's personal funds. From a practical standpoint, this approach may be somewhat more burdensome for a part-time judge's partners and associates. But we are plainly not limiting the First Amendment rights of attorneys who practice law with part-time municipal judges because those lawyers may continue to make personal political contributions.

In addition to finding a violation of the code of judicial conduct, the Committee had found a violation of Rules 2:15-8(a)(5) or (6), which list 6 types of allegations that the Committee may investigate (misconduct in office, willful failure to perform judicial duties, incompetence, intemperate conduct, engaging in partisan politics, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute). Noting these areas "in many respects parallel the categories of misconduct set forth in the canons of the Code of Judicial Conduct," the Court stated Rule 2:15-8 does not provide substantive standards of conduct for judges to follow, which instead are found in the code of judicial conduct, the rules of professional conduct, and certain other rules. Recognizing that language in prior cases could lead to an alternative view, the Court directed that, going forward, the Committee should not use Rule 2:15-8 as a basis for a substantive ethical violation.

Public Reprimand of Black (North Carolina Judicial Standards Commission August 13, 2010) (www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc10-013.pdf)

The North Carolina Judicial Standards Commission publicly reprimanded a judge for a 2-year delay in entering an order; the judge accepted the reprimand.

Over 5 days, ending July 30, 2008, the judge presided over a hearing on the issue of equitable distribution in a divorce case. On July 1, 2009, a status hearing about entry of the order was held. From September 30, 2009 until May 5, 2010, counsel for the plaintiff filed 6 notices of hearing for entry of the order with the court clerk. The judge repeatedly assured the parties that the order was close to completion. The order was filed on July 13, 2010. The complexity of the case, scheduling conflicts with both parties' attorneys, a large caseload, and limited court resources contributed to the delay. The judge also underwent shoulder surgery while the order was pending. The Commission

noted that the judge had acknowledged that the order was excessively delayed and fully cooperated with its investigation.

Disciplinary Counsel v. Campbell, 931 N.E.2d 558 (Ohio 2010)

Agreeing with the recommendation of the Board of Commissioners on Grievances and Discipline based on the parties' stipulations, the Ohio Supreme Court suspended a judge from the practice of law for 1 year for (1) an improper investigation of a criminal matter pending in his court; (2) failure to act in a patient, dignified, and courteous manner; (3) use of his position to pressure persons into action; (4) improper handling of proceedings to appoint counsel to indigent defendants; (5) comments that improperly gave the impression that 3 defendants were remanded into custody due to a failure on the part of the county commissioners; (6) placing a defendant in a holding cell until he was ready to discuss her case; (7) creating the appearance that he was trying to force the mayor to execute a law director's contract; (8) involving himself in the formulation of charges against a defendant; and (9) badgering 2 defendants about their eligibility for appointed counsel. The Court stayed 6 months of the suspension on the condition that the judge commit no further violations for 12 months; if the judge fails to meet this condition, the stay will be lifted, and he will serve the entire 1-year suspension.

(1) A defendant had appeared before the judge several times on charges of underage consumption of alcohol and similar conduct. On April 9, 2006, that defendant and several other individuals were arrested for underage consumption at a party held at an apartment. 2 of the individuals appeared before the judge on April 13 and pleaded guilty. Without placing them under oath, the judge questioned them about who had brought alcohol to the party, and each stated that the defendant had supplied alcohol. Although 2 attorneys had already entered an appearance of counsel on the defendant's behalf, they were not present at this hearing. Afterwards, the judge spoke to a police officer off the record and indicated that he should follow up on the information that the defendant had brought alcohol to the party. After investigating, the police did file a charge against the defendant for furnishing alcohol to minors.

At his pretrial and probation-violation hearing, the defendant entered a not-guilty plea. The city law director moved to dismiss the furnishing charge because it appeared that the police had questioned the defendant without his counsel or giving him his Miranda warnings. The judge denied the motion, stating, "Well it doesn't matter if he was given Miranda or not it is the testimony of the other people [sic]. On the new charge." When the law director noted that the defendant had made an admission to the officer, the judge replied, "So, he can suppress it. It doesn't change the charge."

2 days later, the same 2 individuals previously questioned appeared before the judge to enter pleas to related underage-consumption charges. The judge asked who had brought the alcohol to the party, and 1 mentioned the defendant's name. When the other also mentioned the defendant in response to questions, the judge placed him under oath. Before he continued the questioning, the judge asked the law director who was representing the defendant. The law director identified the attorney, but, after acknowledging her response, the judge continued to question the other defendant.

At defendant's pretrial, the parties proposed a plea that would have dismissed the furnishing charge in exchange for a plea on other charges. However, after a discussion

with the parties, the judge declined the plea, stating, "Alright, then I guess we will set that one [the furnishing charge] for trial. Furnishing is a very serious crime and this court takes a very serious approach to that."

During a later off-the-record discussion of the plea agreement, the judge opened a volume of the Ohio Revised covering depositions in criminal cases and left the bench. When the judge returned, the defendant's attorney stated that he did not want to depose witnesses on the furnishing charge due to the added expense. The judge then asked the clerk to get the audio recordings of the earlier hearings. Using headphones because the recordings could not be played on the courtroom speakers, the judge listened to the portions where the defendant was implicated for bringing alcohol to the party. He then relayed what he had heard to the attorneys.

The judge stated that he wished to proceed with the probation-violation hearing. The defendant's attorney objected, stating that because the probation violation was based upon the same facts as the furnishing and underage-consumption charges, the hearing should be continued until those charges were resolved. The parties stipulated and the board found that the judge set the case for a pretrial and probation-violation hearing and permitted the defendant to remain on electronic monitoring. But the record demonstrates that before doing so, the judge proceeded to hear the testimony of a police officer. Only when the defendant's attorney renewed his objection at the conclusion of the state's direct examination of the witness did the judge agree to continue the hearing. At that time, the judge also terminated the defendant's bail for electronic and remanded him into custody.

Based upon these facts, the parties stipulated and the Board found that the judge engaged in misconduct by encouraging the officer to follow up on the statements of 2 other individuals who had implicated the defendant for furnishing alcohol and questioning the other minors about who had supplied their alcohol after the defendant had been charged with furnishing alcohol to a minor. The Court stated:

> We do not suggest that a judge who obtains information about illegal conduct may not relay that information to law-enforcement officials who may, at their discretion, elect to investigate. Here, however, the judge did more than merely forward information that came to his attention; he became a participant in the investigation. The totality of the evidence in this case clearly and convincingly demonstrates that respondent (1) actively sought information about the defendant who allegedly supplied the minors with alcohol, knowing that he already had a case pending before the court, (2) placed one of the minors under oath for the specific purpose of obtaining evidence against the defendant, (3) initiated the law-enforcement investigation of the defendant for furnishing alcohol to minors, (4) repeatedly and unreasonably refused to either dismiss the furnishing charge or to consider a plea that would result in the dismissal of that charge, (4) revoked the defendant's EMHA after counsel requested a continuance of his probation-violation hearing until after the furnishing and underage-consumption charges were resolved. Moreover, the record demonstrates that on August 25, 2006, while denying that any basis existed for his disqualification, the judge assigned the case to a visiting judge. And on August 28, 2006, pursuant to R.C. 2701.031, the judge was removed from this case in response to an affidavit of disqualification

filed by defendant's counsel, based upon a "lingering distrust" that the judge could fairly and impartially decide the case.

The Court concluded that the judge's conduct "crossed the line from the permissible relay of information to law enforcement to the impermissible active participation in the investigation and collection of evidence against the defendant."

(2) During an off-the-record pretrial hearing in chambers in May 2006, 1 of the attorneys representing a defendant in a domestic violence matter informed the judge that his client would not accept a plea agreement and wanted a jury trial. The judge became upset with the attorney and told him that he was "behaving like a horse's ass." After the attorneys left the pretrial for the lunch recess, the judge encountered a police officer in a back hallway and asked him to open defendant's holding cell. In a raised voice and outside the presence of defendant's counsel, the judge told him that he would be taken back to the jail because there was not going to be a plea. When counsel returned after lunch, the judge continued the pretrial for 2 months. The judge testified that his statement to defense counsel was "out of line" and that he should not have spoken to a defendant who had an attorney.

(3) On January 13, 2005, a defendant appeared before the judge to be arraigned for operating a vehicle while intoxicated and possession of marijuana. On February 7, he pleaded guilty to an amended charge of reckless operation and was fined $150. At the time of his plea and sentencing, the results of a second test of his urine sample were not available. Even though he knew that the defendant's case had been closed, in mid-February, the judge asked the city law director's secretary to bring the law director's file on the defendant to the municipal court. Upon examining the file, the judge found that it did not contain the results of the second drug test. The law director was unaware of the judge's request for her case file until she discovered it sitting on the counter in the clerk's office.

At the panel hearing, the judge testified that it was wrong for him to use his position as a judge to pressure someone, in this instance the law director's secretary, to do something. He also conceded that it was not part of his job to look in the prosecutor's file.

(4) A defendant, an ironworker from Nebraska, was arrested for assault, aggravated menacing, and criminal damaging causing serious risk of physical harm — all first degree misdemeanors. At his arraignment, the judge spoke to defendant regarding his eligibility for appointed counsel:

Court: Have you hired an attorney * * *?
Defendant: No.
Court: You're a union ironworker?
Defendant: Well, I was until Friday.
Court: You were on the date of — of the event?
Defendant: Yes, sir.
Court: The Court finds you're not indigent; you'll have to hire an attorney.

Because of the defendant's criminal record and the fact that he was a Nebraska resident who had worked in Van Wert only a short time, the city law director requested a high

cash bond. The judge set bail at $20,000 secured bond or 10% cash bond. Unable to make bail, the defendant was held in jail. The defendant repeatedly requested appointed counsel; the acting law director relayed one such request to the court before trial. At trial, the defendant made at least 3 separate requests for appointed counsel and stated at least 6 times either that he had no money or that he had no money to hire an attorney. The judge denied those requests, stating that the court had already determined that he was ineligible for appointed counsel, but granted him a continuance to obtain counsel at his own expense. An attorney ultimately entered an appearance on the defendant's behalf and represented him on a pro bono basis. A guilty plea was entered, and the judge sentenced the defendant to 180 days in jail with credit for time served, suspended the balance upon payment of a $250 fine and costs, and placed him on probation for 1 year.

At the panel hearing, the judge testified that he had misunderstood the law that applies to appointment of counsel for indigent defendants, in that he believed that the focus of the determination was the defendant's status at the time of the offense. He stated that had he properly understood the law, he would have made a more thorough inquiry regarding the defendant's finances at the arraignment.

(5) On April 30, 2007, 3 defendants who were in custody and apparently indigent and in need of appointed counsel appeared before the judge; there were no public defenders available that day. While arraigning 1 of the 3, the judge tried unsuccessfully to reach the public defender's office to determine whether someone could provide counsel. When he was unable to locate a public defender, the judge stated on the record that a public defender is normally present in court, but that the "county commissioners chose not to properly endorse the contract; so, therefore, no county — no public defender is here."

After commencing the third such arraignment, the judge called a county prosecutor who was also president of the county bar association to see if she could assist him in locating an attorney who would be willing to act as a public defender that day. When this attempt failed, the judge continued the 3 arraignments and remanded all 3 defendants to custody until the following morning. The judge then wrote a letter to the prosecutor and copied it to the public defender, detailing what had occurred during the arraignments.

At the panel hearing, the judge agreed that it was inappropriate for him to make comments regarding the acts of the county commissioners and admitted that those remarks improperly gave the impression that the 3 defendants were remanded into custody due to a failure on the part of the county commissioners.

(6) On August 6, 2007, a defendant appeared before the judge and entered a no contest plea to misdemeanor charges of possession of marijuana and drug paraphernalia. After entering her plea, the defendant volunteered that she was not currently using marijuana, but had been prescribed marijuana in pill form during an earlier hospitalization and had continued to use it in plant form for a time afterwards. Based upon her representation, the judge asked if she would take a urine drug screen, and the defendant agreed.

Shortly after the defendant left with a female staff member, she returned to the courtroom where the judge was conducting further arraignments. The defendant stated that she would require a blood test because she had end-stage renal disease and was unable to produce urine. The judge had her placed in a holding cell for approximately 49

minutes while he completed his arraignment docket. Upon the defendant's return to the courtroom, the judge questioned her, under oath and on the record, about her medical conditions.

At the panel hearing, the judge acknowledged that because the defendant had not been disorderly or out of line, it was neither prudent nor necessary to place her in a holding cell until he was ready to discuss her case.

(7) The city law director gave notice of her resignation, effective December 31, 2006. In the early morning of January 2, 2007, the judge learned that her successor had not yet received a signed contract from the city and so would not serve as the prosecutor that day. Without a representative for the prosecution, the arraignments scheduled in the judge's courtroom could not proceed. The judge called the mayor's office and spoke with his secretary. Shortly thereafter, the mayor arrived at the courthouse and went to the clerk's office to see the judge. Seeing the mayor, the judge entered the clerk's office wearing his judicial robe and gesturing toward the courtroom. After the 2 men entered the courtroom and the judge took the bench, the clerk announced that court was in session. The judge called the mayor to the bench and questioned him, on the record but not under oath, about why the new law director's contract had not been approved. The mayor explained that before the new law director could assume his duties, 3 people had to sign the contract — the mayor, the new law director, and the city auditor. The judge then asked the mayor whether the law director would be in court at 11:00, and the mayor said that he would be.

The judge conceded that by wearing his robe and bringing the mayor into the courtroom, he gave the appearance that he was trying to force the mayor to execute the law director's contract and that his conduct was not appropriate.

(8) On July 15, 2004, a defendant appeared before the judge, pro se, and entered a guilty plea to a charge of violating a civil protection order that had been granted in her favor by allowing the person against whom she had obtained the order to stay in her home. The judge convicted her and sentenced her to serve 1 day in jail and to pay a $50 fine. 6 days later, an attorney entered an appearance on the defendant's behalf. Citing a court of appeals decision in State v. Lucas, 795 N.E.2d 642 (2003), for the proposition that the protected subject of a CPO cannot violate her own CPO, the attorney moved for withdrawal of the guilty plea. The judge denied the motion. On appeal, citing Lucas, the court of appeals reversed. On remand, the judge permitted the defendant to withdraw her guilty plea and enter a plea of not guilty to the original charge. The judge made it clear that he would not dismiss the charge until an amended charge was filed. After a discussion off the record with the law director and defense counsel as to which charge would be appropriate, the prosecution amended the charge to obstruction of justice. The defendant pleaded guilty to that lesser charge. The judge convicted her and sentenced her to 10 days' incarceration, all suspended, 1 year of probation, plus a $50 fine and costs. Additionally, as a condition of her probation, the judge ordered the defendant to have no contact with the party against whom she had obtained the civil protection order.

At the panel hearing, the judge stated that he had misunderstood his role upon remand from the appellate court and admitted that he should have dismissed the original charge. He also acknowledged that as a judge, it was his duty to serve as the neutral referee and that it was improper for him to be involved in the formulation or prosecution of charges.

(9) A defendant completed a personal-data form and bail questionnaire stating that he was homeless, was not employed, and owned no property. The judge had this information available to him at the defendant's arraignment on a count of breaking and entering. However, the judge badgered him by repeatedly inquiring about his employment history, his efforts to seek employment, why he had not sought employment, and why he did not want to work. Although the judge often cut off the defendant's attempts to answer, the defendant eventually stated that he had not been employed since 2004. Based upon the information obtained at hearing, the judge determined that defendant was indigent, appointed a public defender, and ordered a mental-health evaluation. Although the defendant was homeless and had no income, the judge set bail at $2,500 cash, which required the defendant to be held in jail.

Another defendant appeared before the judge for arraignment. In her bail questionnaire and personal-data form, defendant stated that she was not employed, had income of both "0" and "100," was married, and was living at the House of Transition, a local women's shelter. In assessing her eligibility for appointed counsel, the judge asked the defendant about her husband's employment and income. The defendant responded that she had separated from her husband and had obtained a protection order against him in Indiana. When the judge asked to see the order, the defendant stated that she did not have a copy, that the issuing court did not know her whereabouts, and that once she got settled in locally, her attorney in Indiana would send her the paperwork. The judge indicated that without a copy of the order, he would have to consider her husband's income in determining her eligibility for appointed counsel. The judge also inquired about the defendant's residence, stating that "as I understand your statement [you're] homeless; correct?" When she replied, "Well, I have the House of Transition," the court insisted, "No, you're homeless. The house — You have no right to be at the House of Transitions. That's a conditional, vol — that's an — something you're allowed to be at," and continued to refer to her as "homeless" throughout the hearing. At the conclusion of the hearing, the judge conditionally appointed a public defender to represent defendant, set bail at $5,000 cash bond, and remanded her to jail.

At the panel hearing, the judge acknowledged that he had not treated either of the defendants with the requisite courtesy and admitted that he "basically lapsed into a trial lawyer cross-examination," asking too many questions and pressing too hard to get answers.

As mitigating factors, the Court noted that that judge had not been the subject of previous discipline, had not acted with a dishonest or selfish motive, and had made a full and free disclosure to the Board, and had exhibited a cooperative attitude. As aggravating factors, the Court noted that the judge engaged in a pattern of misconduct involving multiple offenses and caused harm to vulnerable persons, namely criminal defendants, who were temporarily deprived of appointed counsel and subject to unnecessary and embarrassing questions about their personal affairs.

Disciplinary Counsel v. Plough, 931 N.E.2d 575 (Ohio 2010)

Accepting the recommendation of the Board of Commissioners on Grievances and Discipline, the Ohio Supreme Court suspended a former judge from the practice of law for 1-year (with 6 months stayed) for (1) failing to maintain or provide complete

records of the proceedings in his courtroom, (2) unreasonably delaying compliance with a mandate of the court of appeals on remand, (3) engaging in an improper ex parte communication with a prosecutor, (4) expressing an opinion on an issue of fact in the jury's presence, berating defense counsel during closing argument, and refusing to grant a mistrial based upon his own prejudicial conduct, and (5) refusing to accept a guilty plea for a misdemeanor speeding violation based upon his mistaken belief that the prosecutor was statutorily required to charge the defendant with a greater offense. 1 justice dissented and would have suspended the judge for 1 year.

(1) The judge failed to either maintain or provide a complete record in 3 proceedings in his court despite numerous written requests by the parties. In 1 case, the judge never produced an audio recording of the proceedings. In a second case, the recordings were incomplete or incapable of being transcribed. In a third case, the judge failed to comply with multiple remands from the district court of appeals ordering him to produce the audio recording or follow the procedure for creating a statement of the evidence or proceedings. The judge's failure to maintain or provide complete recordings resulted in the reversal of a portion of a criminal defendant's sentence that required him to register as a sex offender and the reversal of another defendant's conviction for operating a vehicle under the influence of alcohol.

(2) The judge waited almost 3 months to comply with a district court of appeals remand ordering him to vacate an appellant's operating while intoxicated conviction and enter a judgment of acquittal.

(3) The judge telephoned the county prosecutor without defense counsel present to discuss the judge's opposition to an assistant prosecutor's plea agreement reducing a pending third degree felony charge to a misdemeanor.

(4) At a jury trial of a defendant charged with operating while intoxicated, the judge interrupted when defense counsel attempted to ask the arresting officer on re-cross examination whether the officer had properly performed the field sobriety tests. Referring to the officer's previous testimony during a suppression hearing, the judge stated, "we've gone through this hearing before and we've determined that these tests were done in accordance with [National Highway Traffic Safety Administration] standards, so go on with another question." The judge denied the resulting defense motion for a mistrial. Later, during closing argument, the judge repeatedly interrupted defense counsel, berated him, and criticized his professional qualifications in front of the jury. The district court of appeals reversed the judgment of conviction in part, based on the judge's conduct.

In the discipline case, the Court stated that the judge's "conduct in expressing his personal opinion on a factual issue to be resolved by the jury and in castigating defense counsel during closing argument caused defense counsel to forfeit closing argument, thereby prejudicing the defendant and adversely affecting public confidence in the judicial system."

(5) The judge refused to accept a guilty plea for a minor-misdemeanor speeding offense based upon his mistaken belief that a statute mandated that the defendant be charged with a more serious offense. In fact, the defendant did not have 2 prior convictions within 1 year so as to warrant a fourth-degree misdemeanor charge.

In re Squire, 617 F.3d 461 (6th Circuit 2010)

Affirming the district court's imposition of reciprocal discipline, the U.S. Court of Appeals for the 6th Circuit held that the state disciplinary proceedings against a former Ohio judge were "not so lacking in notice or opportunity to be heard as to constitute a deprivation of due process" and that there was "not such an infirmity of proof establishing the misconduct as to give rise to a clear conviction that this Court could not accept as final the conclusion of the Supreme Court."

In 2007, adopting the findings of fact, conclusions of law, and recommendation of the Board of Commissioners on Grievances and Discipline, the Ohio Supreme Court suspended the former judge from the practice of law for 2 years for her conduct in 2 civil protection order cases, 2 divorce cases, and 1 case involving a complaint that a child was abused and neglected. Disciplinary Counsel v. Squire, 876 N.E.2d 933 (Ohio 2007). The judge claims that she should not have been reciprocally disbarred because she was denied due process during the state proceeding because Disciplinary Counsel refused to reveal the names of every witness with whom he had spoken during the investigation, the findings of the state court were against the weight of the evidence, and investigation was the product of political machinations between members of the Ohio Supreme Court and the Franklin County Domestic Relations and Juvenile Court.

The 6th Circuit found that the judge had "not shown that her state proceedings deprived her of due process," noting she was given notice of all the claims against her and she had ample opportunity to respond to the state's charges, to testify in her own defense, to present witnesses and evidence, and to make objections "in over eight days of hearings recorded in a transcript that runs several thousand pages long." The Court also found that failure to disclose the names of those persons to whom the Disciplinary Counsel may have spoken during his investigation, but who were not part of the administrative record and did not testify against her, was not a due process violation requiring reversal. The Court noted that the judge's "testimony during her disciplinary hearing is peppered with references to her duty to God, her physical ailments, and her personal problems. Some of it is difficult to understand. None of it supports her claim that the findings of the Ohio Supreme Court run counter to the weight of evidence," adding that despite affidavits of several witnesses who testified that a particular complainant attorney's behavior was appalling and that the judge was fair, did not shout, and did not behave inappropriately did not indicate that there is such an infirmity of proof as to give rise to the clear conviction that it could not accept as final the state court's conclusion on or that "imposition of the same discipline by this court would result in grave injustice."

The Court also rejected the judge's "claims that she was punished more harshly than similarly-situated colleagues of different political affiliations and races."

> In support of her race bias claim, Squire mentions several disciplinary cases that she alleges demonstrate that similarly-situated white judges received lesser sanctions than Squire for more egregious behavior. Though Squire contends that the judges' violations were more outrageous than her own, Squire fails to show that this allegation is more than her subjective opinion, particularly as the judges' offenses are not similar in content or scope to Squire's. Furthermore, there is no evidence in the record to support a finding of racial bias.

> Moreover, while it may be true that Squire was the only democrat on the Franklin County Domestic Relations and Juvenile Court, Squire presents no evidence that supports a finding that her punishment was overly harsh due to her political party affiliation.

In re Alonge, Opinion, (Pennsylvania Court of Judicial Discipline June 18, 2010), Order (July 21, 2010) (www.cjdpa.org/decisions/jd09-04.html)

The Pennsylvania Court of Judicial Discipline ordered that a judge be suspended for 60 days without pay for "scary" conduct "akin to stalking" toward 4 female lawyers (2 of whom occasionally appeared before the judge and 1 of whom was another judge's clerk) and a 17-year-old girl who had appeared in his court; the Court also placed him on probation until December 31, 2011. The Court ordered that, during probation, the judge shall continue with the medical are of Dr. Thomas Gustin and Dr. Lamar Neal as described in Dr. Neal's videotaped testimony at the sanction hearing. The Court ordered that the Judicial Conduct Board provide monthly reports certifying the judge's compliance with the conditions. 1 member would have suspended the judge without pay for 30 days.

The Court found that the judge's "most remarkable" conduct was his encounter with Julie Bagnoni, a part-time assistant public defender who occasionally appeared in the judge's courtroom. On October 30, 2007, at about 7 p.m., Bagnoni pulled her automobile, with her 2-and-1/2-year-old son in the back seat, into the driveway of her home, and another car pulled in right behind her. It was dark and raining. The judge got out of the car and came toward her, telling her he was the district justice from Northeast and "had come to meet the phenomenal and sensational attorney that he had heard so much about." The judge told her that even through Nicole Sloane had told him Bagnoni had blonde hair, he saw that her hair was not blonde but brunette, but that was "okay with him." The judge told Bagnoni that he had been waiting for her to arrive for several hours. Bagnoni had never given the judge her address, phone number, or any personal information. Although Bagnoni told the judge about 20 times that she had to go into the house, the judge remained in the driveway for 4-7 minutes chitchatting about Bagnoni participating in moot court with him. The judge asked Bagnoni if he could call her sometime, and she responded only if it was about business. Finally, Bagnoni turned away, ignoring the judge, went into the house, and locked the door. Immediately calling Sloan, Bagnoni left a message on her voice mail asking why she would "sic this guy on me, why she would tell him that I lived there, why he thought I had blonde hair, instead of brown hair, and basically what was going on." At 9:15 p.m. the next night, which was Halloween, the judge called Bagnoni and asked how her son liked Halloween and if he got a lot of candy. He said there was nothing on TV and he was bored. The next day, Bagnoni received in the mail materials from a criminal law seminar with a note from the judge that said, "you couldn't make it to the seminar I made you a copy." The judge called Bagnoni at her home at least 10-12 times, usually on Friday or Saturday night, leaving no message; Bagnoni identified the judge through caller ID. Bagnoni spoke to the chief public defender and gave him a memo describing her encounters with the judge, asking that it be kept in her file.

On October 12, 2006, Hallie DeMarco, then age 17, appeared before the judge having been cited for under-age drinking. DeMarco and her mother met with the judge in his office, and a disposition was worked out. During the meeting, when DeMarco mentioned her interest in soccer, the judge told her that he was a soccer coach at Mercyhurst College, offering to show her the college campus and to give her a ride to the campus. In March 2008, at a community social event, the judge invited DeMarco to his office to talk about an opportunity he had for her. When she met with him for approximately 45 minutes in his private office, the judge made small talk, telling her several times how he had been "struck" by her appearance and complimenting her eyes and curls. When DeMarco asked what the "opportunity" was, the judge mentioned the possibility of hiring DeMarco on a per diem basis to fill in when an employee was absent. DeMarco said that she was not interested. The conversation ended, and the judge said, "Don't be a stranger. Keep in touch, here is my card." Thereafter, the judge called DeMarco on her cell phone, sometimes a couple of times a day. On 1 occasion, DeMarco's brother took the phone from her and told the judge he was not too happy with the judge's calls to his sister. On a couple of occasions, the judge sat alone in the club where DeMarco worked part-time as a waitress.

Kari Froess first met the judge in November 2006 at a brunch for the new members of the county bar association. Throughout 2007, the judge called Froess repeatedly. Sometime in 2007, the judge showed up unexpectedly at her law office, and they talked for 15 minutes about mock trials and other irrelevancies. The judge said he had heard Froess had purchased a new home, which she had not told him.

Heather Purcell was a court solicitor and law clerk to Judge Elizabeth Kelly. In January 2008, Judge Alonge called Purcell at her office with a question about marriage ceremonies. Purcell had never met the judge, and he was not known to her. The judge began asking personal questions about her education and prior work experience. 2 weeks later, the judge called Purcell and asked if she would like to be his law clerk when he served as a judge in a moot court competition. Purcell did not accept his invitation. 2 days later, the judge showed up unannounced at Purcell's office in the courthouse; they had a 5-minute conversation about nothing in particular during which the judge continuously looked at Purcell's wedding ring, making Purcell "uncomfortable." 5 days later, the judge again appeared at Purcell's office unannounced and stated that he had something to tell her but she had "made him feel shy" at their earlier meeting. The judge told Purcell that the magisterial district judge in the district where Purcell lived was planning to retire and that she should run for that office. Purcell had never told the judge where she lived. The judge also asked if the ring she was wearing was an engagement ring. Purcell told him it was a wedding ring. A month later, the judge again called Purcell at her office and left a message asking her to call him.

Erin Connelly was an assistant district attorney who occasionally appeared in the judge's court. Sometime after the judge took office in January 2006, he began calling Connelly frequently, asking her to call him Gerry and to go to lunch. The calls made Connelly uncomfortable in his courtroom, and she would not enter his office unaccompanied.

The Court concluded:

> While it cannot plausibly be maintained that Respondent's attentions to these young women were not extremely irregular, extremely out of ordinary, bizarre and even "weird," one might be inclined to regard the conduct as perhaps annoying but essentially harmless, attributable to Respondent's crashing lack of any social fluency. However, brief reflection leads to the realization, indeed, to the conviction, that Respondent's conduct cannot be excused or rationalized in such a fashion.
>
> First of all, conduct of a judge which is bizarre and weird by itself certainly does not enhance the professionalism, the dignity or the reputation of the judicial office – of judges across the board. But this Respondent's conduct, bizarre and weird as it was, did not play to an empty house, it did not occur in a vacuum. There were five young women on the receiving end. And they were young – one, DeMarco, was only 17 . . . . The other four women were young, newly admitted lawyers, and we believe their status as lawyers and Respondent's status as judge makes Respondent's approaches to them significantly more coercive. In DeMarco's case, Respondent was abusing the perceived power of his office by deluding a 17 year old into believing he could do something for her.
>
> Second, Respondent's conduct was not harmless. We regard Respondent's conduct as akin to "stalking." He made repeated phone calls to these women, mostly at night. He made the calls even after repeatedly being told not to call. He appeared uninvited and unannounced at the offices and homes of these women. In some cases he had obtained information about their personal lives and affairs which could only have come from a personal investigation conducted by Respondent. This is beyond unsettling – this is scary. Two of the women lawyers, Connelly and Bagnoni, had jobs which required them to be in Respondent's court from time to time, and both were so concerned that their expressed disaffection with Respondent's attentions would have repercussions in his courtroom to the disadvantage of their clients, that they took steps to prevent that from happening.

In re Dumas, Reprimand (Tennessee Court of the Judiciary July 16, 2010) (www.tsc.state.tn.us/geninfo/COJ/COJindex.htm#publicPleadings)

Based on an agreement, the Tennessee Court of the Judiciary publicly reprimanded a judge for hiring as her court officer her daughter, without competitive consideration of other qualified applicants, and authorizing her to be paid a salary commensurate with the position even though she had no experience or training. Her daughter served in the position from November 2005 until September 2006, when her employment was terminated prior to the initiation of the Court's complaint.

The Court also disposed of the 2 other counts in the complaint. Count 1 alleged that the judge was persistently late in attending court sessions and failed to open court at 9:00 a.m. or other designated times for litigants. Count 2 alleged that the judge consistently failed to attend her dockets and extensively used special judges, appointed in a fashion that does not comply with Tennessee law. The Court retired count 1, to be

dismissed in 90 days if another judge certifies to Disciplinary Counsel that the judge has convened court in a timely manner and regularly conducted her own court docket except for emergencies or other normal absences. The Court dismissed count 2.

1 member of the Court wrote a dissent:

> With all due respect to my colleagues on the hearing panel in this case, I am unable to accept the settlement proposed by the parties as a final disposition in this case. There is an adage known by those in the legal profession who are involved in litigation that "some cases just need to go to trial." I have carefully, with much reflection, reviewed the formal charges filed in this matter, and Judge Dumas' Answer. I have also reviewed the other pleadings and the deposition of Mr. James Larue [the investigator for the Court]; all of these documents are public record and are available on the web site of the Administrative Office of the Courts, www.tncourts.gov, by clicking "Information" and then "Court of the Judiciary," then "Public Cases." I wish to make clear that I am not saying in this dissent that the disposition approved by the majority of the hearing panel is too severe. Neither am I declaring that the disposition is too lenient. I am simply of the opinion that this case is one of those cases that should be resolved only after a full trial.

Inquiry Concerning Keller, Findings, Conclusions, and Order of Public Warning (Texas State Commission on Judicial Conduct July 16, 2010) (www.scjc.state.tx.us/pdf/skeller/CommissionOrder.pdf)

The Texas State Commission on Judicial Conduct publicly warned the presiding judge of the Court of Criminal Appeals for her conduct when attorneys representing a death row inmate asked to be allowed to file a writ of habeas corpus after 5:00 p.m.

On the morning of September 25, 2007, the U.S. Supreme Court announced it would hear a case (Baze v. Rees) that raised the issue whether Kentucky's 3-drug protocol for lethal injection violated the 8th Amendment's prohibition against cruel and unusual punishment. Texas uses a similar protocol. Michael Richard was scheduled for execution at 6 p.m. on September 25. The Texas Defender Service, which represented Richard, had only a few hours to seek a stay of Richard's execution based on the U.S. Supreme Court decision to hear the case. Before the U.S. Supreme Court would even consider whether to stay Richard's execution, Richard had to exhaust the argument based on Baze before the Texas courts, that is, to present a lethal injection argument to the Texas Court of Criminal Appeals.

The Texas Court's execution-day procedure provided that a designated judge would be in charge of each scheduled execution and that all communications regarding the scheduled execution must be referred first to the assigned judge. (The execution-day procedures were unwritten until November 2007, when they were put in writing, but it was undisputed that the oral policy in effect on September 25, 2007, was identical to the written procedures created in November 2007.) Judge Cheryl Johnson was the assigned judge for Richard's execution, although this was not disclosed to Richard's counsel. Judge Johnson and other judges intended to stay at the Court until word of the execution

was received. Members of the Court, including Judge Keller, were aware of the U.S. Supreme Court's decision to grant certiorari in Baze.

Judge Keller left her chambers at about 3:45 p.m. returned home, and did not return to the Court that day. Before she left, the judge had seen an e-mail from the Court's General Counsel, Edward Marty, concerning an anticipated filing on behalf of Richard.

Texas Defender Service had computer and/or e-mail problems that it anticipated would prevent them from filing by 5:00 p.m. At approximately 4:40 p.m., Dorinda Fox of Texas Defender Service called the Texas Court deputy clerk, Abel Acosta, and told him that Texas Defender Service would like to file late. Acosta told Fox that he would need to check with someone. Acosta knew that a judge was assigned for the Richard execution day, but did not know of the execution-day procedures or of any requirement that the communication be first directed to the assigned judge. He had never received any training concerning the execution-day procedures in his 17 years at the court. Immediately after speaking with Fox, Acosta called Marty and told him of the telephone call. Marty, who also did not know that the execution-day procedures required all communications must be first referred to the assigned judge, called Judge Keller at her home at about 4:45 p.m. looking for direction. Marty recalled telling the judge that a representative of Richard's legal team had asked to keep the Court open past 5:00 p.m. The judge said "no," and then asked "why?" Marty explained that they wanted to file something, but they were not ready. The judge again responded "no." She said, "We close at 5:00 p.m." Based on the judge's reply, Marty told Acosta that the Presiding Judge said the Court closed at 5:00 p.m. and that the Court was not going to accept something after 5:00 p.m. Acosta called Fox at approximately 4:48 p.m. and told her that he had been told to tell her, "We close at 5:00 p.m." Fox asked Acosta if she could take the filing to the Court and drop it with a security guard. Acosta replied he did not known what good that would do because a security guard would not accept it. In a call at about 5:07 p.m., Melissa Waters of Texas Defender Service asked Acosta to confirm that the Court would not accept a late filing, as it had done on previous occasions, and whether they could e-mail or fax the filing. Acosta told Waters that the decision had already been made not to accept a filing after 5:00 p.m. and that fax or e-mail filing would not be permitted. Acosta testified that, if the decision had been his, he would have accepted the filing after 5:00 p.m. and that it would have caused him no hardship. Acosta believed that he could not talk to a different judge about the communication because it would have been going behind the Judge Keller's back and would have been disloyal to her.

At approximately 4:59 p.m., Judge Keller called Marty from her home and asked him whether representatives for the person scheduled to be executed that day had filed anything. Marty told the judge that they had not. In either the 4:45 p.m. call or the 4:59 p.m. call, the judge asked Marty why the clerk's staff should be made to remain after hours for lawyers who cannot get their work done in time.

The Texas Defender Service did not complete the lethal injection pleadings until after 5:00 p.m. when the Court's clerk's office closes. Fox called Acosta at approximately 5:56 p.m. and told him that she was headed to the Court to hand-deliver the filing on behalf of Richard. Acosta told Fox "don't bother. We're closed." In her telephone conversations with Marty, Judge Keller did not give him any guidance about the execution-day procedures and did not tell him to direct Texas Defender Service

inquiries to Judge Johnson, the assigned judge, but instead, addressed and disposed of the communications. Neither Judge Johnson nor the other judges who remained at the Court after 5:00 p.m. were aware that Richard's legal team had called to ask whether filings after 5:00 p.m. could be accepted. When Judge Johnson left the Court that evening, she was "quite surprised" that nothing had been filed. If Judge Johnson had learned of the Texas Defender Service communications, she would have accepted the filing.

At approximately 6:10 p.m., Texas Defender Service faxed a motion to stay Richard's execution to the U.S. Supreme Court. The U.S. Supreme Court denied the motion at 8:01 p.m. Richard was executed by lethal injection at 8:25 p.m. The Commission found that the failure of the Texas Court of Criminal Appeals to consider and rule on Richard's application for relief compromised his counsel's efforts in seeking a stay of execution from the U.S. Supreme Court. The Commission noted that Judge Keller testified that, if she were asked the same questions she was asked on September 25, 2007, and knowing the same things she knew on September 25, 2007, she would do nothing differently today.

The next morning, the judges of the Texas Court of Criminal Appeals met for a conference. At the end of the conference, several of the judges discussed their surprise that Richard's lawyers had not filed anything based on Baze. Judge Cochran, who was not aware of Marty's communications with Judge Keller the day before, posed a hypothetical in which someone called the Court before 5:00 p.m., and said they wanted to file something, but could not get it there before 5:00 p.m. Judge Cochran's position was that the court should allow the late filing, and other judges expressed agreement with that viewpoint. Judge Keller was present for that discussion but did not disclose to the other judges her communications with Marty the night before or that Texas Defender Service had called requesting to file after 5:00 p.m.

2 days after Richard's execution, based on the same Baze claim that Richard had not been able to present, the U.S. Supreme Court granted a stay of execution for Carlton Turner's, after the Texas Court had denied his motion for stay. In April 2008, the U.S. Supreme Court issued an opinion in Baze ruling that Kentucky's method of lethal injection was constitutional. Between the time that the Supreme Court granted certiorari in Baze and the time it issued its opinion, Richard was the only person in the U.S. to be executed.

The Commission noted that journalists throughout Texas and the nation strongly criticized Judge Keller's conduct and that it had received numerous complaints asserting that her conduct cast public discredit on the administration of justice in Texas and asking that she be sanctioned or removed. The Commission also noted that judges of the Texas Court of Criminal Appeals had received numerous letters and e-mails, predominantly asserting that Judge Keller be sanctioned or removed.

The Commission found that the judge's addressing and disposing of the September 25, 2007 communications and her failure to direct Marty or Acosta to relay the communications to the assigned judge failed to comply with the execution-day procedures, interfered with Richard's access to court and right to a hearing as required by law, failed to accord Richard access to court and right to a hearing as required by law, and failed to require or assure that staff subject to her direction and control complied with the execution day procedures. The Commission found that the judge's second response of "no" to Marty's explanation that lawyers for the person scheduled to be executed that

evening wanted to file something was intentional conduct designed to prevent the clerk's office from accepting a filing after 5:00 p.m. and her call to Marty at 4:59 was willful or persistent conduct intended to assure that the clerks' office closed promptly at 5 p.m. without accommodating the request of counsel. The Commission also stated that the judge failed to cooperate with other judges and court officials in the administration of court business and to require court staff under her direction and control to observe the standards of fidelity and diligence that apply to herself, contrary to the aspirational goals in Canon 3C(1) and Canon 3C(2). The Commission stated, "while aspirational in application . . , these Canons convey a need for open communication, congeniality, and collegiality that are especially important to the function of the State's appellate courts, and the TCCA in particular. The Commission strongly urges that Judge Keller and all the judges of the TCCA reflect on the importance of achieving the goals stated therein."

Public Reprimand of Priddy (Texas State Commission on Judicial Conduct June 24, 2010)

The Texas State Commission on Judicial Conduct publicly reprimanded a judge for failing to obtain required continuing judicial education hours for 2009 and ignoring the Commission's numerous request that he respond to its inquiries.

The Texas Center for the Judiciary reported that the judge had failed to obtain the required 16 hours of continuing judicial education for fiscal year 2009. The judge did not respond to 2 letters of inquiry from the Commission requesting a written response, 1 e-mail advising him of his responsibility to respond to the Commission's inquiry and offering him the opportunity to appear before the Commission in person in lieu of a written response, to a call to his court coordinator, to a tentative decision to issue a public reprimand. The Commission noted that, in December 2008, the judge received a public warning from the Commission, for among other things, his willful and persistent failure to cooperate with the Commission's investigation against him involving an earlier complaint. The Review Tribunal Appointed by the Texas Supreme Court affirmed.

In the Matter of Eiler, 236 P.3d 873 (Washington 2010)

The Washington Supreme Court suspended a judge for 5 days without pay for deriding the intelligence of pro se litigants who appeared before her and rudely and impatiently interrupting them. 4 justices would have suspended the judge for 90 days, as recommended by the State Commission on Judicial Conduct. 1 justice would have only reprimanded the judge, but concurred in the 5-day suspension "to avert the dissent's undeservedly harsh sanction."

In 2005, pursuant to a stipulation, the Commission had reprimanded the judge for "a pattern or practice of rude, impatient and undignified treatment of pro se litigants," as evidenced in 9 cases. At that time, the judge agreed to participate in ethics training and behavioral therapy, refrain from similar misconduct, and familiarize herself with the code of judicial conduct.

However, the judge's "behavior did not improve," and investigative counsel submitted a statement of allegations to her in February 2008, listing 10 new cases in which she demonstrated a pattern of rude treatment of pro se litigants, attorneys, and

court personnel that was "largely analogous" to her previous conduct. Complaints continued, and the Commission amended its statement to incorporate 5 new instances of improper conduct.

Clerks in her court testified that the judge behaved as described "pretty much all the time" or at least "50 percent of the time." Several litigants and some attorneys testified to being "embarrassed" by the judge's "degrading" treatment, and feeling "mocked," "attacked," and "uncomfortable" in her courtroom.

The Court gave several examples of the judge's demeanor involving pro se defendants. In 1 case, a defendant had been cited for driving 15 miles an hour over the speed limit without a seatbelt. The following exchange took place:

> Defendant: I was going with traffic.
> Judge: That's a bad idea.... [E]verybody's doing it doesn't cut it. Duh. ....
> Defendant: And I had out of state plates.
> Judge: That wouldn't matter in Washington.
> Defendant: Oh.
> Judge: We don't troll for stupid people out of state who speed over the speed limit that they think it is.

The judge questioned the intelligence of a defendant the very next day:

> Judge: So do you have a better reason for me to reduce the amount of this infraction, other than telling me that you were an idiot and driving with the cars around you[?]
> Defendant: No, I would never say that I was an idiot....

She lectured another litigant for driving without proof of insurance in a condescending tone of voice:

> Judge: The wise person takes that little bitty [insurance] card ... [a]nd you cut it out.
> Defendant: Okay.
> Judge: It's the same size as your driver's license, you slide it behind it then you don't have to come here.

The judge scolded a defendant in an unnecessarily patronizing tone for speeding:

> You know, that's, that's the problem with mature people, they think, I see my exit so I have to get ahead, imagine that, ahead of those other trucks, then what did you probably do, you probably put on your brake to slow down to get off at the off-ramp making all those people behind you think that you were an idiot.

A few minutes later, the judge used the word "idiot" again to warn another litigant: "If you drive like an idiot [']cause you're late for work, you're gonna have to pay for it." She added, "You can see your picture on the headlines of the Seattle Times, stupid young man who shouldn't be driving."

The judge also interrupted litigants on occasion in a rude, impatient, and undignified manner, occasionally whistling at them and pounding on her desk to get their attention.

Rejecting the judge's contention that her speech and conduct in the courtroom are protected by the First Amendment, the Court held that "judges do not have a right to use rude, demeaning, and condescending speech toward litigants. . . . Such limitations are certainly narrowly tailored to achieve the compelling interest of preserving respect for, and the integrity of, the judicial system." The Court also held:

> Although each of these examples of Judge Eiler's conduct in the courtroom may appear fairly inoffensive alone, when considered cumulatively, the sum of the evidence points to another conclusion. One or two rude, impatient, or even slightly condescending comments might be understandable -- after all, no jurist is perfect. But more than a dozen such instances is not understandable; rather, it evidences an unacceptable pattern of misbehavior.

Although the Court held that the evidence clearly established that the judge had violated Canon 3(A)(3), it disagreed with the Commission's finding that the judge had also violated Canons 1, 2(A), and 3(A)(4), stating her behavior, while certainly unprofessional, did not go so far as to undermine the integrity and independence of the judiciary, demonstrate disrespect for the law or evidence failure to obey it, or deny any person the right to be heard according to law.

> Judge Eiler did not cut deals with litigants behind closed doors, accept bribes, or otherwise demonstrate that her decisions were governed by anything other than the law and the facts of the cases. Her misconduct also did not undercut public perceptions of judicial integrity or impartiality. She showed no favoritism, prejudice, partiality, or bias in her courtroom -- she was impolite and impatient on occasion, but not to any particular class or group of litigants. Although she frequently interrupted litigants rudely and condescendingly, she did so to protect the record and maintain order in her courtroom and never denied litigants the opportunity to present their cases. Evidencing this is the fact that she closed most of her hearings by asking whether the litigants had anything else to say.

The Court also affirmed the Commission's finding that the judge had not violated Canon 2(B) as alleged. After Elizabeth Alexandra had complained that the judge unnecessarily belittled, humiliated, and insulted her, the judge wrote a letter of apology to Alexandra and dismissed her speeding citation. The Court concluded:

> Although it may be that Judge Eiler would not have reviewed Alexandra's case or reversed her ruling but for Alexandra's submission of a formal complaint about her demeanor, it is not clear that Judge Eiler changed the disposition of that case in order to advance her own "private interest," -- that is, in order to avoid disciplinary proceedings. Rather, Judge Eiler testified at the fact-finding hearing that she was motivated by a desire to correct what in retrospect she perceived to be her mishandling of the case. (Judge Eiler considered Alexandra's letter to be

> an "inartful" motion for reconsideration). Although some evidence exists that other considerations motivated Judge Eiler, it is far from clear, cogent, and convincing.

In aggravation, the Court noted that the judge's conduct was not isolated, but rather was evidence of a pattern of impatient, undignified, rude, demeaning, and discourteous behavior; the acts were frequent and serious and occurred in the courtroom and in her official capacity; they were injurious to the attorneys and pro se litigants; the judge has not acknowledged that her conduct and demeanor violated the canons, but defends it "as a byproduct of her personality, and believes that it is an important aspect of her judging style;" she did not improve her conduct, despite agreeing to do so as part of her previous disciplinary sanction for similar transgressions; her long years on the bench, which "aggravate, rather than mitigate, her misconduct -- she should know better;" and her prior disciplinary action for similar conduct. In mitigation, the Court noted that the judge "did not, for example, flagrantly or intentionally violate her oath of office;" did not "exploit her official capacity to satisfy personal desires -- aside perhaps from her desire to too-rigidly control proceedings in her courtroom, like a 'vice principal'" -- or undermine the integrity of the judiciary;" she cooperated with the disciplinary investigation and proceedings; and "the proven incidents of misconduct represent an extremely small fraction of her case load -- well under one percent -- over the relevant period."

The Court concluded that the "mitigating factors are dwarfed by the number and seriousness of the aggravating factors . . . ," but that removal was unduly harsh, citing removal cases from Washington and other states involving "misconduct much more egregious" and stating "very few judges have been removed for demeanor-based misconduct alone." The Court added that the "same comparison holds, albeit to a lesser degree, with respect to cases from other jurisdictions in which lengthy terms of suspension have been ordered." The Court noted that "most cases involving conduct similar to that of Judge Eiler's have resulted in the issuance of a reprimand or censure," but concluded "since a reprimand has proved ineffective at changing Judge Eiler's conduct and demeanor in the past, and since Judge Eiler has defended her conduct as a matter of judicial philosophy, the more serious sanction of suspension is warranted here."

> The need for a harsher sanction is further evidenced by Judge Eiler's statements that she does not believe the canons are binding on her behavior in the courtroom and that she stipulated otherwise solely to resolve her prior disciplinary investigation. This testimony reveals, at best, a reluctance to modify her behavior in the future; at worst, it may signal that she does not feel the need to do so at all. In light of these concerns, a more severe sanction than customarily has been issued in response to demeanor-based complaints is required if we are to effectuate the desired change in Judge Eiler's behavior. It is clear that a second reprimand or censure without any suspension at all would be too lenient.
>
> Judge Eiler necessarily endeavors to achieve judicial efficiency and punitive effectiveness in her courtroom. These are desirable goals for a judge and are especially necessary in a court with a voluminous case load -- bordering on 100,000 cases over 18 years -- largely comprised of pro se litigants and offenders

who lack experience in our court system. However, we require our judiciary to be efficient and effective without being rude, discourteous, or demeaning.

The Court added in a footnote that, if the judge fails to improve her conduct and demeanor on the bench in response to its disciplinary action, "removal may be warranted. Of course, if King County voters prefer not to wait for further offense, they can achieve the same result at the next election."

4 justices dissented and would have suspended the judge for 90 days as recommended by the Commission. The dissent would have found that the judge violated Canons 1, 2(A), and 3(A)(4), as well as Canon 3(A)(3), stating the lead opinion's statement that the judge's behavior in the courtroom "was 'frequent and serious' and was 'injurious to the pro se litigants and attorneys who appeared before [her]' belies any conclusion" that those canons were not violated. The dissent concluded that the judge's "failure to improve her judicial behavior merits a sanction considerably more severe than the sanction imposed on the prior occasion."

1 justice wrote a concurring opinion, agreeing to suspend the judge for 5 days but arguing that she should only be reprimanded because the lead opinion's "overreliance" on the judge's previous reprimand "exaggerates its import." The concurrence noted that the judge had stipulated that she violated 5 canons in 2005 and "it does not make sense to impose a significantly harsher sanction for a significantly lesser violation. We should impose a sanction that is appropriate for the conduct."

In re Hecht, Order (Washington Supreme Court August 5, 2010) (www.cjc.state.wa.us/CJC_Activity/public_actions_2010.htm#5863)

Granting the recommendation of the State Commission on Judicial Conduct, the Washington Supreme Court disqualified a former judge from future judicial office. The Commission action followed the judge's conviction on 1 misdemeanor count of patronizing a prostitute and 1 count of felony harassment.

In the Matter of Zodrow, 787 N.W.2d 815 (Wisconsin 2010)

Based on stipulations and the findings and recommendation of Judicial Conduct Panel, the Wisconsin Supreme Court publicly reprimanded a former judge for a substantial backlog of unadjudicated citations and refusing to adjudicate any parking ticket stipulation cases.

The City of Cudahy municipal court has an annual caseload of approximately 4,000 cases. During the judge's tenure as municipal judge, a substantial backlog of unadjudicated citations accumulated, dating back to at least 2002. City officials, court staff, and court officials had repeatedly advised the judge about the backlog, but he did not take significant action to reduce it. An audit of the court showed a large backlog of cases dating from 2002. Although he was advised of the results of the audit in November 2008, the judge refused to timely decide cases or reduce the backlog. When the judge appeared before the Judicial Commission on October 23, 2009, he said he did not know how many cases were pending or for how long they had been pending; his best guess was between 1,000 and 1,500 pending cases, with some dating from 2002 and a few pre-

dating 2002. When the Commission filed its complaint in November 2009, approximately 3,500 cases were awaiting the judge's decision.

Throughout the judge's tenure, a single full-time clerk supported the City of Cudahy municipal court. The judge believed the court was under-staffed, particularly when compared to the neighboring City of South Milwaukee's municipal court, which had a smaller caseload but 1 and 1/2 clerk positions. Throughout his tenure as municipal judge, the judge persistently asked city officials to fund an additional half-time or full-time clerk position. The parties agree that additional clerk support would have assisted the municipal court in case management and reduced or possibly eliminated the need for the municipal court to rely on clerical staff from the city's police department to process cases involving parking citations and other court administrative matters. The judge believes he would have been encouraged to process cases in a more timely manner if there had been additional clerk support so he would not have been required to spend time performing tasks that he believed to be more properly the work of a clerk. Funding for a 1/2 deputy clerk position was approved in November 2009, but remained unfilled when the judge left office on April 30, 2010, after being defeated in the election.

Since early May 2009, the judge refused to adjudicate any parking ticket stipulation cases to protest the decision of the City of Cudahy's police department that the municipal court could no longer access the police department computer in those cases. The judge placed parking ticket stipulation cases in a box. He told the Commission that "they can sit and collect dust until hell freezes over for all [he] care[s]." The judge refused to adjudicate parking ticket stipulation cases because he believed that the use of a police department clerk as a de facto court clerk was unconstitutional. Although he did adjudicate a small number of parking ticket stipulation cases after the 1/2 clerk position was approved in November 2009, most of those cases remained unadjudicated until he left office on April 30, 2010.

The Court agreed with the panel's finding "that there is no conceivable reason that might justify a backlog of 3,500 cases, some of which were more than seven years old. Judge Zodrow's persistent misconduct stymied the timely disposition of cases assigned to him and adversely impacted the business of the Cudahy municipal court and, more broadly, cast a negative light on the entire Wisconsin judicial system." The Court noted that the judge expressed regret for his conduct and that he had been defeated in the general election and no longer serves as a municipal judge. Stating the likelihood of similar conduct by the former judge is minimal, the Court concluded, "we trust that the reprimand we impose on him will provide adequate protection to the public from any further judicial misconduct of this kind by others."

In re Complaint of Judicial Misconduct (Real) (U.S. Judicial Conference Committee on Judicial Conduct and Disability April 12, 2010) (www.uscourts.gov/uscourts/RulesAndPolicies/conduct/ccd-10-01Order-final-04-12-10p.pdf)

Reviewing, at the complainant's request, an order dismissing 2 complaints, the U.S. Judicial Conference Committee on Judicial Conduct and Disability upheld the 9th Circuit Judicial Council's findings that a judge's failure to state reasons for his decisions in 38 cases was not willful, and, therefore, did not constitute misconduct.

In 2008, the Committee had reviewed the Judicial Council's private reprimand of the judge and remanded the matter for the Council to determine if there was clear and convincing evidence that the judge arbitrarily and intentionally departed from prevailing law based on his disagreement with or willful indifference to that law. On remand, based on the findings of a special committee, the Judicial Council found that the record did not offer clear and convincing evidence of misconduct, but expressed concern about the judge's conduct.

On review, the Committee found no clear error in the Council's findings or application of the standard set forth in its previous order. The Committee rejected the complainant's argument that "the enormous number of cases in which the Judge refused to give reasons . . . is proof of misconduct, and the misconduct is habitual."

> In contrast to the complaint's bare assertions, the special committee made an individualized assessment of 38 cases in which Judge Real arguably had failed to give reasons for his judicial acts. In each instance it examined Judge Real's order or opinion, along with any context of which he would have been aware, for clear and convincing evidence of a failure that meets our test of wilfulness. . . .
>
> The special committee employed, in essence, three exclusionary criteria: (1) a statement of reasons that is present but inadequate will not, without more, trigger a finding of misconduct for failure to give reasons; (2) no finding of misconduct can be made if the prevailing legal standard or appellate directive does not articulate a statement of reasons requirement clearly and unambiguously; and (3) even where a failure to give reasons is found, it cannot be considered wilful if a justification for the judge's action is discernible in the record, "thus suggesting that [the judge] likely assumed that [his] reason was sufficiently understood by the parties." . . .

The Committee determined that the judge's failure in 8 criminal cases over 20 years to give reasons where they were required was not a substantial number and "did not individually reflect wilfulness because, in each case, a justification for the judge's action could be discerned in the record," although the failures were "clearly in violation of an established requirement" and thus "arguably deliberate and arbitrary." The Committee found that the 4 civil cases in which the judge failed to give reasons were too few to be "substantial" and were distinguished by a statement of reasons (albeit an insufficient one) or the absence of a clear requirement that reasons be given.

However, the Committee stated that it was "troubled by the instances in which Judge Real failed to give reasons where the law requires that they be given, and in which he acted obdurately regarding appellate directives." The Committee warned:

> If Judge Real were to continue such conduct, a future Council would no longer need to seek a pattern: this Memorandum of Decision places Judge Real on notice that a judge must state reasons for any judicial decision for which the law requires the giving of reasons. In view of this notice, any future instance in which Judge Real fails to give reasons as required by law may be "clear and convincing

evidence" of his "arbitrary and intentional departure from prevailing law based on his . . . disagreement with, or wilful indifference to, that law."