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# JUDICIAL CONDUCT REPORTER

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## The Judicial Ethics Expert Witness

by Marla N. Greenstein and Steven Scheckman

Familiar in lawyer malpractice and discipline, the concept of an ethics expert is relatively new to the area of judicial discipline. Most judicial conduct commissions limit witness testimony to factual testimony, disallowing the use of “ethics experts” to address whether the charged conduct constitutes a disciplinable ethical violation.

Judicial conduct organizations of-

ten have the difficult job of determining ethical issues of first impression in their states, or perhaps, nationally. That important job should not be delegated to an expert witness in a proceeding. No legal scholar or judge familiar with the customs of a judicial community possesses unique knowledge of ethical standards that is more reliable than the independent decision-making of the members of

the judicial conduct organization. By relying on their own expertise as representatives of the public and legal community, rather than the opinions of experts, a judicial conduct commission fulfills its official public responsibility to formulate the appropriate ethical standards for their states.

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## Thirteen Judges Removed in 2000

Approximately 266 judges had been removed from office as a result of discipline proceedings between 1980 and the end of 1999. In 2000, 13 judges (or in two cases, former judges) were removed.

**The Arkansas Supreme Court** removed a judge from office for (1) continuing to represent two clients in litigation after becoming a judge; (2) willfully failing to honor a subrogation agreement with a union for medical expenses paid on a client’s behalf; (3) failing to properly report attorney’s fees, referral fees, and income from a trust on the financial interest statement required to be filed with the secretary of state; (4) writing fifty-nine insufficient funds checks between 1993 and 1997; (5) failing to

pay federal income taxes in 1994; (6) placing the license tag for his 1981 Toyota on his Ford pickup truck; and (7) depositing client funds in a personal account rather than a trust account. *Judicial Discipline and Disability Commission v. Thompson*, 16 S.W.2d 212 (2000). The court also forwarded the opinion to the Committee on Professional Conduct for a hearing on the issue of lawyer discipline.

**The Florida Supreme Court** removed a judge who had engaged in a pattern of hostile conduct towards attorneys, court personnel, and fellow judges. *Inquiry Concerning Shea*, 759 So. 2d 631 (2000). For example, the judge (1) intimidated two attorneys into withdrawing from representation of a client (with whom the judge had a

personal dispute) by threatening to recuse from all of their cases; (2) entered an order directing a litigant to show cause why she should not be held in criminal contempt for writing a letter to the governor complaining of the judge’s handling of her case; (3) limited the rights of pro se petitioners with domestic violence complaints by requiring employees of the domestic abuse shelter to submit affidavits that stated that they did not furnish any assistance to the petitioners, which chilled the willingness of victims and staff to come forward with legitimate claims, and falsely stating in a letter to a newspaper that the staff of the shelter agreed to use the forms; (4) falsely

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# Disclosure to Bar Authorities: Exceptions to Confidentiality

by Cynthia Gray

At least 12 states have adopted an exception to the requirement of confidentiality that allows or even requires the judicial conduct commission to disclose otherwise confidential information to attorney discipline authorities.

In most of those states, the exception leaves the disclosure within the commission's discretion. The rule for the Maine Committee on Judicial Responsibility and Disability, for example, provides:

Information may be provided to the Board of Overseers of the Bar, the Grievance Commission, and Bar Counsel in connection with matters within their jurisdiction.

The rules in Arkansas, Colorado, Louisiana, and Pennsylvania also use the term "may" provide or disclose. The Iowa, Kansas, and Wisconsin rules use a different syntax but grant the same discretion. The rule for the Iowa Commission on Judicial Qualifications provides:

Nothing in these rules shall prohibit the commission from releasing any information regarding possible . . . violations of the Iowa Code of Professional Responsibility for Lawyers to the Iowa Supreme Court Board of Professional Ethics and Conduct.

Under the rule in Kansas:

The [Commission on Judicial Qualifications] or a panel is authorized, in its discretion, to disclose relevant information and to submit all or any part of its files to the Disciplinary Administrator for his or her use and consideration in investigating or prosecuting alleged violations of the Supreme Court Rules Relating to Discipline of Attorneys.

The Wisconsin rule states:

This section does not preclude the [Judicial Commission], in its sole discretion, from . . . [r]eferring to an attorney disciplinary agency information relating to the

possible misconduct or incapacity of an attorney or otherwise cooperating with an attorney disciplinary agency in matters of mutual interest.

The Arizona Commission on Judicial Conduct has "discretion" to disclose information to attorney discipline authorities but only "[u]pon inquiry by the disciplinary commission of the supreme court . . ."

In Kentucky and Michigan, the commission may disclose information regarding attorney misconduct "on its own initiative" (Kentucky) and "absent a request" (Michigan) but is required to disclose information upon the request of the attorney discipline authorities. The Kentucky rule provides:

The [Judicial Conduct] Commission may on its own initiative, and shall upon request of the director or Board of Governors of the Kentucky Bar Association, make available to the Kentucky Bar Association any of the Commission's records pertinent to a disciplinary matter or inquiry under investigation by the Commission or by the Association.

The Michigan provision states:

Notwithstanding the prohibition against disclosure in this rule, the [Judicial Tenure Commission] shall disclose information concerning misconduct to the Attorney Grievance Commission, upon request. Absent a request, the commission may make such disclosure to the Attorney Grievance Commission.

For the Georgia Judicial Qualifications Commission, disclosure is mandatory even absent a request; the commission has not only "the authority" but "a duty to refer the matter to the [Disciplinary Board of the State of Georgia] for such action as the Board may consider appropriate."

The rules in several states allow a judicial conduct commission to disclose information it has about any

attorney's misconduct, even those who are not judges, if evidence of professional misconduct is discovered during investigation of a judge. Those rules refer to disclosing:

- "information concerning conduct of a member of the Bar" (Georgia),
- "any information" regarding possible violations of the code of professional responsibility for lawyers (Iowa),
- information related to violations of rules of professional conduct (Pennsylvania), or
- "information relating to the possible misconduct or incapacity of an attorney" (Wisconsin).

However, the rules in Arizona, California, Colorado, and Virginia appear to allow disclosure only if a judge or former judge is the subject of the information.

- The Arizona rule refers to information that relates to the attorney disciplinary commission's "jurisdiction over former and incumbent judges."
- The discretion of the California Commission on Judicial Performance to disclose information to the State Bar is triggered only when "a judge retires or resigns from judicial office after a complaint is filed with the commission, . . . , provided that the commission has completed a preliminary investigation."
- The Colorado rule provides (emphasis added): "The [Commission on Judicial Discipline] may release confidential information *concerning a judge* when . . . [t]he commission notifies the Supreme Court Grievance Committee of a complaint against a judge involving conduct that may vio-

late the Colorado Rules of Professional Conduct.”

- The rule for the Virginia Judicial Inquiry and Review Commission only allows disclosure of confidential information related to “the alleged misconduct of a judge or substitute judge which relates to his private practice of law.”

In most states, only the judicial commission’s lawyer discipline counterpart in the same state is identified as the appropriate recipient of confidential information. Those states are Arizona (the disciplinary commission of the supreme court), Colorado (the Supreme Court Grievance Committee), Kentucky (the Kentucky Bar Association), Georgia (the Disciplinary Board of the State of Georgia), Iowa (the Iowa Supreme Court Board of Professional Ethics and Conduct), Kansas (Disciplinary Administrator), Louisiana (the disciplinary board of the Louisiana State Bar Association), Maine (the Board of Overseers of the Bar, the Grievance Commission), and Michigan (Attorney Grievance Commission).

In contrast, the commissions in Arkansas, Missouri, and Pennsylvania may disclose information to out-of-state attorney discipline authorities.

- The Arkansas Judicial Discipline & Disability Commission may disclose information “to any committee, commission, agency, or body within or outside of the state empowered to investigate, regulate, or adjudicate matters incident to the legal profession.”
- In Missouri, the Commission on Retirement, Removal and Discipline may disclose to Missouri’s chief disciplinary counsel or “to the appropriate lawyer or judicial disciplinary authorities in other jurisdictions when the confidential records relate to possible violations of a lawyer licensed . . . in that jurisdiction”
- The rule for the Pennsylvania Ju-

dicial Conduct Board allows information related to attorney misconduct to be disclosed “to the appropriate agency.”

At what point the judicial conduct commission has the discretion or duty to disclose is described in different terms in different states.

- In Arkansas, the discretion is triggered when the Commission “reasonably believes that there may have been a violation of any rules of professional conduct of attorneys at law.”
- The California Commission can disclose information regarding former judges to the state bar “in the interest of justice or to maintain public confidence in the administration of justice.”
- The Georgia Commission’s duty to disclose information is triggered when “the Commission feels” it has information that “should be considered by the Disciplinary Board of the State of Georgia for the purpose of determining whether such conduct constitutes a violation of the Code of Professional Responsibility.”
- In Louisiana, the state supreme court must approve the commission’s disclosure “in appropriate cases . . . .”

The rule in Wisconsin allows the Commission to disclose to an attorney disciplinary agency information not only about possible misconduct by an attorney but also “possible incapacity of an attorney.” Furthermore, the Commission may “otherwise cooperat[e] with an attorney disciplinary agency in matters of mutual interest.”

### Disclosure to bar admission authority

In at least 6 states, there is an exception to the confidentiality rule for judicial discipline proceedings that allows the commission to disclose informa-

tion to authorities investigating an application to the bar. For example, the rule for the South Dakota Commission on Judicial Qualifications states:

This section shall not be construed to deny access to relevant information by authorized jurisdictions investigating qualifications for admission to practice.


The rule for the Hawaii Commission is similar, but disclosure is conditioned “upon concurrence of the Commission or by order of the supreme court.”

The Colorado rule requires that a judge sign a waiver before the Commission may release confidential information concerning a judge in response to a request from an agency authorized to investigate the qualifications of persons for admission to the bar of another state. The Pennsylvania Board may release information to other jurisdictions investigating qualifications for admission to practice only “[a]t the request of the Judicial Officer, in the discretion of the Chair.”

The rule for the Maryland Commission on Judicial Disabilities states:

Upon a written application made by...a Bar Admission authority . . . the Commission shall disclose to the applicant: (i) Information about any complaints or charges that did not result in dismissal, including reprimands and deferred discipline agreements; and (ii) the mere fact that a complaint is pending . . . . The Commission shall send the judge a copy of all documents disclosed under this subsection.

Under the provision in Missouri,

The Commission may make otherwise confidential records of disciplinary proceedings available to . . . the appropriate lawyer or judicial disciplinary authorities in other jurisdictions when the confidential records relate to possible violations of a lawyer . . . applying for licensure . . . in that jurisdiction. 

*This article was written as part of a continuing project to study confidentiality in state judicial discipline systems funded by Good Samaritan Inc.*

## Thirteen Judges Removed in 2000 *(continued from page 1)*

accused an assistant state attorney of attempting to make ex parte contacts with him and threatening to report him to bar; and (5) verbally attacked fellow judges in a judges' meeting.

**The Iowa Supreme Court** removed a judge who had (1) conducted initial appearances in her office, preventing others from being present; (2) clearly violated procedural requirements when conducting arraignments; and (3) had frequent conflicts with almost all of the people with whom she came in contact, including the chief judge, other judges, the court administrator, court reporters and attendants, clerk's office employees, peace officers, domestic violence personnel, department of corrections employees, attorneys, and the public. *In the Matter of Holien*, 612 N.W.2d 789 (2000). The court found that the judge refused any meaningful attempts to discuss her problems with the chief judge. Noting there were 84 witnesses and the hearing lasted eight full days, the court stated the gist of the testimony was that the judge was volatile, often angry, unwilling to yield even though it was clear she was wrong, and made people fearful of offending her, fearful of working with or for her, or even being in her court. The court concluded:

"She simply should not be a judge."

**The Kentucky Judicial Conduct Commission** removed a district judge from office for a "disturbing course of conduct . . . that can only be described as judicial tyranny" in the two weeks after losing his candidacy for circuit judge. *In re Woods*, Findings of Fact, Conclusions of Law, and Final Order (June 27, 2000). The order became effective ten days after it was served because the judge did not file an appeal. The judge then ran in the November 2000 special election called to fill his unexpired term. Granting the Commission's motion, the Kentucky Supreme Court held that a judge who had been removed from office by the Commission was ineligible to seek election to that office. *Kentucky Judicial Conduct Commission v. Woods*, 25 S.W.2d 470 (2000).

Examples of his misconduct include telling a state police officer, prior to the opening of court, three days after the election, that people did not appreciate him and things were going to change. Opening the court, the judge slammed his gavel on the bench, announced, "Sit down, shut up, hang on." On two court dates, the judge denied customary requests of the county attorney for traffic school

or diversion and, without notification to the county attorney, ordered bench warrants for defendants who were not present even though the pre-election custom was that defendants were not required to be present per agreement of the county attorney. The judge openly displayed a handgun on the bench in district court on two days.

**The Louisiana Supreme Court** removed a judge who had (1) abused his contempt power three times, (2) banned a prosecutor from his courtroom and then dismissed 41 cases when the prosecutor did not appear, (3) participated in a case as counsel for four years after becoming a judge, and (4) deliberately disobeyed orders of the administrative judge. *In re Jefferson*, 753 So. 2d 181 (2000). The former judge subsequently qualified to run for the same office from which the court had removed him, but the court ordered him to withdraw his candidacy and ordered the Secretary of State to remove his name from the ballot if he had not withdrawn by the deadline. *In re Former Judge Jefferson*, 770 So. 2d 314 (2000).

**Up-holding the decision of the Commission on Judicial Discipline** to remove a judge from office, the Nevada Supreme Court concluded that clear

### Other Judicial Discipline in 2000

In addition to the 13 removals, approximately 89 judges or former judges were publicly sanctioned in judicial discipline proceedings across the country in 2000. 2 were censured and suspended (1 for 5 months, 1 for 10 days); 2 part-time judges were reprimanded and suspended from taking assignments for 6 months; 1 judge was fined and suspended (a \$1500 fine, a 90

day-suspension); 3 were suspended (2 for 6 months; 1 for the remainder of the judge's term); 2 more were suspended (for 6 months) but the suspensions were stayed; 1 was reprimanded and suspended (for 2 weeks); 11 were censured; 3 were censured following the judges' agreement to resign; 1 was fined (\$1000); 26 were admonished; 3 were reprimanded

and fined (\$861.50/\$1500/\$500); 28 were reprimanded; 1 senior judge was reprimanded and ordered to receive no more assignments; 2 were publicly warned; 2 public informal resolutions were reached; and 1 judge was ordered to obtain additional education. 14 of these cases involved former judges. 24 of the sanctions were imposed pursuant to agreement.

## Thirteen Judges Removed in 2000 *(continued from page 4)*

and convincing evidence supported the Commission's findings that the judge had engaged in numerous and repeated ex parte communications with experts retained by the parties or appointed by her in child custody proceedings and appointed her first cousin as the mediator in a case without informing the parties of their relationship. *In the Matter of Fine*, 13 P.3d 400 (2000). See "Recent Cases," 20 JUDICIAL CONDUCT REPORTER 1 (Fall 2000).

**The New York Court of Appeals** accepted the determination of the State Commission on Judicial Conduct that a town court justice be removed from office for (1) failing to deposit court funds in his official account within 72 hours after receipt, in violation of court rules, (2) failing to remit court funds to the state comptroller by the tenth day of the month following collection, in violation of statutes, (3) his conduct during a disagreement between the judge and a local attorney who represented a funeral home in an action against the judge for an unpaid bill, (4) acting in a retaliatory manner toward a second attorney, and (5) suspending a traffic defendant's driver's license out of personal animosity for the defendant's attorney. *In the Matter of Corning*, 741 N.E.2d 117 (2000).

**The New York Commission** determined that removal was the appropriate sanction for a judge who had (1) required indigent defendants to pay for assigned counsel by performing community service, (2) failed to advise defendants of their right to counsel and taken action against them without notice to their lawyers when he knew that they were represented, (3) threatened defendants with jail before conviction and called them names, (4) repeatedly used intemperate language, (5) jailed without bail defendants who were statutorily entitled to bail, (6) summarily convicted

on criminal contempt charges individuals whom he concluded without trial or guilty pleas had violated some court order, (7) sat on cases in which he was the complaining witness and in which he had knowledge of disputed evidentiary facts, and (8) frequently engaged in ex parte communication. *In the Matter of Buckley, Determination* (April 6, 2000) ([www.scjc.state.ny.us/buckley.htm](http://www.scjc.state.ny.us/buckley.htm)).


**The New York Court of Appeals** removed a judge from office for (1) making derogatory racial remarks about a crime victim while attempting to influence a disposition, (2) displaying intemperate behavior and pressing a prosecutor to offer a plea for the judge's own personal convenience, (3) making disparaging remarks about Italian-Americans at a charity dinner and during an election campaign, and (4) testifying at a proceeding with reckless disregard for the truth. *In the Matter of Mulroy*, 731 N.E.2d 120 (2000).

**The New York Commission** determined that removal was the appropriate sanction for a part-time town court justice who had been convicted of two misdemeanors for physically abusing a mentally incompetent patient in a nursing home where she was employed as a licensed practical nurse. *In the Matter of Stiggins, Determination* (August 18, 2000) ([www.scjc.state.ny.us/stiggins.htm](http://www.scjc.state.ny.us/stiggins.htm)). The judge had thrown a patient who was unable to care for herself due to dementia onto the arm of a chair and caused a fractured rib. She had been convicted of third degree assault and endangering the welfare of an incompetent person.

**The New York Commission** determined that removal was the appropriate sanction for a judge who (1) engaged in a course of conduct, arising out of a personal relationship with his law clerk, that detracted from the dignity of his office, seriously disrupted

the operations of the court, and constituted an abuse of his judicial and administrative power, and (2) engaged in favoritism by issuing an ex parte order terminating the suspension of the driver's license of a long-time acquaintance. *In the Matter of Going, Determination* (December 29, 2000) ([www.scjc.state.ny.us/going.htm](http://www.scjc.state.ny.us/going.htm)). During the two-month relationship with his law clerk, the judge displayed physical affection for the law clerk in view of court staff and discussed the relationship with court staff and attorneys who appeared before him, which was so disruptive that the chief clerk felt compelled to report his actions to court administrators. The Commission found that, after the relationship ended, the judge's hostile, retaliatory behavior toward the law clerk created an atmosphere of polarization and mistrust among court staff, further disrupting the operation of the court, and constituted a flagrant abuse of his judicial position.

**The Pennsylvania Court of Judicial Discipline** removed and disbarred a former judge following his conviction on the federal felony charge of conspiracy to violate civil rights. *In re Melograne*, 759 A.2d 475 (2000).

**The Pennsylvania Court of Judicial Discipline** removed from office a former justice of the Supreme Court who had been found guilty of two felony counts of criminal conspiracy. The court also ordered that the justice be ineligible to hold judicial office in the future and disbarred him. *In re Larsen*, No. 4 JD 94, Opinion (December 31, 2000), Order (February 2, 2000). In dissent, one member of the court argued that there was no controversy because the justice had been impeached by the House and convicted by the Senate, removed from office, and barred from holding judicial office in the future. 

# Real Estate Investments: Appearing Before Administrative Agencies

by Cynthia Gray

In general, a judge may appear before or write a letter to an administrative body about zoning and land use issues affecting the judge's residence.

- To protest a neighbor's non-conforming use that devalued a judge's home and an application for a liquor license in the judge's neighborhood, a judge may attend hearings, offer testimony as a property owner, and sign a protest petition (*Maryland Advisory Opinion 99* (1982)).
- A judge may testify before a local zoning board in reference to a petition for an exception or variance on a parcel of land that adjoins the judge's home (*Rhode Island Advisory Opinion 87-7*).
- A judge may write a letter to the city board of review requesting a variance from a local zoning ordinance necessary to build an addition to her home (*South Carolina Advisory Opinion 10-1996*).
- A judge may participate in the formation of a local improvement district that has the goal of having a vote scheduled to have streets in the judge's neighborhood paved (*Washington Advisory Opinion 97-8*).
- A judge may oppose the U.S. Forest Service's proposed plan to build facilities for off-road use on property that adjoins or is near land the judge owns for a weekend home (*Washington Advisory Opinion 97-8*).

But see *Nebraska Advisory Opinion 92-3* (A judge may not appear before a city planning commission, either alone or in conjunction with others, and express support or opposition to a proposed development that would affect real estate owned by the judge).

While making a request to or appearance before an administrative body, a judge must exercise great care not to use the judicial position to influence the decision or to create the appearance that the judicial position is being used for that purpose. Therefore, a judge:

- should not initiate or participate in personal contacts with the hearing officer or the administrative office (*Maryland Advisory Opinion 99* (1982)).
- should voice his or her opinion only insofar as a zoning question may affect the judge's property (*New York Advisory Opinion 92-21*).
- should voice his or her opinion only in the judge's individual capacity as a property owner (*New York Advisory Opinion 92-21*).
- should plainly state the facts and reasoning supporting the request to make it clear that a personal favor is not being sought (*South Carolina Advisory Opinion 10-1996*).


Such appearances are probably not allowed, however, if they relate to investment property owned by the judge.

In *In re Foster*, 318 A.2d 523 (Maryland 1974), the Court of Appeals of Maryland censured a judge for "personally and publicly assum[ing] command responsibility" in furtherance of a speculative real estate development project that depended for success on official action of the city and that resulted in a substantial profit to the judge. For example, the judge had personally attended at least three meetings with officials to discuss the development, including the zoning that would be required; had engaged in extensive correspondence concerning the

project, including letters to officials that were typed by his secretary during her regular work hours; had made a number of telephone calls to officials; and had several meetings in his court chambers.

The court noted, "as regards investments in real estate, the critical question is whether a judge can maintain a low profile." The court concluded that, "It was inevitable that [the judge's two-year course of conduct] would cause reasonable suspicion and distrust in the public view of the particular judge."

The Ohio Supreme Court publicly reprimanded a judge for appearing at zoning commission meetings to speak on behalf of real estate partnerships in which he owned an interest. *Ohio State Bar Association v. Reid*, 708 N.E.2d 193 (Ohio 1999). The judge had spoken on at least four occasions at governmental meetings and before a planning commission on behalf of real estate partners of which he was a partner. The court noted that it had always been the judge's position that he was a passive investor in all of his real estate partnerships. Therefore, the court concluded there was no reason for the judge to appear and speak on behalf of his partnership interests at zoning commission meetings and that the judge's testimony was intended to lend the prestige of his office to advance the interests of himself and his partners. But see *New York Advisory Opinion 92-21* (a judge may speak at a planning board meeting about a zoning issue that affects the judge's commercial property).

This article is an excerpt from the up-dated version of "Real Estate Investments by Judges," part of the *Key Issues in Judicial Ethics* series. See page 12 for more information. 

# Recent Cases

## Joking remarks about the outcome of an appeal

**T**he California Commission on Judicial Performance publicly admonished a judge for making remarks to friends that purported to convey the outcome of an appeal in which the friends had an interest. *Public Admonishment of Revak* (December 12, 2000) (<http://cjp.ca.gov/pubdisc.htm>).

Judge Revak had had dinner on February 6, 2000, with Justice Terry O'Rourke of the 4<sup>th</sup> District Court of Appeals. Judge Revak inquired about a pending appeal from a jury award of approximately \$100 million in compensatory and punitive damages to 98 plaintiffs. The next day, Judge Revak played golf with three friends, including one of the plaintiffs in the case and the husband of another plaintiff. During the game, the judge stated that a friend with the court of appeals with whom he had had dinner had told him that the verdict and/or punitive damages award had been reversed. Subsequently, the plaintiffs submitted a motion to recuse the justices of the 4<sup>th</sup> district and transfer the appeal on the grounds that Judge Revak and a member or employee of the court had disclosed confidential information and that the court had pre-judged the appeal. The presiding justice of the 4<sup>th</sup> district denied the motion but referred the allegations to the Commission. The California Supreme Court transferred the appeal to the 5<sup>th</sup> District Court of Appeal "to avoid even the appearance of impropriety."

The Commission found that Judge Revak did not reveal confidential information to his friends. Both judges testified that their conversation at dinner did not involve any substantive information regarding the appeal. Although noting that "these statements

might be regarded as self-serving," the Commission also noted evidence that the outcome of the appeals had not been determined at the time of the dinner, supporting the conclusion that the judges could not have discussed how the appellate court had decided to rule and, therefore, Judge Revak could not have conveyed that information to his friends on the golf course.

Judge Revak contended that his remarks were a joke, that he spoke in what he believed was a joking manner, and that he believed his friends understood the remarks as a joke. The Commission found:

Judge Revak's remarks, even if a joke, constitute misconduct. . . . Judge Revak's comments purported to convey to his friends the outcome of a court case in which they were involved and in which no decision had been announced by the appellate court. Even if intended as a joke, the comments implied to laypersons involved in a pending case that the judge was conveying inside information. Indeed, the implication was apparently so strong in the minds of Judge Revak's friends that they did not believe the judge when he later told them the comments were only a joke.

The Commission also found that the "potential harm to public confidence in the integrity and impartiality of the judiciary was fully realized in the impact of Judge Revak's conduct on the parties to the . . . case and on the courts," and "the judge's comments, the plaintiffs' motions, and their "aftermath resulted in substantial publicity adverse to public confidence in the judiciary."

## Disparaging comments to defendant

Pursuant to an agreed statement of facts and joint recommendation, the New York State Commission on Judicial Conduct determined that censure

was the appropriate sanction for a judge who made improper, inflammatory, taunting, and provocative comments to and about a defendant while presiding over his arraignment for a crime that had resulted in the death of a police officer. *In the Matter of Brennan*, Determination (February 8, 2001) ([www.scjc.state.ny.us/brennan.htm](http://www.scjc.state.ny.us/brennan.htm)). The judge called the defendant a "sociopath" and "loser," and stated, "If somebody were to lay a gun on that table right now you would shoot me and walk out of this court room." The Commission found that the judge's comments assumed the defendant's guilt, conveyed the appearance that the judge had concluded that the defendant was guilty, elicited incriminating responses from the defendant, and distorted the arraignment process. The Commission also found that, by stating to the defendant that the defendant would shoot him if given the opportunity, the judge "attributed to the defendant the motives and conduct of a murderer."

The judge was sitting on the civil court of the City of New York but at the time of the comments, he was a candidate for nomination to the supreme court. The Commission found that the judge's comments conveyed the appearance that he "was pandering to public sentiment against the defendant" and the impression that he "was using the judicial proceeding as a political forum in order to demonstrate his harshness toward a defendant charged with a crime which, as [the judge] commented, had 'outraged' the community. This was unseemly and totally inappropriate." The Commission noted that the judge "undoubtedly knew, or should have

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## Recent Cases *(continued from page 7)*

known, that his disparaging remarks about the defendant would likely be widely publicized.”

### Campaign statements about leniency

The Texas State Commission on Judicial Conduct publicly warned a judge of the court of criminal appeals about statements and photographs in campaign literature prepared, reviewed, and circulated by the judge during his campaign. *Public Warning of Price*, CJC No. 00-0769-AP (January 25, 2001). The literature stated:

Judge Tom Price is an advocate for victims of crime. “I’m very tough on crimes where there are victims who have been physically harmed. In such cases I do not believe in leniency. I have no feelings for the criminal. All my feelings lie with the victim.”

The Commission concluded that the judge’s “pledges go beyond the usual and amorphous language of campaign promises that a judge will be ‘tough on crime’ or ‘tough on criminals.’” The Commission stated:

Judge Price’s message to the voters inappropriately signaled prejudgment and bias in cases appealed to his court, giving the unmistakable impression that the judge would favor crime victims over criminals in virtually all cases; that in some cases, the judge would be willing to ignore constitutional safeguards guaranteed every accused and, in doing so, would not always uphold his oath of office to protect and defend the constitutions of the United States and Texas; and that the judge would be willing to abdicate his role as a fair, detached and impartial jurist in order to fulfill his promise to be an advocate for crime victims.

The judge testified that, despite his campaign statement, the court of criminal appeals makes no decisions at any time that have to do with leniency or that would afford him the opportunity to advocate in favor of crime victims. Rejecting that argument, the Commission stated “if it were true that the Court of Criminal Appeals does not deal with leniency issues, then it would be irrelevant and, therefore, misleading to tell voters in a political campaign for any position on the Court of Criminal Appeals that Judge Price does not believe in leniency.” Further, the Commission found the court of criminal appeals “does become involved in ‘leniency’ issues whenever it is asked to consider whether any sentence is grossly disproportionate to the crime and in violation of the Eighth Amendment of the United States Constitution and Article 1, Section 13 of the Texas Constitution,” and to the extent that the court ever reverses any case “regardless of the correctness and soundness of its decisions, such action will be viewed by the public as being lenient.”

The Commission also found that the judge’s use of photographs of the judge taken with then-governor George W. Bush, disseminated while Bush was a candidate for President and a photograph taken of the judge with then-President Ronald Reagan was misleading to voters because the photographs implied that Bush and Reagan had endorsed the judge when they had not.

The Commission also found that the judge’s use of photographs of the judge taken with then-governor George W. Bush, disseminated while Bush was a candidate for President and a photograph taken of the judge with then-President Ronald Reagan was misleading to voters because the photographs implied that Bush and Reagan had endorsed the judge when they had not.

### Delay in circulating opinions by supreme court justice

The Wyoming Commission on Judicial Conduct and Ethics submitted to the Governor and the Chief Justice a letter of resignation from Justice Richard V. Thomas of the Supreme Court. *News Release (Thomas)* (February 5,

2001). The justice had prepared the letter as part of a conditional settlement agreement in 1999 in which the Commission agreed not to submit the letter as long as the justice remained current in the circulation of opinions. In December 2000, the Commission learned that the justice was again delinquent in the circulation of opinions and voted to invoke the retirement provision of the settlement agreement; however, because several significant cases were pending before the Supreme Court, the Chief Justice asked the Commission to allow the resignation to become effective March 31, 2001. The Commission agreed, contingent upon the justice’s continued timely circulation of opinions. In late January, 2001, the Commission determined that Justice Thomas was not circulating opinions and voted to impose the sanction of immediate removal.

The Wyoming Supreme Court also issued a news release about the resignation and the Commission proceedings. The Court’s news release noted that the Court has internal operating rules that require cases to be completed in a timely manner and that the Chief Justice provides reports to the Commission each month on case status. The Court stated:

Justice Thomas has been a member of the Supreme Court for 26 years. His contributions to both the law and community activities outside the Court have been significant. The time frame, however, within which each justice is to have an opinion prepared becomes critical for the litigants and the public. Failure to comply with those rules can have a negative impact on those both inside and outside the Court.

The Court also acknowledged the commitment of the Commission:



While the work of the Commission may not always be visible, the public should be assured that this group of independent and vigilant citizens is working to protect the rights of our citizens through the enforcement of the rules of Judicial Conduct and Ethics.

### Criticism of jury

The Utah Supreme Court approved the implementation of the Judicial Conduct Commission's order of public reprimand of a judge who had on-the-record, in the courtroom, criticized jurors in two cases for their verdicts. *In re Young*, Order (November 7, 2000). At the conclusion of one criminal trial,

the judge made the following comments in the courtroom to the jury:


I want to tell you that I am personally disappointed in your verdict in this case and that's all I'm going to say about it. I think that this was a pretty clear case. I don't know how you came out with this result and this is one of the very few times I have criticized a jury for their verdict. Thank you. You may be excused. Anything else?

In the jury room, the judge explained his disagreement with their verdict to the jury. At the conclusion of a second trial, the judge made the following comments to the jurors:

I will tell you from my perspective that

the jury and the jurors in normal circumstances err on the side of compassion. This is a case in which they did that. I do not believe the testimony of Mr. Johnson. From my perspective I don't know how the jury does, but I believe that the circumstances, Mr. Johnson, you were not candid in this case, and I think you were very fortunate to have a not guilty verdict.

That being the verdict of the jury the court will accept it as the decision of the court and the case is dismissed. And you are released from any further obligation on the cases.

And I suggest to you, Mr. Case, that I believed your story and that I believe that the jury was out of line. And that's the end of the case. 

## The Judicial Ethics Expert Witness *(continued from page 1)*

### Experts on the code of judicial conduct

Most states' rules of evidence are based on, and similar to, the federal rules of evidence, including the rules applicable to the use of expert witnesses, and most judicial conduct organizations use the evidence rules applicable in civil cases in their respective states. Therefore, although the federal rules of evidence are not strictly applicable to judicial discipline cases, this article will focus on the federal rules of evidence because analysis of the rules from each of the states is beyond the scope of the article.

Occasionally, judges have attempted to have law professors serve as judicial ethics experts in judicial conduct proceedings for the accused judge. Law professors have the credibility of their institutions' independence and the legitimacy of scholarship, which is usually national in scope.

Those judicial conduct hearing

boards that exclude ethics scholars as expert witnesses do so largely on two grounds. First, the rules of evidence restrict opinion testimony to testimony that will assist the trier of fact in determination of a factual issue. In other words, judicial ethics experts assist in determination of law and not fact. Second, expert testimony is prejudicial and its prejudicial effect outweighs any benefit to the decision-maker. This second approach acknowledges that the ethics scholar is hired by one side in the proceeding and, through the scholar's expertise, could replace the independent legal analysis of the judicial conduct organization.

Rule 702 of the Federal Rules of Evidence provides, in pertinent part:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

Additionally, Federal Rule of Evidence 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by the experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Thus, expert opinion testimony is admissible if it will assist the trier of fact in the determination of a factual issue. Generally, expert opinion testimony embracing an ultimate issue of fact is admissible. Fed. R. Evid. 704. However, the rules of evidence do not permit opinion on law, except questions of foreign law. Expressions of general belief as to how the case should be decided are "worthless to the trier of fact" and, therefore, excludable. John W. Strong, *McCormick on Evidence*, § 12, at 51

*(continued on page 10)*

## The Judicial Ethics Expert Witness *(continued from page 9)*

(5<sup>th</sup> Ed. 1999).

Moreover, when expert opinion testimony is superfluous and a waste of time, the opinions should be excluded. *See* Advisory Committee Notes, Fed. R. Evid. 702; John W. Strong, *McCormick on Evidence*, § 12, at 51 (5<sup>th</sup> Ed. 1999). Expert opinion testimony is not helpful to the trier of fact in the determination of factual issues unless the subject of the testimony is outside the common knowledge of the average layman and based on some specialized knowledge on the expert's part rather than simply an opinion broached by a purported expert. *See, e.g., Faircloth v. Lamb-Grays Harbor Co., Inc.*, 467 F.2d 685 (5<sup>th</sup> Cir. 1972); *Textron Inc. v. Barber-Colman Co.*, 903 F. Supp. 1558 (W.D.N.C. 1995).

The question in judicial discipline proceedings is whether a judge's conduct compromises the integrity and independence of the judiciary or lessens public confidence that such integrity and independence exists. Those determinations do not require knowledge that is beyond the experience of members of a conduct commission. The judge and lawyer members of a conduct commission, a key case noted, are considered experts in the relevant ethical standards and the state's supreme court review assures the application of proper standards in any particular case. *In re Zoarski*, 632 A.2d 1114 (Connecticut 1993).

Moreover, as the Connecticut Supreme Court has explained, questions about public confidence "may be answered as competently by those without formal legal training as by those with such training." *In re Flanagan*, 690 A. 2d 865 (1997). The court rejected the judge's argument that, because a majority of the members of the Judicial Review

Council were neither judges nor lawyers, expert testimony was necessary to support the Council's finding that the judge violated the code by engaging in a consensual sexual relationship with a married court reporter who regularly had been assigned to his courtroom. (The Council had found the expert opinion evidence offered by the judge was not persuasive.)

The court stated that expert testimony, although possibly admissible, was unnecessary to a determination whether certain conduct has the effect of reducing public confidence in the integrity of the judiciary. In fact, the court emphasized "to create a rule of law requiring expert testimony in judicial discipline cases focusing on the public's perception of the judiciary would contravene the legislature's desire to have an equal "lay" voice on the council . . ." Any questions that judicial conduct factfinders may have concerning the standards to apply are best addressed through briefing by counsel presenting and defending the charges against the judge

The authority of commission members, lay members particularly, has also been affirmed by the Supreme Court of Kansas.

Lay members bring unique qualifications and perspectives to the Commission. For example, in determining whether a particular set of circumstances gives rise to "an appearance of impropriety," a lay member's opinion may be insightful. The lay member is in a unique position to express the views of litigants and other members of the public who may be affected by a judge's conduct.

*In the Matter of Platt*, 8 P.3d 686 (Kansas 2000).

There may also be ethics issues for the legal ethics scholar who serves as an ethics expert. The value of the

scholar lies in that scholar's objectivity. In the area of judicial ethics law, the legal scholar is also a lawyer and may also serve as a consultant to the advocate who hires the scholar. *See* Carl M. Selinger, *The Problematic Role of the Legal Ethics Witness*, 13 *GEORGETOWN JOURNAL OF LEGAL ETHICS* 405 (Spring 2000). By acting as a legal consultant to a party, the legal scholar expert may also be compromising his or her objectivity as an expert.

### Experts on custom and practice

Respondent-judges in judicial discipline proceedings also attempt to call current and retired judges as expert witnesses to testify concerning the custom and practice of judges in a community concerning a particular topic, such as recusal or disqualification. At times these witnesses may be denominated as experts, and on other occasions as fact witnesses.

In either case, expert testimony that a respondent-judge's conduct is no different from that of other judges in a community is irrelevant and should be excluded. The New York Court of Appeals (the highest state court in New York) explained:

Each Judge is personally obligated to act in accordance with the law and the standards of judicial conduct. If a Judge disregards or fails to meet these obligations the fact that others may be similarly derelict can provide no defense.

*Sardino v. State Commission on Judicial Conduct*, 448 N.E.2d 83 (1983). Therefore, the court held that the State Commission on Judicial Conduct properly refused to allow a judge to present evidence that his practices were consistent with the general practice of other judges of the system. (The judge had admitted that he had failed in 62 cases to in-

form the accused of the right to counsel and failed to conduct even a minimal inquiry to determine whether they were entitled to assigned counsel because he considered it “counter productive” to read defendants their rights at arraignment. He was removed from office.)

In a subsequent case, the New York court re-affirmed that evidence many other judges engaged in similar misconduct would be irrelevant in judicial discipline proceedings. *In re Duckman*, 699 N.E.2d 872 (1998).

### Daubert Motions

In a judicial discipline case, when confronted with proposed expert testimony concerning the alleged custom and practice of judges in a particular community, judicial commissions should consider the propriety of a *Daubert* motion if the expert’s opinion is unreliable. In *Daubert, et al. v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the United States Supreme Court established the gatekeeping function of the trial court, stating under the federal rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. The Court vacated and remanded a civil damage suit in which the trial court and ap-

ellate court upheld the rule that expert opinion based on a scientific technique is inadmissible unless the technique is “generally accepted” as reliable in the relevant scientific community. Critically, the *Daubert* Court enumerated the following non-exclusive factors to be considered when determining whether a theory or technique is “scientific knowledge that will assist the trier of fact”:

- (1) whether the theory can be or has been tested;
- (2) whether the theory has been subject to peer review or publication;
- (3) known potential rate of error; and
- (4) general acceptance in the scientific community.

Moreover, the *Daubert* Court observed that the trial judge must determine, at the outset, “whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue.”


Subsequently, in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the “gatekeeping” function articulated in *Daubert* was extended to include all expert testimony, not just scientific evidence. The *Kumho Tire* Court explained:

A trial judge determining the admissibility of an [engineering] expert’s testimony may consider one or more of the specific *Daubert* factors . . . the Rule 702 inquiry . . . is a flexible one.

Further,

The *Daubert* factors do not constitute a definitive checklist or test . . . the gatekeeping inquiry must be tied to the particular facts . . . [t]hose factors may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert’s particular expertise, and the subject of his testimony . . . [i]n determining whether particular expert testimony is reliable, the trial court should consider the specific *Daubert* factors where they are reasonable measures of reliability.

For instance, in its discussion concerning the reliability of scientific knowledge, the *Kumho Tire* Court noted “[p]roposed testimony must be supported by appropriate validation — i.e., ‘good grounds,’ based on what is known.” Subsequently, state courts have begun to adopt the *Daubert* and *Kumho Tire* tests.

Accordingly, judicial discipline organizations should consider their “gatekeeping” functions when confronted with expert opinion testimony. In particular, an expert’s opinion concerning the custom and practice of judges in a particular community may be unreliable and excluded if: (1) the expert has no specialized knowledge concerning the topic; (2) the expert’s theories have not been subject to peer review or publication; and, (3) the expert’s opinion is not generally accepted in the legal community and/or is in direct contravention of the law. 

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