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Ex Parte Communications in Domestic Violence Cases *by Cynthia Gray*

The exigent circumstances involved and sympathies generated in cases alleging domestic violence may tempt judges to engage in ex parte communications and other conduct that undermines the right to an impartial judge to which all defendants are entitled.

The Nebraska Supreme Court sanctioned a judge who became embroiled in a domestic violence case, abandoning her judicial impartiality to assist the prosecution and attempt to influence the outcome of the case on appeal. *In re White*, 651 N.W.2d 551 (Nebraska 2002) (120-day suspension without pay). The Court emphasized that the judge was “not being disciplined for her stance relative to domestic violence” but because “concerns about domestic vio-

lence, however well founded, cannot excuse the respondent’s unethical conduct.”

The judge had placed a defendant on probation after he pled guilty to violating a domestic protection order. When he subsequently pled guilty to violating probation, the judge sentenced him to the maximum penalty (180 days’ confinement and a \$1,000 fine). The defendant appealed to the district court, alleging that the judge had exhibited bias toward him. Finding that a reasonable person could question the judge’s impartiality, the district court vacated the sentence and remanded for re-sentencing by a different judge.

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Participating in Charitable Walkathons, Performances, and Similar Fund-raisers *by Cynthia Gray*

Athletic events such as walks, runs, or bike rides in which participants secure pledges from sponsors and artistic performances such as concerts or plays for which tickets are sold are popular fund-raising events for charitable organizations. As active supporters of their communities, many judges have sought guidance from judicial ethics advisory committees about how to participate in such events without violating the ethical prohibitions on using the prestige of office to raise funds and personally soliciting charitable contributions.

Walking, biking, running

Advisory committees have assumed that the judge’s position would not be the focus of a walkathon or similar event

and, therefore, allowed participation as long as the judge is not identified as a judge on the roster of participants or in any other way connected with the event. *Washington Advisory Opinion 2006-7*. *Accord New York Advisory Opinion 06-114* (judge’s participation in walk to raise funds for an organization dedicated to fighting an illness may not be used to raise funds for the organization); *Massachusetts Advisory Opinion 2000-4* (judge may not allow sponsors of charity bike ride to disclose the judge’s profession); *Wisconsin Advisory Opinion 98-7* (judge’s identity may not be used for any purpose in connection with charity bike ride). In one advisory opinion, the Florida judicial ethics committee assumed that a judge would have a “very visible

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Recent Advisory Opinions

 A judge is not required to recuse or disclose when an attorney appearing in a case sits on the board of directors of a non-profit organization with the judge. *New York Opinion 09-234.*

 A judge may thank jurors for their service verbally, by letter or certificate of appreciation, or by a small, dignified memento, such as a bookmark, imprinted with the judge's name, picture, and a historic quote regarding jury service. A judge should thank jurors soon after their service, using a uniform method and without discussing the merits of the case or commending or criticizing the verdict. *Ohio Opinion 2009-10.*

 A judge with responsibility for the dependency and neglect docket may not continue to serve on an inter-agency oversight board after its memorandum of understanding with the department of human services is amended to encourage fewer residential placements. *Colorado Opinion 2010-2.*

 A juvenile court judge or court staff may not accept travel expenses from the owners of a private placement facility for an informational tour of the facility or to assess a juvenile placed there by the court. *Ohio Opinion 2009-2.*

 After recusing, a judge may not be involved with uncontested aspects of a case unless no other judge is available. If the circumstances requiring recusal cease, whether the judge is required to continue to recuse herself depends on the posture of the case. *Maryland Opinion 2009-18.*

 Judge A must report to the State Commission on Judicial Conduct that Judge B offered to have a police officer destroy a ticket issued to Judge A's relative. *New York Opinion 10-14.*

 A judge should report to the appropriate disciplinary authority that an out-of-state attorney testified under oath that she had commingled funds in her law office account. *Connecticut Informal Opinion 2010-6.*

 A judge may have an internet blog to promote "a more fair, just and benevolent society," post an essay on which people could comment, and respond to those comments but should exercise caution to ensure that the blog does not call his impartiality into question. *Washington Opinion 09-5.*

 A judge may make a charitable contribution from personal or campaign funds that is recognized, with or without "judge" or "honorable," in the same manner as others' contributions are recognized. *Ohio Opinion 2009-11.*

 A judge may not rent a room in her home to an unrelated individual who is on community control. *Florida Opinion 2010-1.*

 A judge may not, in anticipation of retirement, list his name with a private alternative dispute resolution service, advertise in newspapers, or provide general notices to attorneys regarding his availability to provide mediation and arbitration after leaving the bench. *Connecticut Informal Opinion 2010-3.*

 A new judge may apply to be discharged from her duties as guardian for an incapacitated person and for a final accounting in a court proceeding. *New York Opinion 10-47.*

 A judge may sponsor and move the admission of her child to practice in federal court. *New York Opinion 10-62.*

 A full-time judge may pursue part-time paid employment as a solo musician only occasionally and only with family, friends, neighbors, and others who are unlikely to appear in the judge's court and should not advertise his availability to the general public. A judge who is an artist may occasionally participate in juried and non-juried art shows; may exhibit his work on the internet and at a gallery or public place if his presence is not required; and may sell his work on commission. *New York Joint Opinions 09-192 and 09-231.*

 A judge may purchase a home at a foreclosure sale if the judge has had no judicial involvement in the foreclosure but should not alert his co-judge or court personnel that he is interested in the home, other than in the same time, place, and manner as other members of the public, and should not disclose his judicial status unless he must do so pursuant to law or administrative rule. *New York Opinion 09-134.*

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

Demeanor

The Washington Supreme Court suspended a judge for five days without pay for deriding the intelligence of pro se litigants who appeared before her and rudely and impatiently interrupting them verbally and, occasionally, by whistling at them and pounding on her desk to get their attention. *In the Matter of Eiler*, 2010 WL 3036753 (August 5, 2010). Several litigants and attorneys testified they were “embarrassed” by the judge’s “degrading” treatment, and felt “mocked,” “attacked,” and “uncomfortable” in her courtroom. The Court stated:

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. Judge Eiler’s conduct and demeanor lacked the patience, dignity, and courtesy expected of members of the judiciary and at times denied parties their right to be heard.

Rejecting the judge’s contention that her courtroom speech and conduct 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 noted that the judge’s long years (over 20) on the bench “aggravate, rather than mitigate, her misconduct — she should know better.”

Scheduling

Based on a joint recommendation, the New York State Commission on Judicial Conduct admonished a judge for his policy of scheduling trials based on the availability of the issuing police officers, resulting in a failure to efficiently and promptly schedule trials in more than 500 traffic matters. *In re Barlaam*, Determination (March 15, 2010) (www.scjc.state.ny.us).

The judge’s court held weekly traffic trials on Thursday afternoons. A case-tracking system catalogued all matters based on the individual issuing officer. Pursuant to the judge’s policy, to reduce overtime costs for the police department, his clerk obtained the schedule of each officer in advance and scheduled or rescheduled the court appearance to coincide with the officer’s availability during a day shift. As a result, over 500 traffic cases were not adjudicated for as long as five years and five months. The judge acknowledged that his policy created a bias and/or the appearance of bias in favor of the police department and was detrimen-

tal to litigants who were forced to wait years for their day in court.

Gift of tickets/letter of recommendation

The Texas State Commission on Judicial Conduct publicly admonished a judge for accepting tickets to basketball games from an attorney and writing a letter of recommendation for a person with a pending criminal case. *Public Admonition of Guerrero* (March 26, 2010) (www.scjc.state.tx.us/pdf/actions/FY2010-PUBSANC.pdf).

On at least one occasion, the judge accepted a free ticket, valued at approximately \$230, to attend a San Antonio Spurs basketball game from an attorney who wrote bail bonds and/or practiced in her court. The donor did not accompany the judge to the game. On several occasions, the same attorney allowed the judge to sit in his reserve seats when he was not attending. The judge’s attendance at games as a guest of the attorney was reported by a local TV station.

The judge wrote a letter of recommendation on behalf of an applicant to the American

Registry of Radiologic Technologies, signing with her name and title. After disclosing that the applicant had a pending criminal case (a DWI charge), the judge stated she was “confident” the applicant would be “vindicated” and her reputation “restored.” The Commission concluded that the letter went well beyond general praise for the applicant’s qualifications, finding that the judge “suggested that she had unique insight, or perhaps was privy to inside information” regarding the case and that the applicant was in a position to influence her in the disposition of the case.

Tinfoil hat

The California Commission on Judicial Performance publicly admonished a judge for a variety of misconduct. *In the Matter Concerning Edwards*, Decision and Order (April 12, 2010) (<http://cjp.ca.gov/>).

(1) During a group conversation in which the judge was present, a man whom the judge knew socially suggested that wearing a tinfoil hat would be a way of getting out of jury duty. As the man recalls, the judge responded, “I dare you,” in a manner that the man believed was intended to convey disapproval.

Several months later, the man reported for jury duty with a tinfoil hat on his head. After the case settled, the panel was dismissed by the judge. The judge saw the man with the tinfoil hat but did not ask him to remove the hat. The Commission found it reflected a lack of decorum for the judge to allow the potential juror, whom he knew was joking,

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Recent Decisions

Ex Parte Communications in Problem-solving Courts

The notes for the 2007 *American Bar Association Model Code of Judicial Conduct* report that several witnesses before the Joint Commission to Evaluate the Model Code testified that judges in problem-solving courts “communicate with parties, service providers (such as social workers), and others in ways that can be in tension with traditional rules governing ex parte communications.” In response, the ABA adopted two new comments.

One comment in the application section explains:

In recent years many jurisdictions have created what are often called “problem solving” courts, in which judges are authorized by court rules to act in nontraditional ways. For example, judges presiding in drug courts and monitoring the progress of participants in those courts’ programs may be authorized and even encouraged to communicate directly with social workers, probation officers, and others outside the context of their usual judicial role as independent decision makers on issues of fact and law. When local rules specifically authorize conduct not otherwise permitted under these Rules, they take precedence over the provisions set forth in the Code. Nevertheless, judges serving on “problem solving” courts shall comply with this Code except to the extent local rules provide and permit otherwise.

Comment 4 to Rule 2.9(A), which governs ex parte communications, states:

A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

Arkansas, Indiana, Iowa, Minnesota, and Wyoming have adopted both of the new comments, while Montana, Nevada, and Utah have adopted the comment to the rule on ex parte communications. The Hawaii Supreme Court created a broader exception that allows judges serving on therapeutic courts to engage in ex parte communications without the limitation that they must be authorized by law.

Other states have adapted the comments to reflect their practices and policies for problem-solving courts. The Colorado revision, for example, states that ex parte communications are allowed, not only when expressly authorized by law, but also “by consent of the parties.” The versions in Arizona and Maryland refer to ex parte communications authorized by protocols and consented to by the parties, not authorized by law. For example, the Maryland rule provides,

“When serving in a problem-solving court program . . . , a judge may initiate, permit, and consider ex parte communications in conformance with the established protocols for the operation of the program if the parties have expressly consented to those protocols.”

The Ohio rule allows a judge to engage in ex parte communications “when administering a specialized docket, provided the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage while in the specialized docket program as a result of the ex parte communication.” The Idaho Supreme Court adopted a new section to the ex parte rule that states:

A judge presiding over a criminal or juvenile problem solving court may initiate, permit, or consider ex parte communications with members of the problem solving court team at staffings, or by written documents provided to all members of the problem solving court team. A judge who has received any such ex parte communication regarding the defendant or juvenile while presiding over a case in a problem solving court shall not preside over any subsequent proceeding to terminate that defendant or juvenile from the problem solving court, probation violation proceeding, or sentencing proceeding in that case.

A comment in the Kansas code incorporates Kansas Supreme Court Rule 109A, which authorizes court districts to establish problem-solving courts. Rule 109A states:

A judge presiding over such a court calendar may initiate, permit, or consider ex parte communications with probation officers, case managers, treatment providers, or other members of the problem-solving court team at team meetings, or by written documents provided to all members of the problem-solving court team. A judge who has received any such ex parte communication regarding the defendant or juvenile may preside over any subsequent proceeding if the judge discloses the existence and, if known, the nature of the ex parte communication to the defendant and the State and both the defendant and the State consent to the judge hearing the matter. 

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Participating in Charitable Walkathons, Performances, and Similar Fund-raisers *(continued from page 1)*

role” in a highly publicized fund-raising marathon and concluded that the judge could not participate. *Florida Advisory Opinion 2005-14*. In a subsequent opinion, however, the committee decided that merely walking in a charitable event where someone might recognize the judge was not an impermissible use of the prestige of the office. *Florida Advisory Opinion 2010-15* (walkathon to benefit research into and raise public awareness of an illness).

Although a judge participating in a fund-raising bike ride or similar event may contribute to the sponsoring organization himself, advisory committees warn that the judge may not obtain pledges, solicit sponsorships or contributions, or permit contributions to be made in his name. *Arizona Advisory Opinion 00-6*; *Florida Advisory Opinion 2010-15*; *New York Advisory Opinion 96-147*. See also *Florida Advisory Opinion 2005-14* (new judge may forward to a charity donations related to his participation in a marathon received prior to his appointment to office, but not donations received after that date); *Massachusetts Advisory Opinion 2008-11* (judge who is walking to raise money for cancer research should not permit his name to appear on a public fund-raising web-site for the event; judge should reimburse a probation officer who made a donation but is not required to refund a modest contribution from a woman whom the judge knows professionally); *New York Advisory Opinion 07-17* (judge may walk to raise funds for a charitable organ-

ization with a team if the other members solicit donations without reference to the judge and the judge does not solicit individuals to participate on the team or to sponsor team members).

The Massachusetts and Washington advisory committees created an exception that allows a judge to raise funds from family members who would never appear before him. *But see New York Advisory Opinion 06-114* (judge walking to raise funds for a charitable organization may not solicit relatives). A Massachusetts judge asked about participating in a bike ride that would raise money for charitable organizations engaged in AIDS research where each partic-

ipant commits to raise at least \$3,900. *Massachusetts Advisory Opinion 00-4*. The judge intended to raise that amount from relatives and his personal funds without requesting or accepting funds from lawyers or “anyone with even the remotest possibility of becoming a litigant” in his court.

The committee noted that the restrictions on soliciting

contributions to charities were “designed to assure that a judge does not neglect his official duties, that he does not use, or give the impression of using, his official position to further the interests of the charity involved, and that the people who work within the judicial system and those who come before it do not feel pressured to help a cause being championed in any way by the judge.” The committee concluded, “none of these aims would in any way be compromised when a judge asks members of his immediate family . . . to join with him in a charitable activity by contributing their money.”

The relationship of spouse, parent, child, brother or sister is so basic that it renders irrelevant the judge’s official status. To think that such close family members would feel pressured because [the judge is] a judge does not comport with a realistic view of the dynamics of family life. Indeed, the very concept of “solicitation” implies a more formal endeavor that seems at odds with family activities. Moreover, a judge’s official actions could never be called into question by such a solicitation since a judge would

The committee reasoned that “the motivation for friends and family members to contribute to the judicial officer is personal in nature and not related to the prestige of the judicial office.”

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never have occasion to sit on matters involving these family members.

Similarly, a judge asked whether he could join the Leukemia and Lymphoma Society's team for a Seattle-to-Portland bicycle ride when each entrant was required to make a minimum financial contribution through donations and pledges. The Washington committee stated that the judge could, acting as an individual and without identifying himself as a judge, solicit pledges from family and friends to participate in the ride. *Washington Advisory Opinion 06-7*. The committee reasoned that "the motivation for friends and family members to contribute to the judicial officer is personal in nature and not related to the prestige of the judicial office."

Finally, the New York judicial ethics committee advised that a judge may volunteer for a supportive role during a charity's athletic event. For example, a judge could act as a "crew person" helping to set up camp, prepare foods, and provide other assistance to riders during a two-day AIDS bicycle ride (*New York Advisory Opinion 96-147*) or serve on a planning committee for a charity's fund-raising walk

and perform tasks such as putting up signs, recognizing sponsors, directing walkers, setting out food and drink stands, registering participants, handing out raffle prizes, and picking up in-kind donations from sponsors. *New York Advisory Opinion 07-17*.

Singing, dancing, acting, playing ball

Similarly, most advisory opinions allow a judge, with certain conditions, to perform as part of a group in a charity's fund-raising show.

For example, the Arizona advisory committee stated that a judge who is a member of a singing group may perform with the group after a charity's silent auction. *Arizona Advisory Opinion 00-6*. The group's name, but not the judge's name or title, would be advertised in connection with the event, and the auction bids would be closed before the performance begins. The committee reasoned that, although the judge would be directly involved in a fund-raising event, she would not be directly involved in soliciting funds, and her involvement could not be reasonably construed as lending the prestige of judicial office for that

Code provisions regarding charitable fund-raising

Jurisdictions vary in the rules that govern charitable fund-raising depending on which version of the ABA *Model Code of Judicial Conduct* the jurisdiction has adopted and what variations on the model the jurisdiction has fashioned.

Under both the 1972 model code and 1990 model code, judges were expressly prohibited from personally soliciting funds for all not-for-profit organizations, both organizations devoted to the improvement of the law, the legal system, or the administration of justice (quasi-judicial organizations) and educational, religious, charitable, fraternal, or civic organizations (extra-judicial organizations). The 1990 model code added exceptions that allowed a judge to personally solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority and to personally participate in membership solicitation that would not reasonably be perceived as coercive and was not essentially a fund-raising mechanism.

Following the 2007 revisions, the ABA model code now provides in Rule 3.7(A)(2) that a judge "may solicit contributions" for both extra-judicial and quasi-judicial organizations "but only from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority." The 2007 model code no longer expressly states that a judge shall not personally solicit contributions from other individuals. (The structure of Rule 3.7(A)(2) suggests that a judge "may not" do so, but that is not an enforceable standard.)

In addition, in Rule 3.7(A)(4), the 2007 model code allows a judge to speak or receive an award at, be featured on the program of, and permit his or her title to be used for a fund-raising event — but only for an event that concerns the law, the legal system, or the administration of justice. A new comment also explains that it is "generally permissible for a judge to serve as an usher or a food server or preparer, or to perform similar functions, at fund-raising events sponsored by educational, religious, charitable, fraternal, or civic organizations. Such activities are not solicitation and do not present an element of coercion or abuse the prestige of judicial office."

purpose as long as she was not singled out for recognition before or during the event; her name or title was not mentioned; she was not a soloist or other primary, featured performer; and funds were not directly solicited or collected at the performance. *See also Arkansas Advisory Opinion 93-6* (judge may play with band at a fund-raising radio broadcast performance for a public radio station where her name and position will not be mentioned and no person being solicited would know that she is performing); *Illinois Advisory Opinion 95-23* (judge could act in a play even if the sponsoring charitable organization hopes to raise money where her name will not appear on any of the materials other than as a member of the cast); *Maine Advisory Opinion 05-3* (judge may participate as a member of a musical group that is hosting a free performance for friends and families at which there will be containers in which attendees can place contributions to charities chosen by band members). *Compare Arizona Advisory Opinion 00-6* (judge who plays on a softball team with other lawyers in a small community may play in a tournament to raise money for needy families even if the event is broadcast on local radio unless her title is mentioned and her participation is singled out or specifically used to support the fund-raising) *with Arkansas Advisory Opinion 93-3* (judge may not manage or play on a softball team that would play against teams of the executive and legislative branches of state government where the judges' participation would be highly publicized and spectators would support their favorite teams or players by agreeing to contribute money to a charitable organization).

However, the Arizona committee noted that a judge should not sing at a fund-raising event if she will be a soloist or other primary performer or if funds were directly solicited or collected at the event itself. *Arizona Advisory Opinion 00-6*. Similarly, the Florida committee advised that a judge may not appear as a "dignitary guest" actor in a fund-raising production of the Nutcracker for a non-profit ballet company when advertising for the production will use the judge's name and title. *Florida Advisory Opinion 2008-22*. *See also Florida Advisory Opinion 2003-16* (judge may not participate in a voluntary bar

association's fund-raising event by performing a skit or displaying a talent); *Florida Advisory Opinion 1988-31* (judge may not be a model in a fund-raising fashion show for the legal aid society); *New York Advisory Opinion 98-33* (judge may not serve as a model at a charitable event); *Texas Advisory Opinion 41* (1979) (judge may not appear as an opera singer at a fund-raiser); *Washington Advisory Opinion 93-5* (judge may not appear as a model at a fashion show where some of the admission proceeds will be donated to charity). *But see Michigan Advisory Opinion JI-71* (1993) (judge may participate as a model in a fashion show raising funds for charitable purposes even if promotional literature lists the judges who will appear as models); *Pennsylvania Informal Advisory Opinion 8/6/02* (judge may model clothes at a fashion show to raise funds for a charitable organization if the judge's name, title, and likeness will not be used to promote the show, she will not be introduced to the audience as a judge, and the audience will not bid on the clothes). 🗑️



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Ex Parte Communications in Domestic Violence Cases *(continued from page 1)*

After receiving the district court order, the judge encountered the deputy county attorney on the courthouse stairs and asked her to come into her chambers. Directing the attorney to take notes, the judge itemized arguments about the errors in the district court order, with supporting cases, in a “lengthy, detailed, and largely one-sided conversation.” The judge pointed out that defense lawyers would use the order to disqualify her in other domestic violence cases if it was not appealed. In a subsequent meeting in the hallway, the judge identified a resource person at a national organization from whom the attorney “might want to seek additional information” to assist in the appellate brief.

Later, after learning that the county attorney had inadvertently failed to file a timely notice of appeal, the judge asked the presiding judge of the district court to appoint a special prosecutor to pursue an appeal from the defendant’s re-sentencing. The prosecution and the defense were not present and had not been notified of the hearing on the motion.

Abandoning impartiality

The Court found that the judge’s “quarrel with the district court’s decision caused [her] to abandon the impartiality required of a judge no matter what accusations are made against those who appear before the court.” The Court found that the judge’s *ex parte* conversations with the deputy county attorney were impermissible, even though the case was not pending before her, because the code does not limit the prohibition on *ex parte* communications to the docket of a particular judge. The Court noted that *ex parte* communications by a trial judge while a matter is on appeal are prohibited because a case may be remanded.

The Court held that, in her meetings with the deputy county attorney, the judge “figuratively speaking, stepped down from the bench and assumed the State’s place at the prosecutor’s table.”

The respondent injected herself into the proceeding as an advocate for one of the parties. “When a judge becomes embroiled in a controversy, the line between the judge and the controversy before the court becomes blurred, and the judge’s impartiality or appearance of impartiality may become compromised.” In this case, the respondent “‘abandoned the judicial role to become an advocate for [her] own ruling.’” Such behavior by the respondent “discloses an unhealthy and wholly improper concern with the protection of [her] own rulings from appellate reversal.” Simply stated, the individual judge of the court whose order is being reviewed is not a proper party to the proceeding.

Public comment on a pending case

The Court also found that the judge’s motion for appointment of a special prosecutor constituted public comment on a pending matter and was intended to force an appeal, which would interfere with a fair hearing. The Court concluded that the motion was a “public” comment because, while it was “not made in a context as public as, for instance, a press conference,” the judge “was in open court, thus making her comments in a public forum and preserving them as part of the public record.”

Noting the exception permitting judges to make “public statements in the course of their official duties,” the Court distinguished between comments made in an official capacity and comments made in the course of official duties. The Court concluded that the judge’s motion to appoint a special prosecutor, while made in her official capacity, was not made in the discharge of any official duty because her responsibility for the case had ended and she had “no official duties with respect to the disposition of the case — much less official duties that required any public statements to be made.” Noting the rule plainly restricts a judge’s public comments while a proceeding is pending “in any court,” the Court held that the rule applied to a judge’s comments on a matter before another judge or an appellate court to preclude the possibility of undue influence on the judicial process and the threat to public confidence posed by one judge criticizing the rulings or technique of a different judge.

The Court also stated that the judge’s “abortive intervention not only made the appearance of partiality more acute, but pushed the respondent past appearances and into the realm of actual partiality.”

By making public comments in an attempt to justify and defend a decision, and in seeking intervention from the district court to force appellate review of her decision, the respondent adopted the role of an advocate. The respondent’s inappropriate and unethical foray into the prosecution of a matter for the purpose of vindicating her prior ruling shattered the appearance of an impartial magistrate, and was an evident attempt to intrude into the authority of another branch of government.

The Court further found:

The responsibility of a judge is to decide matters that have been submitted to the court by the parties. The judge may not, having decided a case, advocate for or, as in this case, materially assist one party at the expense of the other. Such advocacy creates the appearance, and perhaps the reality, of partiality on the

part of the judge. This, in turn, erodes public confidence in the fairness of the judiciary and undermines the faith in the judicial process that is a necessary component of republican democracy.

On a mission

The Kentucky Supreme Court affirmed a sanction for a judge who, after a summary hearing, erroneously held a husband in contempt of court for contact with his wife, finding the judge “was on a mission and nothing was going to stop her, not the law or anybody/anything else.” *Gormley v. Judicial Conduct Commission*, 2010 WL 3374407 (August 26, 2010) (reprimand and 45-day suspension for this and other misconduct).

A bailiff informed the judge that witnesses had reported that, while waiting in the hallway for a hearing on a wife’s motion for a modification of the no contact provision of a domestic violence order, a husband had attempted to convince his wife to leave the courthouse. After interviewing two witnesses, the judge held an impromptu summary criminal contempt of court hearing without prior notice to the husband or advising the husband that he had the right to counsel, that he did not have to respond to questions, and that his answers to questions might subject him to criminal sanctions. The judge called one witness to testify about the incident in the hallway but did not allow the husband to question this witness. The judge questioned the husband under oath. Based on the ex parte information she had obtained from the two witnesses and the bailiff and the husband’s testimony, the judge found the husband in contempt of court and sentenced him to six months in jail. On appeal, the Court of Appeals reversed and remanded for an appropriate evidentiary hearing.

Finding that the judge clearly erred in holding a summary criminal contempt proceeding for indirect criminal contempt, the Court noted “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. . . .”

The Court concluded, however, that the judge’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. . . . Section 121 of the Kentucky Constitution recognizes the reality of rogue judges and authorizes the Commission as a way to deal with the situation.

Ex parte communications with the victim

Pursuant to a stipulation, the Washington State Commission on Judicial Conduct publicly admonished a judge for considering an ex parte communication from the victim in a criminal domestic violence case. *In the Matter of Lukevich*, Stipulation, Agreement, and Order (May 9, 2002) (www.cjc.state.wa.us). The judge had released a defendant on his own recognizance at arraignment, following his representation that he would stay away from the victim. After the defendant left the courtroom, the victim appeared at the counter and explained to the judge that she was afraid that the defendant’s release would result in her death. At sentencing, the judge disclosed the communication for the first time and, noting that the victim had been terrified, crying, and upset, stated that he was imposing the sentence “with the vivid memory of [her] in my mind.” On direct appeal, the conviction had been reversed, and the case remanded to a different judge.

Similarly, in *In the Matter of Canfield*, Determination (September 19, 2003) (www.scjc.state.ny.us), approving a joint recommendation, the New York State Commission on Judicial Conduct admonished a judge who had, in addition to other misconduct, amended an order of protection after he had an ex parte communication with the victim. The judge had ordered a defendant to refrain from certain harassing conduct toward his wife and then disqualified himself from the case. The next day, the judge discussed the case ex parte with the victim and, sua sponte, amended the order of protection to direct the defendant to stay away from the victim and her children.

Advisory opinions have also disapproved of communications by judges with the victims in domestic violence cases outside of the presence of the defendant.

- If a complainant in a domestic violence case has asked that a no-contact order be vacated, a judge may not meet privately with the complainant to ascertain whether she is acting voluntarily or out of fear or coercion. *Arkansas Advisory Opinion 02-9*.

- A judge who presided over a concluded criminal proceeding in domestic violence court should not agree to the victim’s request to meet with the judge to describe the his-

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Ex Parte Communications in Domestic Violence Cases *(continued from page 9)*

tory of abuse she had experienced and to thank the judge for considering her views at sentencing. *New York Advisory Opinion 09-11*.

- When a defendant arrested for domestic violence is to be arraigned late at night or on the weekends when the court is closed and the complainant cannot be present, a judge may not telephone or otherwise communicate ex parte with the complainant to inform her of the types of orders of protection available, the possible bail that may be imposed, and her statutory right to continue the action in family court or concurrently in both family court and criminal court. *New York Advisory Opinion 05-81*.

In *In the Matter of Cerbone*, Determination (March 21, 1996) (www.scjc.state.ny.us), the New York Commission admonished a judge who had made an ex parte telephone call to the victim in an assault case, in addition to other misconduct. At arraignment, the judge had released a defendant on his own recognizance and orally issued an order of protection in favor of the complainant.

The day after arraignment, the judge called the complainant ex parte. After advising the complainant that she could continue the case in his court or have it transferred to family court, the judge said that the defendant appeared to be a “decent guy” who had “made a mistake” but did not pose a threat, adding he felt the defendant was “sincere about not causing any more trouble.” The judge asked the complainant whether she intended to permit the defendant to visit their two-year-old son and suggested that he might modify the order of protection to permit visitation. The complainant testified that, as a result of the conversation, she felt that she had no one behind her and might be making a mistake by going through with the charges.

Several months later, the complainant asked that the charges be dropped. Although the assistant district attorney objected, the judge dismissed the charge without conducting a trial. The judge never disclosed that he had spoken with the complainant or that he had represented the defendant’s parents seven to eight years earlier.

The West Virginia Supreme Court of Appeals publicly reprimanded a magistrate for improperly delaying the filing of a domestic violence protective order by screening the facts through an ex parte communication and deterring the two individuals who sought the order from coming to the courthouse on a Saturday to file the petition. *In the Matter of McCormick*, 521 S.E.2d 792 (West Virginia 1999).

In a telephone call one Saturday when the magistrate was on-call, Cheryl M. informed the magistrate that she and her son wanted to file a domestic violence petition against her son’s estranged wife, who had broken into their trailer. The

magistrate testified that Cheryl alleged no acts of domestic violence but stated that her son wanted custody of his child and his personal property. The magistrate advised Cheryl that the allegations would not support issuance of a protective order and that, if they did come in on Saturday, the order would probably not be served until Monday. Cheryl and her son did not go to the court until Monday.

The Court held that the magistrate should have gone immediately to the courthouse for a hearing on the petition and should not have screened the situation over the telephone and decided whether to issue the order before the petition was even filed.

See also *Inquiry Concerning Rodella*, 190 P.3d 338 (New Mexico 2008) (telling a victim in a domestic violence case ex parte that, if she did not want to testify at her husband’s trial, there would be no adverse legal consequences); *Commission on Judicial Performance v. McPhail*, 874 So. 2d 441 (Mississippi 2004) (informing victim ex parte that, if she did not testify, police officer could not substantiate the charge; advising defendant ex parte to file a counter charge against victim).

Other ex parte communications

The Alaska Supreme Court suspended a judge for ex parte communications with a state trooper in a domestic violence proceeding and related conduct. *In re Cummings*, 211 P.2d 1136 (Alaska 2009). In the jury trial of a man charged with violating a domestic violence protective order issued to his wife, a state trooper who was a prosecution witness testified that the order did not prohibit contact between the defendant and his four children, which was contrary to the express terms of the order. During a recess, the judge called a different trooper to the bench, handed him a note, and stated: “Just in case you want to go fishing.” The note stated: “Look at page 4 DVRO [domestic violence restraining order] just above paragraph (d). About custody of children — [] cannot be protected no visitation.” The judge did not give a copy of the note to defense counsel. During a break later that day, the judge asked the same trooper if he had any questions about the note.

The prosecutor told defense counsel about the note after the trial day ended. Defense counsel asked the judge at the beginning of the next trial day to dismiss the charges with prejudice. The judge explained in open court his purpose in giving the note to the trooper and produced a second, but not identical, note that he gave defense counsel. Although the judge recused himself, he continued to preside over the hearing but ultimately granted defense counsel’s unopposed motion for a mistrial.

The Ohio Supreme Court suspended a former judge from the practice of law for delaying her decisions, conducting ex parte investigations, inappropriate demeanor, and other abuses of power in two civil protection order cases, in addition to other misconduct. *Disciplinary Counsel v. Squire*, 876 N.E.2d 933 (Ohio 2007) (two-year suspension, with one year deferred). A statute required that a hearing be held within 24 hours of the filing of a petition for an ex parte civil protection order. In two cases, the judge held a hearing but refused to render a decision until she conducted an “investigation.” In both cases, the judge spoke with county children services and the child’s grandmother outside the presence of the parties or their attorneys.

The judge argued that the statute did not require a ruling on the day that the petition is filed, only a hearing. Noting that the reason for the hearing is to expedite a decision given the emergency nature of the proceedings, the Court stated, “while it is true that the decision whether to grant a CPO is within the discretion of the trial court, . . . respondent simply refused to make a decision at all.” The Court rejected the judge’s contention that she could not decide until she investigated, noting her “so-called attempts at

‘investigations’ resulted in ex parte communications.” The Court emphasized that “Ohio law does not require or permit [a judge] to conduct her own investigation of circumstances underlying the petition for a CPO or permit [a judge] to delay her decision in order to conduct or require such an investigation.”

See also *In the Matter of the Rock*, Determination (New York State Commission on Judicial Conduct June 27, 2001) (www.scjc.state.ny.us) (based on an ex parte communication with his own daughter, judge accused defendant of lying when he denied striking his wife); *Disciplinary Counsel v. Campbell*, 931 N.E.2d 558 (Ohio 2010) (telling defense attorney in a domestic violence matter that he was “behaving like a horse’s ass” when told the defendant would not accept a plea agreement and talking to the defendant, who was in a holding cell, in a raised voice and outside the presence of defendant’s counsel). *In the Matter of Beckham*, 620 S.E.2d 69 (South Carolina 2005) (finding defendant guilty based only on the law enforcement incident report and re-opening case based on ex parte communication with defendant’s attorney). 

Recent Decisions *(continued from page 3)*

to leave the tinfoil hat on his head during court proceedings.

(2) The judge and his wife are the godparents of Corrie Floris’s child. After Floris was charged with assault with a deadly weapon for stabbing her boyfriend, she appeared before the judge for arraignment. The judge’s wife, an attorney, stood up when the case was called. The judge asked his wife what should be done next, and she replied that Floris should have the public defender. The judge then arraigned Floris, appointed the public defender, set bail, and set the matter for a bail review and preliminary hearing. As the judge walked out of the courtroom, he walked by the jury box where Floris was sitting and hugged her.

(3) Because Hayfork residents are generally impoverished and without transportation, the judge dismissed misdemeanor cases against defendants who lived in Hayfork but had been cited by law enforcement to appear in Weaverville. The appellate division held dismissal on those grounds was an abuse of discretion, observing that issues of court administration are “external to the case” and cannot be grounds for dismissal.

(4) Court proceedings are held in Hayfork one Friday a month, with the calendar typically completed in the morning. After the calendar is concluded, the judge leaves, but the clerk remains in Hayfork until 4 p.m. to handle walk-in

matters, with a lunch break between noon and 1 p.m.

One Friday when Judge Woodward, the other judge on the court, was handling the Hayfork calendar, Judge Edwards flew to Hayfork around noon and took the clerk and deputy marshal to lunch. They flew to the coast but did not locate an open restaurant and returned to eat in Hayfork. The clerk did not return to the court until approximately 2:45 p.m. The Hayfork court was locked during the clerk’s absence. The judge did not contact anyone regarding the clerk’s whereabouts and did not attempt to arrange for other court employees to staff the courthouse. The judge had a few matters on the calendar in Weaverville at 1:30 p.m., but he did not return until approximately 3:30 p.m. or contact the court. Judge Woodward handled the matters.

(5) The two judges of the Trinity County Superior Court have approximately a half-time caseload, which they supplement by presiding over calendars in other jurisdictions. Despite the light caseload, between 2005 and 2008, Judge Edwards decided at least four matters only after delays of 119 days, 91 days, 99 days, and 91 days.

(6) During an arraignment calendar, the judge commented in a crowded courtroom that a certain misdemeanor “was just another example of the DA overcharging.” 



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