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# JUDICIAL CONDUCT REPORTER

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## Judicial Discipline for Pre-Bench Attorney Misconduct

In recent cases, two judges were disciplined for misconduct committed while they were attorneys, many years before they went on the bench.

The Nebraska Supreme Court suspended a judge who, in 1984, while serving as a county attorney, had altered a copy of a police report, provided the altered copy to defense counsel, and asked the police officer who made the report to alter the original to conform to the changes. The

suspension was for six months without pay. The Commission on Judicial Qualifications had recommended removal. *In re Krepela*, 628 N.E.2d 262 (2001).

Krepela admitted that while prosecuting first degree murder charges in 1984 against Robert Edward Hunt, he had removed from a copy of a police report two pages that related to Hunt's requests for an attorney during police questioning. Krepela instructed his secretary to type a false page as a sub-

stitution, and Krepela gave the false report to the defendant's attorney. The Commission also found that Krepela asked the police detective who prepared the report to alter his original report to conform to Krepela's changes, although Krepela denied that charge. Subsequently, Krepela made arrangements for another attorney to serve as special prosecutor and disclosed the alteration of

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## May a Judge Sign a Nominating Petition?

by Cynthia Gray

State judicial ethics advisory committees are split on the question whether a judge may sign a petition for a candidate's name to be placed on the ballot. A conclusion about the propriety of the conduct depends on whether signing a petition is viewed as comparable to an endorsement, which is prohibited by the code of judicial conduct, or as analogous to voting, which is permitted.

### Opinions that prohibit signing

Concluding that a judge may not sign a nomination paper for a candidate for

public office, the Massachusetts judicial ethics advisory committee "declin[ed] to draw so fine a line as to distinguish between a public endorsement of a candidate for election and a public endorsement of a candidate for placement on a ballot." *Massachusetts Advisory Opinion 99-13*. Accord *Florida Advisory Opinion 92-32*; *Florida Advisory Opinion 84-8*. The Massachusetts committee stated:

While nomination papers are not high profile documents and frequently play no role in campaigns once a position on the ballot is secured, they are public docu-

ments. Signing a nomination paper constitutes a public endorsement of the candidate's placement on the ballot, and thus can be construed as a public endorsement of the candidate.

Similarly, the Pennsylvania judicial ethics committee noted that, while voting is private, a nomination petition is filed with a state agency and is available for public inspection. *Pennsylvania Formal Advisory Opinion 2000-1*. The committee concluded that "[s]igning a nomination petition

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# Judicial Independence and Judicial Discipline

In a recent case, the United States Court of Appeals for the District of Columbia Circuit affirmed the relationship between maintaining an effective judicial discipline system and preserving judicial independence. Noting “the benefits to the judiciary from intra-branch efforts to control the self indulgence of individual judges,” the court stated the “concern for protecting the judiciary from other branches argues for internal disciplinary powers.” The court concluded, “Arrogance and bullying by individual judges expose the judicial branch to the citizens’ justifiable contempt. The judiciary can only gain from being able to limit the occasions for such contempt . . . .” *McBryde v. Committee to Review Circuit Council Conduct and Disability Orders*, 264 F.3d 52 (2001).

A Special Committee of the Judicial Council of the Fifth Circuit had investigated John H. McBryde, District Judge for the Northern District of Texas, for two years, including nine days of hearings. The committee concluded that “Judge McBryde ha[d] engaged for a number of years in a pattern of abusive behavior” that was “prejudicial to the effective and expeditious administration of the business of the courts.” The committee recommended that the judge receive a public reprimand and that no new cases be assigned to him for a year or that he be allowed for three years to preside over cases involving any of the 23 lawyers who had participated in the investigation. The Judicial Council imposed the recommended sanctions. The Judicial Conference Committee to Review Circuit Council Conduct and Disabil-

ity Orders substantially affirmed the Council’s action.

Judge McBryde brought suit, claiming that the Judicial Conduct and Disability Act, both facially and as applied, violated the due process clause and the Constitution’s separation of powers doctrine and that the investigation of him exceeded the authority granted by the statute. On cross motions for summary judgment, the district court rejected the

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**“[W]e are all at a loss to see why . . . the Constitution, in the name of ‘judicial independence,’ can be seen as condemning the judiciary to silence in the face of such conduct.”**

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judge’s claims, 83 F. Supp. 2d 135 (D.D.C. 1999).

On appeal, the D.C. Circuit held that (1) the judge’s claims were moot as they related to the one-year ban on new cases being assigned to him and the three-year disqualification from cases involving the 23 attorneys, and (2) the judge’s “as applied” and statutory challenges were barred by the preclusion of judicial review in the Act.

The court did address the judge’s two facial constitutional challenges. The court concluded that the “overarching purpose” of the tenure and salary protections of Article III was not to insulate individual judges against the world as a whole (including the judicial branch itself), but “to safeguard the branch’s independence from its two competitors,” the executive and legislative branches. The court rejected the judge’s argument that the allocation

of impeachment power to Congress excludes all other forms of discipline, noting the Constitution limits impeachment to removal and disqualification to hold office, does not mention discipline generally, and allows criminal prosecution of judges.

The court also rejected the judge’s claim that the Constitution bars any sanction for “anything to do with anything the judge does verbally or physically when acting and deciding cases or in any phase of the decisional function.” The court described one instance in which, after a lawyer had not had her client attend a settlement conference, as required by the judge’s standard pretrial order, the judge ordered the lawyer to attend a reading comprehension course and submit an affidavit swearing to her compliance. The court, assuming arguendo that the Act may not be used as a substitute for appeal, stated:

Appeal is a most improbable avenue of redress for someone like the hapless counsel bludgeoned into taking reading comprehension courses and into filing demeaning affidavits, all completely marginal to the case on which she was working. Possibly she could have secured review by defying his orders, risking contempt and prison. But we are all at a loss to see why those should be the only remedies, why the Constitution, in the name of “judicial independence,” can be seen as condemning the judiciary to silence in the face of such conduct.

The court stated “we see nothing in the Constitution requiring us to view the individual Article III judge as an absolute monarch, restrained only by the risk of appeal, mandamus and like writs, the criminal law, or impeachment itself.” 

The court stated “we see nothing in the Constitution requiring us to view the individual Article III judge as an absolute monarch, restrained only by the risk of appeal, mandamus and like writs, the criminal law, or impeachment itself.” 

# Disclosure to Appointing Authorities: Exceptions to Confidentiality

by Cynthia Gray

The rules of the judicial conduct commissions in at least 17 states contain an exception to the requirement of confidentiality that allows the commissions to disclose otherwise confidential information to authorities investigating whether a judge should be appointed or re-appointed to judicial office. Those states are Arizona, Arkansas, California, Colorado, Georgia, Hawaii, Kansas, Maine, Maryland, Massachusetts, Minnesota, Missouri, New York, Pennsylvania, South Dakota, Vermont, and Virginia.

In most of those states, whether to disclose the information is discretionary with the commission. For example, the rule for the Arizona Commission on Judicial Conduct provides:

The commission shall . . . have discretion to disclose proceedings and records . . . [u]pon inquiry by an appointment authority or a state or federal agency lawfully empowered to conduct investigations in connection with the selection or appointment of judges.

The rules in Georgia, Kansas, and Pennsylvania also refer to the commission's discretion, while the rules in Colorado, Hawaii, Massachusetts, Minnesota, and Missouri state that the commission "may" disclose confidential information to appointing authorities. (In Pennsylvania, it is the chair of the Judicial Inquiry Board that has the discretion to disclose.) The rule in California indicates that the Commission on Judicial Performance may "in the interest of justice or to maintain public confidence in the administration of jus-

tice" provide information to appointing authorities.

In contrast, the rules in Maine, Maryland, New York, Vermont, and Virginia require that the commission "shall" disclose information if certain conditions are met. The rules in Arkansas and South Dakota are more ambiguous, but both may be construed

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## The information that may be disclosed to appointing authorities is described differently in different rules.

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as requiring disclosure. The rule for Arkansas states that no disclosure "shall be made except . . . [u]pon inquiry by an appointing authority." The rule for South Dakota states that the confidentiality requirement "shall not be construed to deny access to relevant information by authorized agencies investigating the qualifications of judicial candidates."

### To whom may the Commission disclose

Most states permit disclosure to any state or federal agency involved in judicial appointments or nominations. Some rules refer in general to disclosure to, for example, "an appointing authority or . . . a state or federal agency conducting investigations on behalf of such authority in connection with the selection or appointment of judges" (Arkansas) or "authorized agencies investigating the qualifications of judicial candidates" (Hawaii, Pennsylvania, South Dakota). Other rules specifically

list the state and federal bodies that are authorized recipients:

- The "Governor of any State of the Union, the President of the United States, the Commission on Judicial Appointments, or any other state or federal authorities responsible for judicial appointments." (California)
  - The "Judicial Nominating Commission of the State of Georgia and . . . the Governor of the State, or any Commission, Board or Committee officially appointed to evaluate nominees for federal judgeships, including, but not limited to, a committee appointed by the American Bar Association for such purpose." (Georgia)
- The "Governor or the Legislature's Joint Standing Committee on the Judiciary or other appropriate legislative committee, or . . . a United States governmental agency or official authorized to consider and act upon the nomination or appointment of persons to United States government positions." (Maine)

Several states, however, appear to limit application of this exception to *state* appointment authorities. The Kansas rule, for example, only allows disclosure of confidential information to "the Supreme Court Nominating Commission, District Judicial Nominating Commissions, and to the Governor." The Missouri rule refers only to disclosure to "members of a judicial nominating commission or the gover-

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# Judges Sanctioned for Campaign Speech Violations

## Judge removed for misrepresentations and abuse of power

The Florida Supreme Court removed a judge from office for promising in his campaign to favor the state and police and side against the defense and making unfounded attacks on his opponent and for presiding over a case despite a personal, direct conflict of interest after becoming a judge. *Inquiry Concerning McMillan*, Nos. SC00-703, SC95886 (August 16, 2001) ([www.flcourts.org/sct/sctdocs/opinions.html](http://www.flcourts.org/sct/sctdocs/opinions.html)).

While running for county court against the incumbent, Judge Brown, McMillan had sent materials to police officers that declared: "Imagine a judge who will go to bat for you"; "Street officers are unhappy with my opponent. You have told me that Judge Brown has never been a friend to law enforcement in the Courtroom." The judge, a former prosecutor, also sent a letter to the state attorney, with a copy to a local newspaper, in which he declared that "I will always have the heart of a prosecutor," and that defense attorneys would be unhappy with him as a judge.

The court found that, on their face, the statements "appear obviously intended to send a clear message that should he become a judge, Judge McMillan would be partial to law enforcement and the State" and to convey to the voting public that as a judge he would favor the government.

The judge also issued a campaign brochure asserting that the county had lost over \$12 million dollars when fines and court costs had been reduced at the end of court-imposed probation periods. The brochure did not mention that the \$12 million figure included

the more numerous circuit cases. The court approved the finding of the Commission on Judicial Qualifications that the brochure was a knowing and false attempt to attribute the loss of funds and supposed defects in the collection system to Judge Brown, a county judge.

The judge's campaign also stated that for the last four years Judge Brown has averaged only 14 hours a week on the bench and that he took 84

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**"[T]he personal political aspirations and subsequent vindictiveness of an individual judge have been allowed to tarnish the robes of justice."**

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days off from court in 1997 and 86 days in 1996. Judge McMillan considered a "day off from court" any day that Judge Brown did not actually hold court, including any time he spent handling matters in chambers, carrying out his duties as the administrative judge, sitting as a designated circuit judge, or "any of the other myriad responsibilities that a judge has that do not require sitting on the bench in open court." Stating this was "perhaps the most serious issue in this unfortunate campaign," the court approved the Commission finding that Judge McMillan manipulated the phrase "days off from court" to make it appear as though Judge Brown was actually not present at the courthouse at all on those days.

McMillan stated in campaign literature sent to a newspaper that "Judge Brown has consistently failed to enforce the geographical relocation provision, which allows a judge to en-

join a prostitute from returning to the vicinity where she was arrested." However, the county had no geographical relocation ordinance. The court approved the Commission finding that the literature was inaccurate and the misrepresentations intentional.

One of McMillan's campaign brochures stated Judge Brown "Gives Criminals a Good Deal" and that "Court records show Judge Brown gives criminals such light sentences that of 91,000 cases, only 300 people have asked for a jury trial." However, the 300 requests for jury trials were not related to the 91,000 figure because negotiated pleas and other case dispositions agreed upon by

the state drastically reduced the overall numbers. The Commission concluded that the statistics McMillan cited were fundamentally flawed and could not serve as reliable or accurate support for his "inflammatory" assertions about Judge Brown's sentencing practices.

Noting that the judge attempted to justify his conduct on the grounds that there was a conspiracy to prevent his election and that his election was necessary to break up such conspiracies, the court stated "when any person, and most especially a lawyer or judge, has reason to believe that public corruption exists at any level of government, that person is obligated to disclose such information to the appropriate authority without hesitation." However, the court concluded:

when charges are leveled without basis in fact, enormous harm is inflicted upon our public institutions by loss of confidence among a public little equipped to sort out

the valid from the invalid and campaign rhetoric from fact. In this instance, when the smoke has cleared and the evidence is examined, there appears to be absolutely no credible factual basis for Judge McMillan's assaults on the local justice system and a sitting county judge. Nevertheless, the harm to the system will linger.

### Misconduct continued after becoming a judge

After McMillan became a judge and while Commission proceedings arising out of his campaign were pending, he saw a driver, named Ocura, driving in a manner leading him to believe that the driver was intoxicated. The judge then called law enforcement on his cell phone to arrest the driver and signed a witness statement describing the driver's erratic actions. The driver's first appearance on the criminal charges arising out of the driving episode was scheduled for the next morning in front of another judge, but McMillan asked the other judge if he wanted McMillan to take over. The other judge testified that he initially refused, but upon McMillan's insistence, he agreed to let him preside. During the proceedings, Judge McMillan addressed Ocura:

I'm the guy that was behind you in the car that called the police and had you arrested. So I am probably not a good person to address the issue of your bond except that you blew over a .30 and quite

frankly sir, you almost hit several cars and . . . at one point you made a u-turn and I thought you were going to run head on into me.

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Okay, I'm going to set your bond at \$100,000 for now, but I'm going to have it reviewed by another judge later, tomorrow, okay? And make sure I'm not out line. Okay we'll see you tomorrow.

In his testimony to the Commission, McMillan stated when he took the first appearance calendar, he had forgotten all about the case involving the driver. The Commission found Judge McMillan to be untruthful and lacking in candor.

The court stated that the charges arising out of the *Ocura* case clearly constitute the most serious charges both because of their nature and the fact that they were conduct by a sitting judge that reflected "a willingness to sit in judgment in the face of a blatant conflict of interest and personal bias."

Agreeing with the Commission's recommendation for removal based upon cumulative misconduct, the court concluded:

Chief Justice Terrell's words guaranteeing to all "the cold neutrality of an impartial judge" have special application here where the personal political aspirations and subsequent vindictiveness of an individual judge have been allowed to tarnish the robes of justice. Further, . . . to allow

someone who has committed such misconduct during a campaign to attain office to then serve the term of the judgeship obtained by such means clearly sends the wrong message to future candidates; that is, the end justifies the means and, thus, all is fair so long as the candidate wins.

### Judge admonished for calling opponent "soft"

Approving an agreed statement of facts and joint recommendation, the New York State Commission on Judicial Conduct determined that admonition was the appropriate sanction for a judge who had engaged in improper campaign speech during his campaign. *In the Matter of Hafner*, Determination (December 29, 2000) ([www.scjc.state.ny.us/hafner.htm](http://www.scjc.state.ny.us/hafner.htm)). During his 1998 campaign against an incumbent judge, Hafner ran a print advertisement that stated: "Are you tired of seeing career criminals get a 'slap' on the wrist? So am I . . ." Hafner had reviewed and approved for distribution literature issued by the Conservative Party chair that attacked the judge's opponent's record in dismissing specific cases and concluded: "Soft judges make hard criminals!"

The Commission found that the advertisement and party literature conveyed the clear message that, if elected, the judge would treat criminal defendants more harshly than his opponent had and "implied that he would deal harshly with all [career] defendants, rather than judge the merits of individual cases."

[T]he mean-spirited attack[s] on his opponent for decisions to dismiss charges in specific cases . . . may pander to popular sentiment that all defendants charged with heinous crimes should be convicted and that judges who dismiss such charges are 'soft,' but they do a disservice to the judiciary and to the public. While it cannot be determined whether these statements played a significant role in [the judge's] successful campaign, a judge's election is tarnished when the judge's campaign activity violates the ethical rules. 

## Judicial Conduct Reporter

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## May a Judge Sign a Nominating Petition? *(continued from page 1)*

is the legal equivalent of a public endorsement.” Furthermore, the committee warned:

The election process routinely causes or leads candidates to seize upon whatever tactical advantages exist without regard for undesirable collateral effects. When a judge signs a nomination petition often . . . the candidate may publicize it as an endorsement regardless of the signer’s intent. Because the judge in exercising the right to sign a nomination petition may prove to be one of the many casualties of an election war despite the judge’s best efforts to stay off the field of battle, a uniform prohibition on signing nomination petitions is required.

Moreover, noting that in most, if not all, judicial districts of small population, signing nomination petitions would be “likely to produce more harm than good,” the committee stated it did not want to adopt different rules for different districts depending on the size of the population. Finally, the committee decided that, because signing a nomination petition is not specifically authorized by the code, it is prohibited political activity.

However, in a dissent, one member of the Pennsylvania advisory committee argued that only political activity “designed to persuade others to achieve a political result” is prohibited by the catch-all prohibition on political activity in the code. That member concluded that by signing a nomination petition, “a judge is acting as an individual, not as a judge, and he or she is not attempting to persuade others to sign . . . any more than the act of voting is an attempt to persuade others to vote for a particular candidate.” Emphasizing that the right to vote is fundamental, the dissent also stated, a

“judge should not be stripped of the right to sign a nomination petition merely because candidates may improperly exploit the situation; the judge’s right should not be lost because of the conduct of others.” However, the dissent did state that a judge may not solicit others to sign or circulate a petition.

### Opinions that permit signing

As the dissent from the Pennsylvania

committee requires nominating petitions to state that the signor is requesting the name of the individual to be placed on the ballot “so that voters will have the opportunity to vote for” the individual for the specified office. *Wisconsin Advisory Opinion 00-2*. The committee stated that if the petition used the same or substantially the same language as contained in the statute,

a judge may sign the petition because the judge is acting in his or her private capacity as an elector and joins with other electors in requesting that voters be given an opportunity to vote for a person seeking an office. By signing the petition, the elector does not endorse the candidate.

However, the committee cautioned, “If the language on the petition departs from the requirements of the statute to a degree that

an elector signing it indicates support for a candidate, the judge should not sign the petition.”

Moreover, noting that it was “aware that certain partisan candidates have used photocopies of petitions in their advertising,” the committee cautioned a judge who is asked to sign a petition for a partisan candidate to consider:

1) whether the candidate intends to publish the petition the judge signs; 2) if the petition should be published by the candidate, whether the public will be aware that the petition’s purpose is to place the candidate’s name on the ballot and does not imply support for the candidate by the elector whose signature appears on the petition.

The committee also stated that judges should not use their titles if they sign nominating petitions.

Similarly, the Arizona judicial ethics committee stated a “nominating

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**A conclusion about the propriety of the conduct depends on whether signing a petition is viewed as comparable to an endorsement or as more analogous to voting.**

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opinion noted, several state advisory committees have issued opinions permitting judges to sign nominating petitions even for non-judicial candidates under most circumstances. *See Arizona Advisory Opinion 96-7; Illinois Advisory Opinion 98-2* (judge who is currently a candidate may sign petitions for other judicial candidates); *New Mexico Judicial Advisory Opinion 96-1* (judge may sign petition for judicial office); *New York Advisory Opinion 89-89* (judge may sign even if judge is not currently a candidate); *Tennessee Advisory Opinion 90-4; Wisconsin Advisory Opinion 00-2* (judge may sign even for partisan offices).

The permission to sign has been conditioned by advice that a judge consider the precise language of the petition before deciding whether to sign. For example, the Wisconsin committee noted that the relevant stat-

petition does not contain a promise to vote for the nominee or any endorsement of the nominee.” *Arizona Advisory Opinion 96-7*. The committee also noted that commentary to the code advises: “A judge or candidate for judicial office retains the right to participate in the political process as a voter.” The committee concluded:

The language of this advice is well-chosen. It does not merely say that a judge can vote. Instead, it allows the judge to “participate in the political process” just as any voter might. One aspect of such participation is the signing of nominating petitions.

The committee did note that by statute an individual cannot sign more than one petition for the same office but concluded that restriction “appears to be a device to ensure the earnestness of signatories and does not imply an endorsement.” The committee conditioned its approval “on the understanding that nominating peti-

tions are not intended to be used by candidates as endorsements” and advised a judge not to sign if the signature could be misused as an endorsement.

Moreover, the Arizona committee cautioned that signing a nominating petition “is more problematic in a sparsely populated county where fewer signatures are required” and “a judge’s signature is more likely to draw attention.” Noting “[i]n a small county, a judge’s signature on a nominating petition could be perceived as an endorsement and could become a problem if the petition is challenged in the judge’s court,” the committee recommended that a judge in a small community decline to sign petitions to avoid potential conflict.

### **Circulating petitions**

Several committees also allow a judge to circulate nominating petitions to obtain others’ signatures at least if the petition relates to a judicial office

(*New Mexico Judicial Advisory Opinion 96-1*), the judge is also a candidate (*Illinois Advisory Opinion 98-2*), or the judge’s name is also on the petition (*New York Advisory Opinion 91-96*). *But see* Alaska Code of Judicial Conduct, Terminology (defining prohibited political activity to include initiating or circulating a nominating petition). However, the New Mexico committee emphasized that a judge who circulates a nominating petition for a judicial candidate may not publicly endorse or oppose the candidate through the news media or in campaign literature; circulate the petition during normal business hours or using court facilities, supplies, or postage; or solicit others to sign while the judge is performing judicial duties or acting in an official capacity. 

*AJS has links on its web-site ([www.ajs.org/ethics11.html](http://www.ajs.org/ethics11.html)) to judicial ethics advisory committees from many states.*

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### **Name Change**

The name of the Center for Judicial Conduct Organizations has been changed to the “Center for Judicial Ethics.” In addition to being more concise, the new name reflects the Center’s work in judicial ethics education as well as its continuing support for the state judicial conduct organizations. The mission of the Center—promoting high ethical standards in the judiciary and fair, effective enforcement of those standards—remains unchanged.

## Judicial Discipline for Pre-Bench Attorney Misconduct *(continued from page 1)*

the report to that attorney. In its findings of fact, the Commission emphasized that no evidence suggested that Hunt was denied due process or a fair trial but noted that Krepela's actions constituted, at least facially, violations of three criminal statutes.

Krepela became a judge in 1989. The falsified report came to light in a 1997 post-conviction proceeding initiated by Hunt.

The court agreed with the Commission that the evidence was clear and convincing that Krepela had altered the copy of the police report and asked the police detective to alter his original report. The court held:

Krepela's actions were plainly dishonest, deceitful, and in violation of his duties as a prosecutor. . . .

Krepela's actions were clearly conduct which would appear to an objective observer to be not only unjudicial but prejudicial to public esteem for the judicial office. The fact that the conduct took place over 16 years ago does not alter the conclusion that his actions constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

The court noted that "[n]othing in the record suggests that Krepela has ever engaged in any other inappropriate conduct or that he is currently unfit to serve as a county judge," stating "if the conduct at issue were truly evidence of a character flaw affecting fitness, it would be likely that some hint of the flaw would surface during the many intervening years that the respondent served as a judge." Therefore, the court concluded, "we do not believe that the integrity of the judicial system will be eroded if

Krepela remains on the bench." The court noted that, by statute, the maximum suspension it could impose was six months.

In a dissent, one justice stated the judge should be removed. The dissent argued, "This type of conduct by any lawyer, much less by a county attorney prosecuting a first degree murder case, goes to the very heart of our judi-

regulating the practice of law within the state, the court concluded the counsel has no role in disciplining sitting judges, who do not practice law. The court held that the Commission on Judicial Qualifications is authorized to investigate any complaints "concerning the qualifications of a judge, including actions of the judge that occurred prior to the time the judge took office."

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**"The fact that the conduct took place over 16 years ago does not alter the conclusion that his actions constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute."**

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### **Self-dealing contrary to clients' interests**

Accepting the recommendation of the Judicial Tenure Commission, the Michigan Supreme Court publicly censured a judge for engaging in self-dealing contrary to the interests of his clients as an attorney in 1987

and failing to file a timely answer to the formal complaint. *In re Runco*, 620 N.W.2d 844 (2001). Runco became a judge eight years before the Commission proceedings.

The judge had argued that the Commission's charges should be dismissed on the basis of laches or a similar theory because over 12 years had passed since his alleged misconduct. The court held that, even if such a defense were available (which it did not decide), the defense did not apply because no evidence necessary for resolution of the central issues had become unavailable over time.

After Gerald and Ilene Trifan had listed seven vacant lots for sale for \$49,000, Little Caesar's restaurant chain made a written offer of \$49,500. The Trifans brought this offer to Runco who was then an attor-

ney. Runco advised the Trifans not to accept the offer and obtained the Trifans' permission to discuss the property with a friend, Raymond Trudeau, who had developed various properties in the area and might be interested. Subsequently, Trudeau bought the property for \$46,000.

At some point, Trudeau and Runco agreed that they would work together on the Trifan property, with Trudeau doing the developing and Runco doing the legal work. The judge claimed the agreement was entered into after the sale of the Trifan's property, but Trudeau testified the agreement took place before the sale. At no time did Runco or Trudeau ever advise the Trifans of their partnership.

Several months after the sale, Trudeau received an offer of \$133,000 for four of the seven lots as a site to build a Jiffy Lube, and the property was eventually sold for that amount. Shortly thereafter, the remaining three

lots were sold for \$20,000. The two partners shared the profits from both sales equally.

The court adopted the Commission's findings. The Commission had found that the judge's actions, as an attorney, created a breach of his fiduciary duty to his clients and constituted a conflict of interest, or at least the appearance of a conflict. The Commission noted that the judge had not acquired information about his clients' property independently, after the fact, and subsequently acquired an interest in it pursuant to a business arrangement with an unrelated third party. Instead, Runco had "acquired information from his clients while he was representing them; he introduced the purchaser to his clients and essentially brokered the deal," then almost immediately "became involved in a business relationship with his hand-picked purchaser and acquired an in-

terest in the property, which translated very quickly into a substantial profit." The Commission concluded, given the judge's role in the initial transaction, and the proximity in time between his representation of the Trifans and his business arrangement involving the property, even accepting the judge's "version of the sequence of events, he should have been put on notice that his actions constituted self-dealing or the appearance of self-dealing and monetary benefit at the expense of his clients."

In recommending censure, the Commission had noted that the judge committed the acts over 12 years ago, when he was a fairly young, inexperienced attorney; the judge's former clients had a pending civil action for money damages; and there had been no disciplinary action against the judge as a judge. 

## Ex Parte Petitions for Temporary Custody Orders

Prompted by complaints about "lax and unfair" procedures, the Indiana Judicial Qualifications Commission warned in an advisory opinion that a judge must carefully follow the rule governing temporary restraining orders when considering petitions for an ex parte temporary custody order. *Indiana Advisory Opinion 1-01*. The Commission noted that, under the relevant rule of civil procedure, a petitioner must state by affidavit specific facts showing that immediate and irreparable harm will result if the court waits for the adverse party to be heard and must also certify in writing any efforts made to give notice and the reasons that notice should not be required. Noting the rule protects against abuses

of ex parte proceedings, the Commission emphasized that judges must carefully determine whether these elements have been established.

The Commission stated that the judge should be prepared to actively question the petitioner or the petitioner's attorney and rejected the concern that such questions constitute improper ex parte contacts. "To gather information which helps the judge determine whether the extraordinary relief is warranted," the Commission stated, "only bolsters the fairness of the ex parte process which is underway."

The Commission concluded, "Inattention to the extraordinary nature of the relief, and to the procedural demands the rules impose, under-

mines judicial fairness and integrity, and the public's trust."

The Commission stated it had scrutinized cases that "indicate a lack of mindfulness that *ex parte* requests and resultant orders affecting custodial rights are extraordinary, and that the relief depends upon the existence of exigent circumstances—irreparable injury, loss, or damage without immediate relief." The Commission called "on the profession to eliminate the seemingly wide-spread practice in Indiana where lawyers seek, and judges provide, *ex parte* emergency custody where no irreparable harm or injury reasonably is foreseen without notice and a hearing—the fundamentals of our adversary process." 

## Disclosure to Appointing Authorities: Exceptions to Confidentiality *(continued from page 3)*

nor.” The New York rule only allows disclosure to “(a) to the commission on judicial nomination established by [a state statute], with respect to applicants for appointment to the court of appeals; (b) to the governor with respect to all applicants whom the governor indicates are under consideration for any judicial appointment; and (c) to the temporary president of the senate and the chairman of the senate judiciary committee with respect to all nominees for judicial appointments which are subject to the advice and consent of the senate.” The Virginia rule requires the Judicial Inquiry & Review Commission to make disclosure to “(i) the House and Senate Committees for Court of Justice and (ii) any member of the General Assembly, upon request.”

### When the exceptions applies

Under most of the rules, this exception to confidentiality is triggered by a request or inquiry from the appointing authority. (In Hawaii, information can also be released to authorized agencies investigating the qualifications of judicial candidates “by order of the supreme court.”) In California, Maine, Massachusetts, and Vermont, the request must be in writing. In Pennsylvania, the request must come from the judge.

Several states require a waiver by the judge or the judge’s consent before disclosure can be made. For example, information in response to a government agency or nominating commission request may be released by the Colorado Commission on Judicial Discipline only if “the judge signs a waiver for this purpose;” by the Minnesota Board on Judicial Standards only “if the judge in question agrees to such dissemination;” and by the New York State Commis-

sion on Judicial Conduct only “with the consent” of the judge. The Massachusetts rule requires “reasonable notice to the judge affected, unless the judge signs a waiver of the right to such notice.”

Several rules require the commission to provide the judge with the same information that is being provided to the appointing authority. Under the California rule, “Any information released to the appointing authority is simultaneously provided to the applicant.” The Virginia commission must send “to the judge in question” “a copy of any evidence in whatever form . . . transmitted” to the appointing authorities.

### What may be disclosed

The information that may be disclosed to appointing authorities is described differently in different states. In some states, the exception is not specific, referring to “relevant information” (Hawaii, Pennsylvania, South Dakota); “proceedings and records” (Arizona); “information, written, recorded, or oral, received or developed by the commission in the course of an investigation related to alleged misconduct or disability” (Arkansas); “any pending investigation or proceeding with respect to any applicant under consideration for any judicial appointment” (California); “all or any part of [the commission] file” (Kansas); “information on any complaints made against [the person under investigation] and the Committee’s disposition thereof” (Maine); or “confidential records relat[ing] to a judicial candidate’s qualifications for office” (Missouri).

Other rules describe more specifically what information may be disclosed. For example, the Georgia rule states that the Judicial Qualifications

Commission may disclose to an appointing authority “any information involving any prospective nominee for judicial appointment which the Commission feels such Commission, Board or Committee should consider in passing upon the qualifications and fitness of the nominee for judicial purpose.” In Maryland, the Commission on Judicial Disabilities shall disclose “(i) Information about any completed proceedings that did not result in dismissal, including reprimands and deferred discipline agreements; and (ii) The mere fact that a complaint is pending.” The Minnesota board may release only information that reflects “some action of the board pursuant to” rules authorizing private warnings, imposition of conditions, public reprimands, and the filing of charges. The New York commission may disclose:

the record of any proceeding pursuant to a formal written complaint against an applicant for judicial appointment in which the applicant’s misconduct was established, any pending complaint against an applicant, and the record to date of any pending proceeding pursuant to a formal written complaint against an applicant for judicial appointment.

In Vermont, the chair of the Judicial Conduct Board is required to make available “information about matters which are pending and which have proceeded beyond the stage of initial inquiry pursuant to Rule 7(1).” The Virginia commission is required to disclose to the general assembly:

evidence that it has in its possession with reference to the alleged misconduct of any judge . . . includ[ing] the nature of the complaint the current status of the complaint, the duration of any suspension and the evidence supporting the probable cause finding therefor, a description of any remedial course of action, and a statement concluding whether any such remedial course of action was successfully undertaken.

The California and Virginia rules expressly make clear that the information disclosed pursuant to the exception remains confidential. The California rule states: "All information disclosed to appointing authorities under this subdivision remains privileged and confidential." The Virginia rule states: "Any member of the General Assembly who knowingly discloses such information shall be subject to any sanctions which may be imposed by the Committee on Standards of Conduct."

### Former judges

Some of the rules expressly allow the commission to disclose to appointing authorities information about persons who are no longer judges. The Colorado commission may release confidential information when a government agency requests information concerning "appointment of a judge or former judge to another judicial position." The Maine rule allows the Committee on Judicial Responsibility and Disability to provide information "[i]n connection with the consideration of the appointment of a person who is or has been a judge." The Maryland commission may re-

spond to applications from agencies that assert "that the applicant is considering the nomination, appointment, confirmation, or approval of a judge or former judge."

In Kansas, the Commission on Judicial Qualifications is also authorized, "in its discretion, to make public all or any part of its files involving any candidate for election to or retention in judicial office." In Vermont, the board is required to make information available "in any proceeding for impeachment."

### Government employment

Several state provisions also allow disclosure with respect to appointment to government positions or government employment other than judicial appointments.

- "This provision shall not be construed to automatically deny access to relevant information to . . . law enforcement agencies investigating qualifications for government employment; such information may be released upon concurrence of the Commission or by order of the supreme court." (Hawaii)
- "In connection with the consider-

ation of the appointment of a person who is or has been a judge, the Committee shall provide information on any complaints made against that person and the Committee's disposition thereof, upon written request . . . a United States governmental agency or official authorized to consider and act upon the nomination or appointment of persons to United States government positions." (Maine)

- "At the request of the Judicial Officer, in the discretion of the Chair, the Board may provide relevant information to . . . law enforcement agencies investigating qualifications for government employment." (Pennsylvania)
- "This section shall not be construed to deny access to relevant information by law enforcement agencies investigating qualifications for government employment." (South Dakota) 

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

## AJS 2002 Midyear Meeting on Judicial Speech

The AJS 2002 Midyear Meeting will be held on **Friday, March 1 and Saturday, March 2 in San Diego, California**. The program will cover speech during judicial campaigns and speech by incumbent judges, including comments on pending cases and controversial issues. Participants will review and discuss proposed guidelines for judicial speech.

The meeting will be held at the Westgate Hotel. For more information about the program, please contact Cindy Gray, Director of of the Center for Judicial Ethics at [cgray@ajs.org](mailto:cgray@ajs.org) or (312) 357-8812. For hotel and/or registration information, please contact Celia Colista at [colista@ajs.org](mailto:colista@ajs.org) or (312) 357-8811. Look for the most current information in the "What's New" section of the AJS website, [www.ajs.org](http://www.ajs.org).



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## JUDICIAL CONDUCT REPORTER

# The 18th National College on Judicial Conduct and Ethics

**Chicago, Illinois October 24–26, 2002**

The Center for Judicial Ethics will hold its 18th National College on Judicial Conduct and Ethics on October 24–26, 2002, at the Embassy Suites Downtown Lakefront, 511 N. Columbus, Chicago, Illinois. Registration for the College will be \$250. The rate for rooms will be \$169 a night (for single occupancy; \$189 a night for double occupancy), plus tax.

The National College provides a forum for commission members, staff, judges, and judicial educators to learn about and discuss professional standards for judges and current issues in judicial discipline. The College will begin Thursday evening with a reception. Friday through Saturday morning, there will be six sessions with three concurrent workshops offered

during each session. Topics under consideration include: sanctions; issues for new members of conduct commissions; issues for public members; conduct commissions and the media; misuse of office; disqualification; rural judges; how to write discipline decisions; ethical guidelines for commission members; the relationship between attorney discipline and judicial discipline; judicial campaign speech; settlement of discipline cases; ex parte communications; and judicial ethics on the Internet.

More information will be provided in subsequent issues of the *Judicial Conduct Reporter*. If you want to be on the mailing list for information about the College, contact Clara Wells at [cwells@ajs.org](mailto:cwells@ajs.org) or 312-357-8813.