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# JUDICIAL CONDUCT REPORTER

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## The Temptations of Technology *by Cynthia Gray*

Electronic media such as e-mail and the Internet are a great benefit to individual judges and the judiciary in the performance of their duties, but the ease of communication and information-gathering can also facilitate violations of the code of judicial conduct.

For example, perhaps tempted by the then-relatively new technology, in 1997, a judge sent an ex parte e-mail message to an attorney in a juvenile dependency matter that read in part:

I am considering summarily rejecting [the father's attorney's] requests. Do you want me to let [the father's attorney] have a hearing on this, or do we cut [the attorney] off summarily and run the risk the third [district court of appeals] reverses? . . . I say screw [the father] and let's cut [the attorney] off without a hearing. O.K.? By the way, this will self-destruct in five seconds. . . .

The attorney replied by e-mail: "Your honor, I don't feel comfortable responding ex-parte on how you should rule on a pending case." The judge's e-mail response was "chicken."

Several days later, the judge sent the attorney another e-mail in which he solicited the attorney's views on the advisability of having children in court, offering the attorney the opportunity to give an "unofficial" view. In a lengthy response, the attorney gave his views.

The California Commission on Judicial Performance found that the judge's ex parte messages suggested pre-judgment and alignment with one side in the proceeding. *Public Admonishment of Caskey* (California Commission on Judicial Performance July 6, 1998) ([cjp.ca.gov/pubdisc.htm](http://cjp.ca.gov/pubdisc.htm)). The Commission also found that the language

*(continued on page 4)*

## Case-law Following *Republican Party of Minnesota v. White* *by Cynthia Gray*

In 2002, the United States Supreme Court held unconstitutional a clause in the Minnesota code of judicial conduct that prohibited judicial candidates from announcing their views on disputed legal and political issues in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). Since that decision, numerous federal lawsuits have been filed challenging restrictions on campaign and political conduct by judges and judicial candidates. Many of the suits have been dismissed on justiciability grounds. Following is an analysis of the decisions that have reached the merits in challenges to the pledges, promises, and commitments clause; the personal solicitation clause; the endorsement clause; and restrictions on partisan political activities.

### Pledges, promises, and commitments

There are two versions of the pledges, promises, and commitments clause. Canon 3A(3)(d) of the 1990 American Bar Association *Model Code of Judicial Conduct* provided that "a candidate for a judicial office shall not (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." After the decision in *White*, the ABA amended the model code to provide: "A judge shall not, with respect to cases, controversies or issues that

*(continued on page 5)*

# Recent Advisory Opinions

☛ A judge may require DUI probationers to pay for and attend a victim impact panel presented by Mothers Against Drunk Drivers even if the fee will help MADD fund its operations. *Florida Opinion 2009-2*.

☛ A judge may not ask a criminal defendant to divulge the defendant's immigration status at sentencing or a bail hearing. *Maryland Opinion 2008-43*.

☛ A judge may not provide a copy of the court calendar in advance to the district attorney's office with notations summarizing the driving record of each defendant scheduled to appear unless the judge also shares the information with the defense. *New York Opinion 09-38*.

☛ A judge may make available in his courtroom a list of domestic violence organizations that provide legal services to victims as long as he explains that the availability of the materials does not constitute the court's official recommendation and as long as he does not recommend any particular organization. *New York Opinion 09-2*.

☛ A judge may authorize the inclusion of her name on a list of officials willing to perform same-sex marriages maintained on the web-site of a non-profit advocacy organization if the judge reviews the language of the heading that will be used and regularly re-examines the activities of organization and the web-site listing. *Connecticut Opinion 2009-19*.

☛ A judge may serve on the executive committee of a county Inn of Court and may solicit other judges to join the organization, but may not solicit attorneys to join. *New York Opinion 08-156*.

☛ A judge who serves as president of the local Inn of Court may contact members of the legislature on behalf of that organization to suggest passage or defeat of legislation relating to the funding and duties of the judiciary. *Florida Opinion 2009-8*.

☛ The New York Chapter of the National Association of Women Judges may lobby elected officials to pass a bill regarding termination of parental rights when a parent's incarceration or participation in a residential drug treatment program is a significant factor in why a child has been in foster care and a bill regarding use of restraints on incarcerated women during labor, post-delivery recovery, and transport before and after child birth. *New York Opinion 09-108*.

☛ A judge may comment publicly on the vote of the village board to dissolve the village court subject to a referendum pursuant to local law. *New York Opinion 09-50*.

☛ A judge may not be a member of a committee of a non-profit domestic violence organization designed to

encourage lawyers to provide pro bono services. *Florida Opinion 2009-11*.

☛ A judge who serves on a court pro bono action committee may sign letters of appreciation on behalf of the committee, using court or committee letterhead, to attorneys who volunteer as advocates before other judges. *New York Opinion 09-68*.

☛ A judge who observed first-hand that another judge drove recklessly while intoxicated and has substantial information that the other judge presided more than once while intoxicated must report the other judge to the State Commission on Judicial Conduct and to the appropriate administrative judge. *New York Opinion 08-83*.

☛ A judge is not required by the code of judicial conduct to report his own violation of the code. *New York Opinion 08-209*

☛ A judge does not have to be subpoenaed to appear as a fact witness. *Wisconsin Opinion 09-2*.

☛ A judge may participate on a "Law Talk" segment of a local radio program devoted to the judicial branch's foreclosure mediation program. *Connecticut Informal Opinion 2008-25*.

☛ A judge may appear on a radio program in which the participants will discuss the Rotary Club's humanitarian and public service projects if the judge will not be identified as a judge and no donations will be requested. *New York Opinion 09-5*.

☛ A judge may act pro se to assert his personal rights as an individual unit owner in an action against a condominium board, but may not advise the other owners in making litigation decisions or give advice to legal counsel hired to represent the owners. *New York Opinion 09-12*.

☛ A judge who is preparing to retire should not make it generally known that she is seeking a position but may contact law firms that do not currently have and have not recently had matters before her as long as she is selective about which firms to contact to reduce the number of cases from which she has to recuse. *Connecticut Informal Opinion 2008-8*.

☛ A judge may serve as the mentor of a child who has no family court history. *New York Opinion 09-39*.

☛ A judge may not attend a public event at which a friend plans to announce his candidacy for political office. *Connecticut Emergency Staff Opinion 2009-6*.

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

# Disclosure of Dismissals to the Public *by Cynthia Gray*

Most complaints against judges are dismissed because they allege only a disagreement with the judge's decision, contain only conclusory allegations that are insufficient to trigger an investigation, or are not supported by the facts following an investigation. Most commissions do not disclose to the public information about the dismissals other than as statistics. A few jurisdictions have opted for more transparency.

## Full disclosure

Effective April 1, 2000, the New Hampshire Supreme Court amended Rule 3 of the Committee on Judicial Conduct to require the Committee to make available for public inspection all complaints and the Committee's dispositions after a complaint has been dismissed or informally resolved or adjusted. No materials are disclosed until after the judge has been given the opportunity to provide a reply that will also be part of the public record. Although the court did not explain why it changed the rules, the opening up of the process came after almost a decade of public controversy over supreme court decisions, allegations of misconduct by justices on the court, and accusations that the Committee was covering up judicial misconduct.

## Redacted files

In adopting new confidentiality rules for the Commission on Judicial Conduct effective January 1, 2006, the Arizona

Supreme Court was responding to a petition filed by a complainant (a county attorney), who, after his complaint about a judge led only to a private reprimand, asked that all complaints against judges and all forms of judicial discipline be made public. Under the amended rules, if the Commission dismisses a complaint, the complaint and the dismissal order are made public but only after redacting the names of the complainant and the judge and other identifying information. For examples, see the Commission's web-site at [http://www.supreme.state.az.us/ethics/Complaints/Judicial\\_Complaints.htm](http://www.supreme.state.az.us/ethics/Complaints/Judicial_Complaints.htm).

## Redacted dismissal orders

Rule 24(a) of the Rules for Judicial Conduct and Judicial Disability Proceedings, which govern complaints against federal judges, provides that "when final action has been taken on a complaint and it is no longer subject to review, all orders entered by the chief judge and judicial council . . . must be made public," except that, if the complaint has been finally dismissed, "the publicly available materials must not disclose the name of the subject judge without his or her consent." For example, one order entered by the Chief Judge of the U.S. Court of Appeals for the 9th Circuit on June 30, 2009 states:

A misconduct complaint has been filed against a district judge. Complainant, a pro se litigant, filed a civil case in

*(continued on page 10)*

# Proposed Findings of Fact, Conclusions of Law

Commentary to Canon 3B(7) of the 1990 American Bar Association *Model Code of Judicial Conduct* provided that, "A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions." That language was deleted in the 2007 model code because, according to the reporters' notes, "the permissibility of the practice was so free from doubt as to render the Comment unnecessary." However, the admonition that the other side must be given notice and an opportunity to respond is necessary to reiterate and emphasize.

In *Disciplinary Counsel v. Stuard*, 901 N.E.2d 788 (Ohio 2009), the Ohio Supreme Court publicly reprimanded a judge for asking the assistant prosecutor ex parte to prepare a sentencing order in a capital case. The court also publicly reprimanded the assistant prosecutor.

In May and June 2003, the judge presided over a capital murder trial. Christopher Becker and Kenneth Bailey represented the state. A jury found the defendant guilty and recommended a sentence of death. Between the penalty-phase hearing and the sentencing hearing, the judge engaged in four ex parte communications with Becker.

In the first communication, the judge briefly asked Becker to prepare the court's opinion sentencing the defendant to death and gave him two pages of notes on the aggravating and mitigating factors the judge had weighed. Becker agreed to write the opinion.

The next day, the judge found on his desk a 17-page draft of a sentencing opinion. The judge reviewed the draft and noted one or more corrections. In a third ex parte communication later that day, the judge asked Becker to make the

*(continued on page 9)*

## The Temptations of Technology *(continued from page 1)*

used in reference to the father gave the appearance of bias and animus and was entirely inconsistent with a judge's obligations to be impartial and to maintain the dignity of the court. Finally, the Commission stated that by responding "chicken" to the attorney's refusal to communicate about a pending case, the judge displayed a joking attitude toward the attorney's ethical concerns.

### Internet research

The *Model Code of Judicial Conduct* prohibits independent investigations of the facts as part of the prohibition on ex parte communications, and, when the American Bar Association revised the model code in 2007, it added a new comment to Rule 2.9 that provided "the prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic." The reporters' notes explain that, "given the ease with which factual investigation can now be accomplished via electronic databases and the Internet, the risk that a judge or the judge's staff could inadvertently violate [Rule 2.9] has heightened considerably. The need for vigilance on the part of judges has increased accordingly."

The North Carolina Judicial Standards Commission publicly reprimanded a judge for being influenced by information he independently gathered by viewing a party's website while the party's hearing was ongoing, in addition to other misconduct discussed in the following section. *Public Reprimand of Terry* (North Carolina Judicial Standards Commission April 1, 2009) ([www.nccourts.org/Courts/CRS/Councils/JudicialStandards/PublicReprimands.asp](http://www.nccourts.org/Courts/CRS/Councils/JudicialStandards/PublicReprimands.asp)).

From September 9 through September 12, 2008, the judge presided over a child custody and child support hearing. On September 9, the judge used Google to find information about the mother's photography business, viewing samples of her photographs and finding numerous poems. When court reconvened on September 12, prior to announcing his findings in the case, the judge recited a poem, to which he had made minor changes, that he had found on the web-site. The judge told the Commission's investigator that he quoted the poem because it gave him "hope for the kids and showed that Mrs. Whitley was not as bitter as he first thought." The judge could not recall how many times he visited the site but stated that he may have visited it four times.

Following the conclusion of the hearing and after orally entering his order, the judge requested a bailiff to summon the attorneys to return to the courtroom. Only then did he disclose that he had viewed Mrs. Whitley's web-site. Based on a motion by the mother's attorney, the judge disqualified

himself, his child custody and child support order was vacated, and a new trial was ordered.

### Social networks

The New York Judicial Ethics Advisory Committee has advised judges that they could join an Internet-based social network but warned the judges to exercise "an appropriate level of prudence, discretion and decorum" in how they use the network and to stay informed about new service developments that could affect their duties under the code of judicial conduct. *New York Advisory Opinion 08-176* ([www.nycourts.gov/ip/judicialethics/opinions/08-176.htm](http://www.nycourts.gov/ip/judicialethics/opinions/08-176.htm)). The committee explained:

Social networks . . . are Internet-based meeting places where users with similar interests and backgrounds can communicate with each other. Users create their own personal website—a profile page—with information about themselves that is available for other users to see. Users can establish "connections" with other users allowing increased access to each other's profile, including, in many cases, the ability to contact any connections the other user has and to comment on material posted on each other's pages.

The Committee noted that a judge "generally may socialize in person with attorneys who appear in the judge's court," subject to the code, and that there is nothing "per se unethical about communicating using other forms of technology, such as a cell phone or an Internet web page." Therefore, the Committee, stated, "the question is not whether a judge can use a social network but, rather, how he/she does so."

The Committee cautioned that what a judge posts on his or her "profile page or on other users' pages could potentially violate the Rules in several ways" and warned that a judge should "recognize the public nature of anything he/she places on a social network page and tailor any postings accordingly." Noting the "many mainstream news reports regarding negative consequences and notoriety for social network users who used social networks haphazardly," the Committee gave "a non-exhaustive list of issues that judges using social networks should consider."

The judge . . . should be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge's court through a social network. In some ways, this is no different from adding the person's contact information into the judge's Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (i.e., other users

can normally see the judge's friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond. A judge must, therefore, consider whether any such online connections, alone or in combination with other facts, rise to the level of a "close social relationship" requiring disclosure and/or recusal . . . .

The committee also reminded judges not to respond to inquiries from users "who upon learning of the judge's identity, may informally ask the judge questions about or seek to discuss their cases, or seek legal advice" or comments on pending cases.

In the same North Carolina custody hearing discussed in the previous section, during a meeting in the judge's chambers, Judge Terry and Charles Schieck, the attorney for the father, spoke about Facebook, an internet social networking web-site. Jessie Conley, the attorney for the mother, was present but stated she did not know what Facebook was and that she did not have time for it. The judge and Schieck designated themselves as "friends" on their Facebook accounts so that they could view each other's account.

The judge and the attorney had several exchanges on Facebook. For example, the judge posted on his Facebook account that he had "two good parents to choose from" and "Terry feels that he will be back in court," referring to the case not being settled. Schieck then posted on his account, "I have a wise Judge." During a break in the proceedings the next day, the judge told Conley about the exchanges between Schieck and himself. The next day, the judge wrote on his Facebook account, "he was in his last day of

trial." Schieck then wrote, "I hope I'm in my last day of trial." The judge responded, stating, "you are in your last day of trial."

### Electronic politics

Judges have also used technology to engage in inappropriate political or campaign activity.

- A judge used a county computer to forward an e-mail containing a political message from George Bush's campaign, with a subject box that read, "Support G.W. Bush." *Public Admonition of Katz* (Texas State Commission on Judicial Conduct December 19, 2000).

- During a judge's 2004 judicial campaign, his campaign committee co-chair sent three e-mails from the campaign e-mail account (prefixed with "judgekrouse") that requested donations to the judge's campaign. The e-mails were written in the first person and two concluded with "Merle" (the judge's first name) in the typed signature line. *In re Krouse*, Stipulation, Agreement, and Order of Reprimand (Washington State Commission on Judicial Conduct May 5, 2005) ([www.cjc.state.wa.us](http://www.cjc.state.wa.us)).

- A judicial candidate sent attorneys a cell phone text message that stated: "If you are truly my friend then you would cut a check to the campaign! If you do not then its time I checked you. Either you are with me or against me!" *Inquiry Concerning Davis*, Order (Kansas Commission on Judicial Qualifications July 18, 2008). 

[visit www.ajs.org/ethics](http://www.ajs.org/ethics)

## Case-law Following *Republican Party of Minnesota v. White* (continued from page 1)

are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office." The substantive change was the elimination of the "appear to commit" clause from the post-*White* version.

Most of the challenges to the pledges, promises, and commitments clause have arisen in the context of whether judicial candidates could answer questionnaires distributed by special interest groups. Federal courts sitting in Kentucky and North Dakota, have declared the pre-*White* version of the pledges, promises, and commitments clause unconstitutional at least under a preliminary injunction standard. *Family Trust Foundation of Kentucky v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Kentucky 2004) (preliminary injunction); *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021 (D. North Dakota 2005) (sum-

mary judgment). These courts disapprove the clause if the state was simply using the clause "as a de facto announce clause" (*Family Trust Foundation*) and believe there is "little, if any, distinction" between the clause and the announce clause held unconstitutional in *White* (*North Dakota Family Alliance*).

After the preliminary injunction enjoining enforcement of the Kentucky clause in 2004, the Kentucky Supreme Court adopted a revised version that provided: "A judge or candidate for election to judicial office . . . shall not intentionally or recklessly make a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way on a case, controversy, or issue that is likely to come before the court." When a suit was filed chal-

(continued on page 6)

## Case-law Following *Republican Party of Minnesota v. White* (continued from page 5)

lenging the new version, the federal court upheld the clause. *Carey v. Wolnitzek*, Opinion and Order (E.D. Kentucky October 15, 2008) (summary judgment).

The court rejected the plaintiff's argument that the clause continued to prohibit candidates from announcing their views on issues, noting that the revised clause did not prohibit statements that "appear to commit" and unambiguously established an objective standard. The court concluded that promises or commitments by a judicial candidate to rule in a particular way on issues or cases harm the compelling state interest in preserving judicial impartiality because the candidate is actually close-minded on that issue, actually biased against the losing side, or will feel pressure to rule as he or she promised supporters.

Three federal courts, sitting in Indiana, Pennsylvania, and Wisconsin have upheld the pledges, promises, and commitments clause as narrowly construed to allow judicial candidates to answer questionnaires that call for the candidate's personal views on disputed legal or political issues. *See also Kansas Judicial Review v. Stout*, 196 P.3d 1162 (Kansas 2008) (judges and judicial candidates may answer issue-related questionnaires that call only for personal views on disputed legal or political issues).

In the Pennsylvania case, the defendants (members of the Judicial Conduct Board and the Office of Disciplinary Counsel) had proffered an interpretation of the pre-*White* version of the clause that prohibited a candidate only from making pledges, promises, or commitments to decide an issue or a case in a particular way and allowed a candidate to answer the questionnaire from the Pennsylvania Family Institute. *Pennsylvania Family Institute v. Celluci*, 521 F. Supp. 2d 351 (E.D. Pennsylvania 2007) (summary judgment). Agreeing that that interpretation was reasonable, the federal court concluded, "it is hard to imagine a restriction more narrowly tailored to Pennsylvania's compelling interest in protecting the due process rights of future litigants."

After enforcement of the pre-*White* clause had been enjoined in Indiana, the Indiana Supreme Court adopted the post-*White* version of the clause, and the federal court held it was materially different and was narrowly tailored to serve the compelling interests of judicial fairness, impartiality, independence, and integrity, as well as the principles of justice and the rule of law. *Bauer v. Shepard*, Opinion and Order, (N.D. Indiana July 7, 2009) (summary judgment).

The court also found that the clause did not prohibit judges and judicial candidates from answering Indiana Right to Life's questionnaire, although it noted "the assessment could change depending on how questions are worded and framed, what answers questions are intended to elicit, and what responses judicial candidates make." The questionnaire, the court added, could "be improved with clear assurances that judicial candidate respondents will keep an open mind and carry out their adjudicative duties faithfully and impartially if elected."

Similarly, a Wisconsin federal court held that the post-*White* version of the pledges, promises, and commitments clause did not prohibit judicial candidates from responding to a questionnaire from Wisconsin Right to Life and, therefore, was not unconstitutional on its face. *Duwe v. Alexander*, 490 F. Supp. 2d 968 (W.D. Wisconsin 2007) (summary judgment). The court stated, "whether a statement is a pledge, promise or commitment is objectively discernable," and "people are practiced in recognizing the difference between an opinion and a commitment."

The distinction between a commitment and an announced position on an issue is relevant to the health of the judiciary. One presumes that a person is likely to decide in accordance with an opinion or belief, but will only rely upon an actual commitment. As a result, reaction to breaking a commitment or promise is far stronger than to a decision that contradicts an opinion or belief. A genuine commitment creates a different expectation and poses a far greater threat to the impartiality and appearance of impartiality of the judiciary.

Since *White*, state courts have enforced the pledges, promises, and commitments clause to discipline judges who, while candidates, made pro-prosecutorial statements. *Inquiry Concerning Kinsey*, 842 So. 2d 77 (Florida 2003); *In the Matter of Watson*, 794 N.E.2d 1 (New York 2003).

### Personal solicitation clause

Canon 5C(2) of the 1990 model code provided: "A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support," although the candidate could establish a committee to raise funds. Similarly, Rule 4.1(A)(8) of the 2007 model provides: "A judge or a judicial candidate shall not personally solicit or accept campaign contributions other than through

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**There are two versions of the pledges, promises, and commitments clause.**

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a campaign committee . . . .”

A federal court upheld the solicitation clause in the Indiana code of judicial conduct, finding it protects both “the judiciary and potential donors (whether citizens or attorneys)” and gives “added insurance that judges will decide cases based upon the law applied to the facts, rather than solicitations accepted or turned away, money paid or not, and contributions made or not.” *Bauer v. Shepard*, Opinion and Order (N.D. Indiana July 7, 2009) (summary judgment).

In contrast, two federal courts of appeal, in cases from Georgia and Minnesota, and three federal district courts, in cases from Kansas, Kentucky, and Wisconsin, have held unconstitutional the prohibition on judicial candidates personally soliciting campaign contributions.

The federal court in Georgia was skeptical that the need of judicial candidates for financial support to run campaigns necessarily means that they will be partial if they are elected. *Weaver v. Bonner*, 309 F.3d 1312 (11th Circuit 2002) (summary judgment). The federal court in Wisconsin blamed any impartiality concerns on the state’s decision to elect judges, maintaining that only public financing or a change in the method of judicial selection could eliminate impartiality or the appearance of impartiality. *Siefert v. Alexander*, 597 F. Supp. 2d 860 (W.D. Wisconsin 2009) (summary judgment).

Further, although the federal court in the Kentucky case conceded that the requirement that a judicial candidate use a committee to solicit contributions eliminates “direct shakedowns by a corrupt judicial candidate,” it concluded that blatant promises of a quid pro quo were already prohibited by criminal statutes and other provisions of the code. *Carey v. Wolnitzek*, Opinion and Order (E.D. Kentucky October 15, 2008) (summary judgment). Moreover, the court stated that, “while it may be less difficult for a solicitee to decline a request for a contribution when the request is made by a committee, ‘the state does not have a compelling interest in simply making it more comfortable for solicitees to decline to contribute to judicial campaigns.’” The Kansas federal court concurred with that analysis. *Yost v. Stout*, Memorandum and Order (D. Kansas November 16, 2008) (summary judgment).

The decisions conclude that requiring a candidate to raise funds through a committee does not effectively address concerns about partiality or coercion. The risk that a contribution will tempt a judge to rule a particular way “is not significantly reduced by allowing the candidate’s agent to seek these contributions . . . on the candidate’s behalf rather than the candidate seeking them himself” (*Weaver*). Similarly, “while the polls may show that the public believes campaign contributions influence judicial decisions, they do not

show that a solicitation committee decreases that perception” (*Carey*). Finally, solicitation by a candidate’s committee instead of the candidate does not “appreciably diminish” a solicitee’s perception that the solicitation is a “demand for a quid pro quo” (*Carey*).

Moreover, the courts find that the ability of a judicial candidate, despite the prohibition on personal solicitation, to discover who donated to the campaign and who did not renders illusory any belief that the use of a committee reduces the risk of actual impartiality or coercion or the public perception of impartiality or coercion (*Siefert*). Finally, the decisions hold that requiring recusal when a contributor appears in the judge’s court is a less restrictive alternative than a ban on personal solicitation (*Yost, Siefert*).

The attitude of some federal courts seems reflected in this statement from *Siefert*:

In the end, it appears that [the personal solicitation clause] furthers no interest at all, except perhaps one of saving judicial candidates from the unseemly task of asking for money. There is almost a nostalgic quality about it, harkening back to the days of early America when candidates for office thought it was in bad taste to campaign on their own behalf, instead letting their surrogates do all the dirty work.

In the remand of *Republican Party of Minnesota v. White*, the U.S. Court of Appeals for the 8th Circuit held that the personal solicitation clause was unconstitutional insofar as it prohibits a judicial candidate from soliciting contributions from large groups and transmitting solicitations above their personal signatures, which was the extent of the plaintiffs’ challenge. *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Circuit 2005) (summary judgment).

After that decision, the Minnesota Supreme Court revised its code to prohibit a judge or judicial candidate from personally soliciting contributions except when speaking to groups of 20 or more or by signing letters for distribution by the candidate’s campaign committee if the letters direct contributions to the committee. The clause prohibited a campaign committee from disclosing to the candidate the identity of campaign contributors or those who decline to contribute to the campaign.

That revision survived a constitutional challenge. *Wersal v. Sexton*, 607 F. Supp. 2d 1012 (D. Minnesota 2009) (summary judgment). The court rejected the plaintiff’s argument that the rule did not effectively insulate the candidate and concluded that “the rash of recently filed petitions for Writ of Certiorari” demonstrated that recusal was not an effective means of preventing potential bias.

Several judicial candidates have been sanctioned for per-

(continued on page 8)

## Case-law Following *Republican Party of Minnesota v. White* (continued from page 7)

sonally soliciting campaign contributions since *White*. See *Simes v. Judicial Discipline and Disability Commission*, 247 S.W.3d 876 (2007); *Inquiry Concerning Davis*, Order (Kansas Commission on Judicial Qualifications July 18, 2008); *In re Dunleavy*, 838 A.2d 338 (Maine 2003); *In re Singletary*, Opinion (December 1, 2008), Order (Pennsylvania Court of Judicial Discipline January 23, 2009) ([www.cjdpa.org/decisions/jd08-01.html](http://www.cjdpa.org/decisions/jd08-01.html)); *In re Krouse*, Stipulation, Agreement, and Order (Washington State Commission on Judicial Conduct May 5, 2005) ([www.cjc.state.wa.us](http://www.cjc.state.wa.us)).

### Endorsements

One federal court, sitting in Wisconsin, has held unconstitutional the prohibition on a judge or judicial candidate publicly endorsing candidates for other political offices. *Siefert v. Alexander*, 597 F. Supp. 2d 860 (W.D. Wisconsin 2009) (summary judgment). The court concluded that “any concerns about bias in favor of the partisan candidate may be resolved easily through recusal in the highly unlikely event that a candidate endorsed by a judge appears in the judge’s court.” The plaintiff in that case wanted to endorse candidates for President and governor. The court acknowledged that an endorsement of a local candidate for sheriff or district attorney “might make recusal necessary in so many cases that the state may be able to show a compelling interest in prohibiting such endorsements,” but expressed “no opinion on what form such a prohibition would have to take to pass constitutional muster . . . .”

In contrast, two district courts, in cases from Kansas and Minnesota, have upheld the endorsement clause. *Yost v. Stout*, Memorandum and Order (D. Kansas November 16, 2008) (summary judgment); *Wersal v. Sexton*, Memorandum Opinion and Order (D. Minnesota February 4, 2009) (summary judgment). See also *Inquiry Concerning Vincent*, 172 P.3d 605 (New Mexico 2007) (public reprimand for endorsing mayor for re-election).

The federal court considering the Minnesota provision explained:

If the judge endorses a sheriff or county attorney in the jurisdiction where the judge presides, the judge should recuse every time one of those individuals, or their agents, appears in the judge’s courtroom. In certain jurisdictions, particularly those with a small number of judges, this creates an insurmountable burden for the court system. Although the problem may be manageable in larger counties, a district in which there are only one or two judges would be hamstrung.

The court also stated: “The endorsement clause prohibits a single type of narrowly defined speech: the ability of a judicial candidate to endorse or oppose a candidate for a different office. A whole realm of speech remains available to that candidate.” The court rejected the plaintiff’s argument that “the endorsement of a candidate serves as a proxy for his position on issues,” noting if a judicial candidate, for example, “wishes to state that the cause of the current financial crisis was hyper-regulation, he can publicly take that position and does not need to endorse Congresswoman Michelle Bachmann as a proxy for that position.”

### Partisan activities

Federal courts have overturned restrictions on judges’ and candidates’ partisan political activity in three states (Kentucky, Minnesota, and Wisconsin) in which judicial elections are supposed to be non-partisan by law. *Carey v. Wolnitzek*, Opinion and Order (E.D. Kentucky October 15, 2008) (summary judgment); *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Circuit 2005) (summary judgment); *Siefert v. Alexander*, 597 F. Supp. 2d 860 (W.D. Wisconsin 2009) (summary judgment). The challenged clauses prohibited a judge or judicial candidate from identifying as a member of a political party in any form of advertising or when speaking to a gathering (Kentucky, Minnesota); attending political gatherings (Minnesota), seeking, accepting, or using endorsements from a political organization (Minnesota); or belonging to a political party (Wisconsin).

All three federal courts considered the restrictions on partisan activities to be effectively meaningless because the political party affiliations of many judicial candidates would be well known prior to the election or readily discoverable through public records, asking whether “the gag order . . . is fooling anyone” (*Siefert*). The courts found that the restrictions were pro-incumbent and that recusal was a less restrictive alternative to protect the state’s interest in impartiality.

The clauses were also found to be underinclusive because judges and candidates were still permitted to state their political party affiliations when asked (Kentucky) and to accept campaign contributions from political parties (Wisconsin), and political parties were permitted to fund or endorse judicial candidates (Kentucky). The courts also criticized the partisan activities restrictions as underinclusive because they did not prohibit membership in other groups with constitutional, legislative, policy, and procedural beliefs that may influence a judge’s philosophy and interpretation of the laws.

In *Carey*, the court stated that a candidate's political affiliation "is certainly a piece of information that many voters would be interested in knowing," and that voters, not the government, "determine whether particular information about a candidate is a relevant consideration in casting their votes." The court also concluded that the rule "does not eliminate potential bias, but only hides it," preventing litigants from learning if a judge has strong political preferences that could be the basis for a motion to disqualify.

In contrast, a federal court rejected challenges to restrictions in the Indiana code of judicial conduct prohibiting a judge or judicial candidate from acting as a leader in or holding an office in a political organization, making speeches on behalf of a political organization, and soliciting funds for, paying an assessment to, or making a contribution to a political organization or a candidate for public office. *Bauer v. Shepard*, Opinion and Order (N.D. Indiana July 7, 2009)

(summary judgment). Depending on the level of court and county, judges in Indiana are chosen through merit selection, with retention elections; partisan elections; or non-partisan elections.

The court held that the Indiana Supreme Court, informed by its "understanding of the adjudicative function of courts and the important role of judges in making decisions in specific cases based upon their application of the law to the facts of each case," had "carefully designed the rules and the exceptions" to serve the interests in judicial independence, judicial integrity, judicial impartiality, and the principles of justice and the rule of law. 

*This article is on the web-site of the Center for Judicial Ethics (www.ajs.org/ethics/pdfs/CaselawafterWhite.pdf), where it will be up-dated when new decisions are issued.*

## Proposed Findings of Fact, Conclusions of Law *(continued from page 3)*

corrections. Becker made the corrections and also incorporated Bailey's editorial suggestions. In the fourth communication, the judge received the corrected version of what became his opinion sentencing Roberts to death.

During the sentencing hearing, as the judge was reading his opinion from the bench, defense counsel, who did not have a copy of the sentencing order, noticed that one of the prosecutors seemed to be silently "reading along" with the judge, turning pages of a document in unison. In a sidebar discussion, the judge acknowledged that he had given his notes to the prosecution and instructed counsel to draft the sentencing order. Defense counsel challenged the process as an impermissible collaboration and ex parte communication. On direct appeal of the sentence, the Ohio Supreme Court held that the judge committed prejudicial error by delegating responsibility for the content and analysis of his sentencing opinion, vacated the death sentence, and remanded the case with instructions for the judge to personally review and evaluate the appropriateness of the death penalty.

In an advisory opinion, the Indiana Judicial Qualifications Commission stated that "a judge must never announce his or her decisions to one party, to the exclusion of others, except in extraordinary circumstances." *Indiana Advisory Opinion 1-98* ([www.in.gov/judiciary/jud-qual/docs/adops/1-98.pdf](http://www.in.gov/judiciary/jud-qual/docs/adops/1-98.pdf)). The Commission, which performs both disciplinary and advisory functions, had received a complaint about a judge who, after presiding over a contested support hearing, had telephoned the attorney whose client had prevailed, outlined his decision, instructed the

attorney to prepare an order reflecting that decision, and then signed the order drafted by the attorney after making some minor changes. The attorney for the other party was unaware of the judge's decision or of his instruction to opposing counsel until after the order was signed.

The Commission explained that the judge's conduct had given one party's lawyer the advantage of speaking with the judge ex parte about the judge's decision.

Even assuming the judge's decision was firm, and the conversation involved only its announcement and instructions to prepare an order, the party whose lawyer was not asked to participate justifiably would question the fairness of the conduct and might question whether the conversation, from which his or her attorney was excluded, went beyond a simple announcement and might have involved further argument or comment on the merits. Then, subsequent to the ex parte conversation, for a period of time, one party only was privy to the outcome. The potential for abuse is great and, even where the informed party has no occasion or reason to exploit that information, the negative impact on the other party's perception of the judge's neutrality and impartiality is rightfully compromised.

The Commission concluded:

A judge who is not inclined to ask for proposed orders from all parties prior to rendering the decision, and who, instead, prefers to instruct only the prevailing party to prepare a proposed order conforming with the judge's decision, must give that instruction under circumstances in which both parties are made aware of the decision at the same time. 

## Disclosure of Dismissals to the Public *(continued from page 3)*

district court. The subject judge was assigned to the matter. Complainant alleges that the judge improperly dismissed his complaint. This charge relates directly to the merits of the judge's ruling and must therefore be dismissed. . . . A misconduct complaint is not a proper vehicle for challenging the merits of a judge's rulings. . . .

Complainant also alleges that the judge was biased against him. But complainant hasn't provided any objectively verifiable proof (for example, names of witnesses, recorded documents or transcripts) supporting this allegation. Adverse rulings do not constitute proof of bias. . . . Because there is no evidence that misconduct occurred, this charge must be dismissed. . . .

Dismissals orders are posted on-line by at least four federal circuits — the 1st ([www.ca1.uscourts.gov/](http://www.ca1.uscourts.gov/)), the 7th ([www.ca7.uscourts.gov/JM\\_Memo/jm\\_memo.html](http://www.ca7.uscourts.gov/JM_Memo/jm_memo.html)), the 9th ([www.ce9.uscourts.gov/misconduct/orders.html](http://www.ce9.uscourts.gov/misconduct/orders.html)), and the 10th ([www.ck10.uscourts.gov/misconduct.php](http://www.ck10.uscourts.gov/misconduct.php)).

Rule 7(1) of the Vermont Judicial Conduct Board provides that the Board's closure letter, sent when the Board determines that a complaint is unfounded or there is otherwise insufficient cause for further proceedings, "shall be a public record." The letter contains "a summary of the complainant's allegations, the Board's investigation, and the reasons for dismissal." However, a closure letter "shall not identify the complainant, the judge, or any other person by name."

Rule 7A of the Arkansas Judicial Discipline and Disability Commission provides that: "Any action taken by the Commission after investigation of a judge shall be communicated to the judge by letter which shall become public information. If the allegations leading to the investigation have proven to be groundless, the letter to the judge shall so state." Although the letter is public, it does not disclose the allegations of the complaint.

### Summaries in annual reports

Several judicial conduct commissions summarize examples of dismissed complaints in their annual reports without any details that identify the judge or the complainant. For example, in its 2008 annual report ([www.mass.gov/cjc/2008AnnualReport.pdf](http://www.mass.gov/cjc/2008AnnualReport.pdf)), the Massachusetts Commission on Judicial Conduct summarizes examples of dismissals by the Commission:

- A pro se litigant filed a complaint more than 15 months after the alleged misconduct took place, making the complaint more than three months stale. The complaint alleged that the judge denied him his constitutional rights by failing

to appoint an attorney to represent him. Speaking with the complainant revealed that he was not entitled by law to an appointed attorney.

- A pro se litigant, who had previously filed 14 complaints against various judges, filed complaints alleging that two judges had taken bribes in his case. Speaking with the complainant revealed that he had no credible evidence to support his allegations.

- A litigant filed a complaint alleging that a judge was biased against him due to his pro se status and humiliated him in court. The Commission's investigation included obtaining the court docket/case summary and listening to the audio recording of court proceedings on four separate dates. The investigation revealed that, while the judge had addressed the complainant courteously and appropriately at all times, the complainant had refused to answer the judge's questions and behaved in a peculiar manner.

- A litigant filed a complaint alleging that a judge had unreasonably delayed making a ruling in his case and was biased against him. The investigation included interviewing the complainant and other witnesses, listening to the audio recording of four court proceedings, and reviewing the judge's responses. The investigation revealed that much of the delay was due to the complainant's changes of counsel and that none of the delay was unreasonable on the part of the judge. No evidence of bias or other judicial misconduct was found.

Similarly, the Kansas Commission on Judicial Qualifications includes in its annual report a list of "examples of conduct found to be proper or outside the Commission's jurisdiction." For example, in its 2008 annual report ([www.kscourts.org/appellate-clerk/general/commission-on-judicial-qualifications/Annual-Reports.asp](http://www.kscourts.org/appellate-clerk/general/commission-on-judicial-qualifications/Annual-Reports.asp)), it explains that it found no violation:

- When a judge presided over a hearing in a case in which the judge had previously recused because the witness who precipitated the recusal was not a party to the pending hearing and all parties knew of the previous recusal and did not object.

- When a judge failed to respond to written correspondence because the response would have been an ex parte communication.

- Based on allegations that a judge failed to act on a mandate from the court of appeals for re-sentencing because, after review, it was determined the matter was appropriately scheduled.

- When it was alleged a judge signed and filed a motion minute sheet disposing of a matter prior to a scheduled hear-

ing because the case was handled summarily according to court procedures.

- For delay because the minutes reports and registry of action report reflected that every motion was considered and ruled on.
- When the transcript of a proceeding did not reflect that the judge was rude, arrogant, and expressed bias and prejudice, as alleged.
- Based on allegations that a judge selectively turned the courtroom recorder off and on because the only time the recorder was turned off was between cases to conserve tape or when the tape ran out and the transcript reflects the reason every time the tape is stopped.

The Indiana Commission on Judicial Qualifications also lists examples of dismissed complaints on its web-site ([www.in.gov/judiciary/jud-qual/examples.html](http://www.in.gov/judiciary/jud-qual/examples.html)):

- A defendant complained that the judge acted unethically and violated courthouse security rules when the judge allowed the prosecutor to bring into the courtroom the weapon the defendant allegedly used in the commission of his crime.
- A defendant alleged he was being held without bond after he was sentenced. Court documents, confirmed by the complainant's attorney, showed that the defendant was being held on other charges.
- A litigant complained that the judge should have disqualified on the basis that the litigant once dated the judge's spouse's distant relative whom the judge did not know.
- A defendant in a child molestation case protested that the judge found his lack of remorse as an aggravating factor at sentencing after the defendant stated that, although he

recognized society "had a problem" with his relationship with his young victim, he simply was in love and was not a predator.

- The mother of a party to a custody dispute stated she sat through a hearing and felt her son's lawyer presented their case very well; therefore, she complained that the judge must not have been listening to the evidence. 

### **Caperton v. A. T. Massey Coal Co.**

Reversing a decision of the West Virginia Supreme Court of Appeals, the U.S. Supreme Court held in a 5-4 decision that the campaign efforts of the principal officer of one of the parties "had a significant and disproportionate influence" in placing Justice Brent Benjamin on the case and, therefore, required Benjamin's recusal under the Due Process Clause of the United States Constitution. *Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252 (2009). The majority emphasized that not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but found "this is an exceptional case." Noting the difficulty of judges' inquiring into "their subjective motives and purposes in the ordinary course of deciding a case," the Court focused on the "serious risk of actual bias—based on objective and reasonable perceptions." The Court's inquiry centered on the relative size of contributions by a person with a personal stake in a particular pending or imminent case "in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election."

There is a longer summary of the case on the Center for Judicial Ethics web-site at <http://www.ajs.org/ethics/pdfs/SummaryofCaperton.pdf>.

## **Judicial Conduct Reporter**

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*An index to the Judicial Conduct Reporter is available on the AJS web-site at [www.ajs.org/ethics/](http://www.ajs.org/ethics/).*

### **Correction**

An article on judicial ethics advisory committees in the spring 2009 issue of the *Judicial Conduct Reporter* incorrectly stated that South Dakota does not have an advisory committee except for matters related to judicial campaigns. In fact, there is a Judicial Ethics Committee, created by the South Dakota Supreme Court and comprised of two circuit court judges and one magistrate judge. The committee does not have a web-site, but redacted summaries of its opinions are sent to every judge in the state.



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