

# JUDICIAL CONDUCT REPORTER



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## Before and after the bench: Part 1 by Cynthia Gray

**T**his two-part article will address two questions. First, in this issue, does a judicial conduct commission have jurisdiction to investigate allegations that a judge committed misconduct before becoming a judge or does the attorney regulatory agency retain disciplinary authority after an attorney becomes a judge? Second, can a former judge be disciplined as an attorney for misconduct while he or she was a judge? The second question will be covered in the fall issue of the *Judicial Conduct Reporter*.

### Conduct gaining the bench

Judicial conduct commissions have disciplined judges for misconduct during the appointment process or in election campaigns, even removing judges for misrepresentations

on their way to the bench. For example, the California Commission on Judicial Performance removed a judge for misrepresenting his educational background on the personal data questionnaires he submitted to the governor and evaluation committees as part of the appointment process, in addition to false statements after becoming a judge, including during the Commission investigation. *Inquiry Concerning Couwenberg*, Decision and order (California Commission on Judicial Performance August 15, 2001) ([http://cjp.ca.gov/pub\\_discipline\\_and\\_decisions.htm](http://cjp.ca.gov/pub_discipline_and_decisions.htm)). The Commission found that the judge's successful application "was premised on material misrepresentations," noting that, although there

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## Defining family by Cynthia Gray

**T**he code of judicial conduct defines several different levels of family relationships with different ethical obligations for different groups. (References are to the American Bar Association *Model Code of Judicial Conduct*, available at [www.americanbar.org/groups/professional\\_responsibility/publications/model\\_code\\_of\\_judicial\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html).)

### The third degree

The code's widest family circle is the "third degree of relationship." The relatives within the third degree are:

- Parents
- Children
- Brothers and sisters
- Grandparents
- Grandchildren
- Aunts and uncles
- Nephews and nieces
- Great-grandparents
- Great-grandchildren

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- A judge may not refuse to perform a same-sex marriage notwithstanding his personal or sincerely held religious belief that marriage is between one man and one woman and even if he provides a referral to another judge willing to perform the marriage. A judge may refuse to perform all marriages or choose to perform marriage ceremonies only for close friends and relatives. *Nebraska Opinion 2015-1*.

- A judge cannot refuse to conduct same-sex marriages while continuing to perform opposite-sex marriages and cannot recuse herself from ancillary matters, such as child custody or adoption proceedings. *Louisiana Advisory Opinion 263 (2015)*.

- A judge may not refuse to perform same-sex marriages while continuing to perform opposite-sex marriages and may not decline to perform all marriages to avoid marrying same-sex couples based on personal, moral, or religious beliefs. *Ohio Opinion 2015-1*.

- A judicial official may complete a confidential reference for the re-certification of an attorney by the National Board of Trial Advocacy. *Connecticut Informal Opinion 2015-10*.

- A judicial official may provide a confidential reference for an attorney seeking certification by the National Association of Counsel for Children. *Connecticut Emergency Staff Opinion 2015-12*.

- A judge who regularly refers litigants to a substance abuse treatment facility may write a letter to a state agency supporting the facility's application to become a participating service provider for insurance purposes. *New York Opinion 2014-180*.

- If he has an adequate factual basis, after the case is completed, a judge may certify that a U-visa petitioner was helpful in the prosecution of criminal activity of which the petitioner was a victim. *Minnesota Opinion 2015-2*.

- A judge may not disclose to a party's employers non-public information from a domestic violence injunction case. *Florida Opinion 2015-3*.

- A judge may not consider ex parte communications from non-parties about a guardian's conduct or a ward's welfare or initiate an investigation. *Nevada Advisory Opinion JE-2015-2*.

- A judge who regularly presides over protection from abuse cases may not serve on the protection order judicial workgroup of the Kansas Coalition against Sexual and Domestic Violence. *Kansas Opinion JE 182 (2015)*.

- A family magistrate is disqualified from a matter in which she previously provided legal advice and assistance to a pro se litigant while she was working at a pro se legal clinic. *Maryland Opinion Request 2015-27*.

- A judge may not continue to employ his judicial assistant after the assistant marries his daughter. *Florida Opinion 2015-9*.

- A judge may not permit a court employee to own a medical marijuana business even if the business fully complies with state laws and regulations. *Washington Opinion 2015-2*.

- Judge A should report Judge B to the State Commission on Judicial Conduct when, after Judge B told Judge A she was only in Judge A's court to support a relative appearing on a traffic ticket, Judge A learned from a reliable source that Judge B had attempted to improperly influence her relative's case, and the prosecutor told Judge A that Judge B had participated in a conference he had with her relative, had challenged the offer the prosecutor made, and slapping a copy of the relevant statute down in front of the prosecutor, had asked if he had read it. *New York Opinion 2015-70*.

- An association of magistrates may, in a letter, express its position on legislation addressing a perceived disparity in the distribution of money collected by town and village courts. *New York Opinion 2015-98*.

- A judge who presides in medical malpractice cases may not accept a private, in-house speaking engagement for the board of trustees of a medical facility that regularly appears before him. *New York Opinion 2014-196*.

- A judge may serve as an uncompensated interpreter for a friend during a business meeting if she will not be identified as a judge and will not provide legal advice. *New York Opinion 2014-183*.

- A judge may accept reimbursement for the costs of lodging incurred in performing an out-of-town wedding for a good friend. *New York Opinion 2015-97*.

- When applying to foster or adopt a child, a judge may disclose information about his employment and discuss his judicial office but should avoid statements that could be viewed as an attempt to use his judicial office to gain favorable treatment in the process. If a department of social services is involved in the process, the judge should disqualify himself from any cases involving that specific department as long as the application is pending. If the application is denied, the judge may resume hearing cases involving that department. If an adoption application is successful, after the adoption is complete, the judge is not required to continue to disqualify or disclose. If an application to foster a child is successful, the judge is disqualified from any cases involving the specific department as long as the judge is fostering that child, absent waiver. *North Carolina Formal Opinion 2015-1*.

- After an intent to circulate a recall petition is filed against her, a judge may campaign as if she were a candidate in a contested election. *Nevada Opinion JE2015-1*.

*The Center for Judicial Ethics has links to judicial ethics advisory committees at [www.ncsc.org/cje](http://www.ncsc.org/cje).*

## Recent advisory opinions

## Continuing disregard

Based on a stipulation and agreement, the Washington State Commission on Judicial Conduct censured a former judge for receiving a discounted carpool parking rate even though he did not carpool. *In re Bonner*, Stipulation, agreement, and order (July 17, 2015) ([www.cjc.state.wa.us/Case%20Material/2015/7716\\_Bonner\\_Stip.pdf](http://www.cjc.state.wa.us/Case%20Material/2015/7716_Bonner_Stip.pdf)). The judge also agreed to reimburse the city the difference between the discounted rate and the regular rate and to not seek or hold judicial office or perform judicial duties without securing the Commission's approval.

In January 2004, the judge applied for a three-person carpool parking permit through the City of Seattle Fleets and Facilities Department. His application was approved and remained in effect without renewal or re-certification until he voluntarily withdrew from the program in August 2014. During that time, he saved \$70-\$140 a month at the discounted carpool parking rate, but he only occasionally carpooled with colleagues, neighbors, or friends. His irregular and infrequent ride-sharing did not meet the minimum requirements of the city's program.

The Commission found that the judge demonstrated a continuing disregard for the high standards of personal integrity to which judges are held.

## Marathon session

The Texas State Commission on Judicial Conduct publicly admonished a judge for (1) holding a court session that lasted until 4:00 a.m.; (2) describing the district attorney as a "New York Jew;" (3) expelling the district attorney from her courtroom; and (4) telling a prosecutor his beard made him look like a "Muslim." *Public Admonition of Schildknecht* (Texas State Commission on Judicial Conduct May 11, 2015) ([www.scjc.state.tx.us/pdf/actions/FY2015-PUBSANC.pdf](http://www.scjc.state.tx.us/pdf/actions/FY2015-PUBSANC.pdf)). The Commission also ordered the judge to obtain four hours of instruction with a mentor.

(1) On July 2, 2014, the judge began hearing probation revocation cases at 1:00 p.m.; the session did not end until 4:00 a.m. on July 3. The judge did not provide any formal breaks for litigants, attorneys, witnesses, or court personnel to eat or use the restroom. The defendant whose case was the final matter heard in the early morning of July 3<sup>rd</sup> appealed her conviction, arguing that "fair consideration could not have possibly been given at 4 a.m. after a 19 hour day." In her written responses to the Commission's inquiry, the judge explained that the "marathon" session was necessary to prevent jail over-crowding and that, in her opinion, there had been enough "downtime" for anyone to eat or use the restroom and return in time to conduct court business.

(2) The judge referred to District Attorney Michael Munk as a "New York Jew" during a private conversation with Munk's secretary in the judge's office. Subsequently, after jury selection in a criminal case, the judge met in chambers with Munk and a defense attorney. In that conversation, the judge stated: "When I tell people why you [Munk] are different and have different thoughts, I explain because you are from New York and because you are Jewish." In her written responses to the Commission's inquiry, the judge explained she made the statements, not with bias or prejudice or to disparage Munk, but to attempt to explain that his "background is that from a culture of a New York Jew," and that his approach and perspective "may be different from that of someone who has been reared in West Texas. To understand that leads to acceptance of the differences." The judge added, "I may be too blunt, but I am not biased or prejudiced against New Yorkers or Jews."

(3) One day when Munk attempted to enter her courtroom, the judge instructed her bailiff, "Get him out of here" or "I don't want to see his face," or words to that effect. In her written responses to the inquiry, the judge expressed regret for acting "in haste" but explained that she did not see any reason for Munk to be in her courtroom after business had concluded for the day.

(4) At the conclusion of a criminal docket in her courtroom, the judge stated to an assistant district attorney with a beard, "You look like a Muslim, and I wouldn't hire you with it," or words to that effect. In her written response to the Commission's inquiry, the judge could not recall whether she made the statement but stated the situation "seemed faintly familiar." The judge added that she would not have made such a comment while conducting court business, surmising that the conversation must have taken place during "down time."

## Appointed counsel practices

Pursuant to the judge's agreement, the Tennessee Board of Judicial Conduct reprimanded a judge for his practices regarding appointed counsel and other matters in criminal cases; the Board also entered a cease and desist order. *In re Holley*, Reprimand (Tennessee Board of Judicial Conduct July 6, 2015)

([www.tsc.state.tn.us/sites/default/files/docs/judge\\_reese\\_holley\\_7-6-2015.pdf](http://www.tsc.state.tn.us/sites/default/files/docs/judge_reese_holley_7-6-2015.pdf)). The judge had required defendants to perform public service work to be granted appointed counsel, sentenced defendants to jail for contempt if they did not complete that public service work, and denied appointed counsel or revoked bonds without considering the defendants' personal financial means

## Recent cases

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was no evidence of the governor's reason for appointing him, his misrepresentations were apparently "critical to his judicial appointment." The Commission stated, "any discipline other than removal would leave the public paying Judge Couwenberg for a judgeship he apparently procured through misrepresentations." Emphasizing that honesty is a "minimum qualification" for judges, the Commission concluded that even an "exemplary judicial performance" would not have excused his misconduct. *See also In the Matter of White*, 499 S.E.2d 813 (South Carolina 1998) (reprimand of a former magistrate who had misrepresented his education on his notarized application to the governor's office, rejecting his argument that the code of judicial conduct did not apply because he was not a judge at the time and noting a candidate who assumes judicial office by means of a misrepresentation directly threatens the public's confidence in the integrity of the judiciary).

The Florida Supreme Court removed a new judge for a clear pattern of intentional misrepresentations during his successful election campaign and for violating state law by accepting campaign funds from his father that he had disguised as earned income. *Inquiry Concerning Renke*, 933 So. 2d 482 (Florida 2006). The Court stated that the "series of blatant, knowing misrepresentations . . . amount to nothing short of fraud on the electorate in an effort to secure a seat on the bench." The Court concluded that "Judge Renke and his cohorts created a fictitious candidate, funded his candidacy in violation of Florida's election laws, and successfully perpetrated a fraud on the electorate in securing the candidate's election."

Noting the recommendation of a public reprimand and \$40,000 fine, the Court suggested that the Judicial Qualifications Commission "may have decided that, as a matter of law, if a judge who has committed serious misconduct is serving adequately as a judge, he is presently fit to hold office." However, the Court held, regardless of abilities and judicial reputation, "one who obtains a position by fraud and other serious misconduct . . . is by definition unfit to hold that office."

Florida has chosen a nonpartisan election process for selecting judges, and conduct that substantially misleads the voting public and interferes with its right to make a knowing and intelligent decision as to a judicial candidate's qualifications will simply not be tolerated in selecting members of the judiciary. Those who seek to assume the

mantle of administrators of justice cannot be seen to attain such a position of trust through such unjust means. The JQC's finding of guilt on the severe campaign finance improprieties evidenced here, when coupled with Judge Renke's efforts to mislead the voting public as to his experience and qualifications to serve as judge, lead us to conclude that his conduct during his judicial campaign was "fundamentally inconsistent with the responsibilities of judicial office."

There are numerous other examples of judicial discipline sanctions for campaign misconduct by a non-judge candidate who won the election. *See In the Matter Concerning Brehmer*, Decision and order (California Commission on Judicial Performance October 25, 2012) ([http://cjp.ca.gov/pub\\_discipline\\_and\\_decisions.htm](http://cjp.ca.gov/pub_discipline_and_decisions.htm)) (admonishment for violating state political reform act in campaign); *Inquiry Concerning Alley*, 699 So. 2d 1369 (Florida 1997) (reprimand for misrepresentations in campaign advertisements); *Inquiry Concerning Kinsey*, 842 So. 2d 77 (Florida 2003) (reprimand and \$50,000 fine for campaign statements

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Emphasizing that honesty is a "minimum qualification" for judges, the Commission concluded that even an "exemplary judicial performance" would not have excused his misconduct.

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that demonstrated a commitment to the prosecution and for knowing misrepresentations about her opponent); *Inquiry Concerning Krause*, 141 So. 3d 1197 (Florida 2014) (reprimand and \$25,000 fine for purchasing a table at a political party fund-raiser, failing to include the qualifier "for" required for non-incumbent candidates in campaign materials, and accepting a campaign contribution from her husband over the \$500 limit); *In the Matter of Robertson*, 596 S.E.2d 2 (Georgia 2004) (removal for a false statement on a declaration of candidacy); *In re Golniewicz*, Order (Illinois Courts Commission November 14, 2004) ([www.illinois.gov/jib/Documents/Orders%20from%20Courts%20Commission/Golniewicz.pdf](http://www.illinois.gov/jib/Documents/Orders%20from%20Courts%20Commission/Golniewicz.pdf)) (removal for using his parents' address to run for office and deceptive advertising, in addition to judicial misconduct); *In the Matter of Anderson*, Determination (New York State Commission on Judicial Conduct October 1, 2012) ([www.cjc.ny.gov/Determinations/all\\_decisions.htm](http://www.cjc.ny.gov/Determinations/all_decisions.htm)) (censure for disguising source of campaign funds to avoid statutory contribution limits); *In the Matter of Chan*, Determination (New York State Commission on Judicial Conduct November 17, 2009) ([www.cjc.ny.gov/Determinations/all\\_decisions.htm](http://www.cjc.ny.gov/Determinations/all_decisions.htm)) (admonishment for campaign literature

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that misrepresented an endorsement and displayed a pro-tenant bias and for personally soliciting campaign contributions); *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)) (reprimand for personally soliciting campaign contributions at a biker rally); *In re Nocella*, 102 A.3d 422 (Pennsylvania 2014), *affirming*, Opinion (June 26, 2013) and Sanction order (Court of Judicial Discipline August 5, 2013) ([www.pacourts.us/courts/court-of-judicial-discipline/court-cases/court-case-archive](http://www.pacourts.us/courts/court-of-judicial-discipline/court-cases/court-case-archive)) (removal for lying repeatedly on questionnaires submitted to a bar judicial selection commission while running for judicial office, in addition to pre-bench misconduct as an attorney).

### Misconduct in law practice

Judges have also been disciplined as judges for pre-bench misconduct in their legal practice. For example, accepting the recommendation of the Judiciary Commission, the Louisiana Supreme Court removed a judge who had, in addition to substantial misconduct as a judge, failed to provide representation to 15 clients before becoming a judge. *In re Hughes*, 874 So. 2d 746 (Louisiana 2004). The Court found:

The evidence clearly and convincingly establishes that as an attorney, Judge Hughes time and time again took money from people who could ill afford to pay it, did minimal or no work to earn it, and then refused to refund monies she clearly had not earned. Preying upon her clients' lack of education and lack of sophistication in legal matters, Judge Hughes either ignored or cavalierly dismissed complaints that she had failed to perform the services for which she was retained . . . .

The judge argued that a judicial discipline proceeding could not address her conduct as an attorney, but the Court reasoned that her failure to account to her former clients and return unearned fees continued after she assumed judicial office and, therefore, was within the Commission's jurisdiction. The Court also stated that the conduct that did not continue into her judicial tenure could be considered as part of a pattern.

Some states have provisions that expressly give judicial discipline authorities jurisdiction over pre-bench conduct. See box on page 6. For example, the Florida constitution provides: "The [judicial qualifications] commission shall have jurisdiction over justices and judges regarding allegations

that misconduct occurred before or during service as a justice or judge if a complaint is made no later than one year following service as a justice or judge." Thus, agreeing with the recommendation of the Judicial Qualifications Commission, the Florida Supreme Court removed a judge for her deceptive conduct as an attorney toward her clients and co-counsel in the settlement of multi-party litigation. *Inquiry Concerning Watson* (Florida Supreme Court June 18, 2015) ([www.floridasupremecourt.org/pub\\_info/summaries/briefs/13/13-1333/Filed\\_06-18-2015\\_Opinion.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/13/13-1333/Filed_06-18-2015_Opinion.pdf)). "Despite Judge Watson's protestations to the contrary," it emphasized, the Court and the Commission have

jurisdiction over misconduct committed by an attorney who subsequently becomes a judge, "no matter how remote."

The judge's law office and two other firms had represented over 400 healthcare providers on personal injury protection claims in numerous lawsuits against Progressive Insurance Company. The "PIP attorneys" also retained other attorneys to initiate

bad faith cases on behalf of some of their clients against Progressive. In 2004, without notifying those "bad faith attorneys," the PIP attorneys accepted Progressive's offer of \$14.5 million to settle the bad faith claims as well as the PIP claims. The PIP attorneys notified their clients of the settlement but did not disclose the conflicts of interests, provide closing statements, or disclose facts necessary to make an informed decision.

The bad faith attorneys sued the PIP attorneys. In April 2008, after a bench trial, a judge found that the PIP attorneys had violated several rules of professional conduct, entering an award in favor of the bad faith attorneys. The trial judge sent his order to The Florida Bar, and the Bar began grievance proceedings against Watson. Watson requested that the prosecution be deferred until after her appeal. The trial court's judgment was affirmed in February 2012, and the Bar proceeded with its investigation. In October 2012, the grievance committee found probable cause that a violation had occurred. In November 2012, Watson was elected, assuming judicial office in January 2013. The Bar forwarded its file to the Judicial Qualifications Commission, and one of the bad faith attorneys filed a complaint. The Commission filed formal charges against now-judge Watson in July 2013.

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## Judges have also been disciplined as judges for pre-bench misconduct in their legal practice.

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After an evidentiary hearing, the Commission found: “When Progressive dangled a pot of money, ethical restraints were swept aside. . . . Temptation overrode Judge Watson’s ethics, despite advance warning. She sold out her clients, her co-counsel, and ultimately herself.” Lawyers who violate the professional conduct rules cannot “escape to the bench,” the Commission stated.

On review, citing a previous case, the Court emphasized that a pattern of deceit and deception “casts serious doubt on [a judge’s] ability to be perceived as truthful by those who may appear before her in her courtroom” and “diminishes the public’s confidence in the integrity of the judicial system.” It concluded that the judge’s conduct was “fundamentally inconsistent with the responsibilities of judicial office,” and her “actions while a practicing attorney, and her

demeanor during these proceedings ‘cast[] serious doubts’ on her ‘ability to be perceived as truthful by those who may appear before her in her courtroom.’” See also *Inquiry Concerning Henson*, 913 So. 2d 579 (Florida 2005) (removal for, in addition to other misconduct, advising a client in a criminal matter to flee the country rather than face prosecution); *Inquiry Concerning Ford-Kaus*, 730 So. 2d 269 (Florida 1999) (removal for mishandling an appeal before becoming a judge, back-dating a certificate of service, falsehoods in a deposition in a malpractice suit, overcharging her client and misrepresenting how much work she had performed, and depositing payments into her operating account rather than a trust account, in addition to judicial

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## Provisions giving judicial conduct commissions jurisdiction over pre-bench conduct

**Arizona:** “The commission [on judicial conduct] has jurisdiction over judges and former judges concerning allegations of misconduct occurring prior to or during service as a judge . . . .” *Rule 2, Rules of the Commission on Judicial Conduct.*

**Arkansas:** “The [Judicial Discipline and Disability] Commission shall have jurisdiction over allegations of misconduct occurring prior to or during service as a judge . . . .” *Rule 6(C), Rules of Procedure of the Judicial Discipline and Disability Commission.*

**California:** The Commission on Judicial Performance may censure or remove a judge or former judge “for action occurring not more than 6 years prior to the commencement of the judge’s current term . . . that constitutes willful misconduct in office, persistent failure or inability to perform the judge’s duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.” *Section 18(d), California Constitution.*

**Florida:** “The [judicial qualifications] commission shall have jurisdiction over justices and judges regarding allegations that misconduct occurred before or during service as a justice or judge if a complaint is made no later than one year following service as a justice or judge.” *Article V, §12(a)(1), Florida Constitution.*

**Indiana:** “The Commission [on Judicial Qualifications] shall have jurisdiction over conduct committed by a judicial officer, whether or not related to the judicial office and whether or not committed during the judicial officer’s term of office.” *Rule 25(1)(C), Indiana Rules of Court, Rules*

*for Admission to the Bar and the Discipline of Attorneys.*

**Massachusetts:** “This jurisdiction shall include all conduct that occurred prior to a judge’s assuming judicial office . . . ; provided, however, that in evaluating such conduct, the commission [on judicial conduct] shall give substantial weight to relevant decisions of the supreme judicial court and the board of bar overseers regarding bar discipline.” *Chapter 2.11(C), §2(2), Massachusetts General Laws.*

**Minnesota:** “The board’s jurisdiction shall include conduct that occurred prior to a judge assuming judicial office. The Office of Lawyers Professional Responsibility shall have jurisdiction to consider whether discipline as a lawyer is warranted in matters involving conduct of any judge occurring prior to the assumption of judicial office.” *Rule 2(c), Rules of the Board on Judicial Standards.*

**South Dakota:** “[J]urisdiction for complaints against members of the judiciary for conduct that occurred prior to becoming a member of the judiciary shall be vested with the Judicial Qualifications Commission.” *Section 16-19-29(10), South Dakota Consolidated Laws.*

**Utah:** “The [Judicial Conduct] Commission has jurisdiction over judges in evaluating allegations that misconduct occurred before or during service as a judge . . . .” *Title R595-1-1, Utah Administrative Code.*

**Washington:** “The commission [on judicial conduct] has jurisdiction over judges regarding allegations of misconduct occurring prior to or during service as a judge . . . .” *Rule 2(b)(1), State Commission on Judicial Conduct Rules of Procedure.*

misconduct); *Inquiry Concerning Hapner*, 718 So. 2d 785 (Florida 1998) (removal for virtually abandoning her law practice and neglecting client matters while she ran for judge, in addition to other misconduct); *Inquiry Concerning Meyerson*, 581 So. 2d 581 (Florida 1991) (public reprimand for, while in private practice, charging fees to clients that exceeded the fees he had agreed to and collecting money due for medical services to his clients; after becoming a judge, failing to timely pay the funds to service providers, failing to disclose his continuing interest in his law practice, and failing to obtain clients' consent to his division of legal fees with another attorney); *Inquiry Concerning Capua*, 561 So. 2d 574 (Florida 1990) (public reprimand for commingling client funds with his funds and failing to give required closing statements to clients, in addition to judicial misconduct); *Inquiry Concerning Carnesoltas*, 543 So. 2d 83 (Florida 1990) (public reprimand for, in addition to judicial misconduct, while an attorney, using obscene language about a federal judge and falsely accusing the judge of personal animosity towards her and, during a deposition, engaging in an emotional outburst and threatening opposing counsel).

Other states have also imposed judicial discipline sanctions for pre-bench attorney misconduct. *See, e.g., In re Runco*, 620 N.W.2d 844 (Michigan 2001) (censure for self-dealing contrary to the interests of his clients when he was an attorney and failing to file a timely answer to the formal complaint); *In the Matter of Mason*, 790 N.E.2d 769 (New York 2003) (removal for commingling personal funds with client funds in his attorney escrow account before and after becoming a judge, giving contradictory testimony to the Commission, and failing to respond to Commission requests for information); *In the Matter of O'Connor*, Determination (New York State Commission on Judicial Conduct August 12, 2013) ([www.cjc.ny.gov/Determinations/all\\_decisions.htm](http://www.cjc.ny.gov/Determinations/all_decisions.htm)) (censure for, prior to becoming a judge, falsely responding to a question about his financial liabilities on applications for appointment as a fiduciary, in addition to judicial misconduct); *In re Nocella*, 102 A.3d 422

(Pennsylvania 2014), *affirming*, Opinion (June 26, 2013) and Sanction order (Court of Judicial Discipline August 5, 2013) ([www.pacourts.us/courts/court-of-judicial-discipline/court-cases/court-case-archive](http://www.pacourts.us/courts/court-of-judicial-discipline/court-cases/court-case-archive)) (removal for twice being held in contempt in a court case arising from a board of ethics complaint against a PAC he represented and, to avoid paying a court-ordered fine, dissipating the PAC's funds and engaging in delay, obfuscation, and deceit, in addition to judicial campaign misconduct). *See also In re DeRobbio*, 604 A.2d 1240 (Rhode Island 1992) (adopting the findings of the Commission on Judicial Tenure and Discipline that no evidence supported allegations that a judge, while a prosecutor in 1976, had intentionally failed to make necessary disclosures to the defense).

In proceedings brought by the Judicial Qualifications Commission, the Nebraska Supreme Court suspended for six months without pay a judge who, while a county attorney 17 years earlier, had altered a copy of a police report, provided the altered report to defense counsel, and asked the police officer to change either his original report or his testimony to conform to the alterations. *In re Krepela*, 628 N.W.2d 262 (Nebraska 2001). In a previous opinion, the Court had held that the Commission had the authority to "investigate any complaint concerning the qualifications of a judge, including actions of the judge that occurred prior to the time the judge took office." *State Bar Association v. Krepela*, 610 N.W.2d 1 (Nebraska 2000).

### Bar discipline for pre-bench conduct

In the same opinion, the Court had dismissed a complaint against the same judge, for the same conduct, brought by the Counsel for Discipline of the State Bar Association. Noting the Counsel for Discipline helps it regulate the practice of law, the Court explained that, "since members of the judiciary do not practice law, the Counsel for Discipline has no role in disciplining sitting judges." The Court also stated that, if a judge were disbarred or suspended as a result of charges filed by the Bar, the judge would effectively be removed from office by a means that was not established in the constitution. Finally, the Court concluded, allowing bar counsel to proceed against judges would compromise the independence of the judiciary. *See also Rule 6.3, ABA Model Rules for Lawyer Disciplinary Enforcement* (1989) ([www.americanbar.org/groups/professional\\_responsibility/resources/lawyer\\_ethics\\_regulation.html](http://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation.html)) ("Incumbent judges shall not be subject to the jurisdiction of the [lawyer discipline] agency . . .").

In contrast, the Missouri Supreme Court held that only the attorney discipline authorities, and not the Commission on Retirement, Removal and Discipline, had jurisdiction

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over a new judge for his pre-bench conduct when a non-judge candidate in a successful campaign for judicial office. *In re Burrell*, 6 S.W.3d 869 (Missouri 1999). The section in the Missouri constitution that establishes the Commission provides that “the commission shall receive and investigate . . . all complaints concerning misconduct of all judges . . .” Stating that section is addressed solely to the misconduct of sitting judges, the Court held that the Commission could not prosecute alleged misconduct that occurred when a judge was not yet a judge.

Similarly, the rules for the Idaho Judicial Council provide that “the Council has jurisdiction over an accused judge regarding allegations of misconduct or a disability and the application of dispositions thereto, based on events that occurred during the duration of the accused judge’s judicial capacity.” The judicial discipline rules in Alabama provide that “incumbent judges are subject to the jurisdiction of the Disciplinary Commission and the Disciplinary Board of the Alabama State Bar during their terms of office for misconduct occurring before they became judges.” The rules in Hawai’i state:

The Disciplinary Board of the Hawai’i Supreme Court may conclude any formal disciplinary proceedings as to said conduct which occurred prior to the judicial tenure of

any full-time or part-time justice or judge, and any petition to the supreme court to determine whether any justice or judge is incapacitated from continuing the practice of law by reason of physical infirmity or illness or because of the use of drugs or intoxicants, if such formal disciplinary proceedings were instituted or such petition was filed prior to the judicial tenure of the justice or judge.

The rules of the Colorado Commission on Judicial Discipline do not “limit the jurisdiction of Attorney Regulation over an attorney with respect to conduct subject to [Colorado Rules of Professional Conduct], which occurred before, during, or after the attorney’s service as a judge.” The Commission may refer to the Attorney Regulation Counsel any complaint about a judge that “may involve grounds for a violation of Colo. RPC.” In 2008, pursuant to stipulations and agreements, the Presiding Disciplinary Judge for the Colorado Supreme Court publicly censured two judges for failing, while assistant district attorneys in the late 1990’s, to ensure disclosure of all information to which a defendant in a murder trial was entitled. *People v. Blair*, 2008 Colo. Discipl. LEXIS 54 (Colorado Supreme Court Presiding Disciplinary Judge 2008); *People v. Gilmore*, 2008 Colo. Discipl. LEXIS 57 (Colorado Supreme Court Presiding Disciplinary Judge 2008). ★

## Defining family (continued from page 1)

The rules apply not only to the judge’s third degree relatives, but also to their spouses and domestic partners, and to the third degree relatives of the judge’s spouse or domestic partner, and to their spouses and domestic partners.

The third degree is used by the code to identify the relatives a judge should not appoint or hire. Rule 2.13 requires a judge to avoid nepotism, and comment 2 defines nepotism as “the appointment or hiring of any relative within the third degree of relationship of either the judge or the judge’s spouse or domestic partner, or the spouse or domestic partner of such relative,” unless otherwise defined by law.

Further, under Rule 2.11(A)(2), a judge is disqualified if the judge knows that someone who is involved in specified ways in a case is related within the third degree to the judge or the judge’s spouse or domestic partner or is the spouse or domestic partner of a person related within the third degree to the judge or the judge’s spouse or domestic partner. (A judge is also disqualified if the judge knows the judge or the judge’s spouse or domestic partner is involved in a case.)

The types of involvement that trigger disqualification are:

- being a party,
- being an officer, director, general partner, managing member, or trustee of a party,
- being a lawyer,
- being a material witness, or
- having a more than de minimis interest that could be substantially affected by the proceeding.

According to Comment 4 of Rule 2.11, a relative’s affiliation with the same law firm as a lawyer in a proceeding does not automatically disqualify the judge, but, if the relative’s interest in the law firm could be substantially affected by the proceeding or the judge’s impartiality might reasonably be questioned, the judge’s disqualification is required. Some states follow that case-by-case analysis; others, however, have adopted a bright-line rule that requires a judge to disqualify, absent waiver, whenever a law firm with which a relative is affiliated appears. *See* “A lawyer in the family—Disqualification when a relative’s law firm appears in a case,” *Judicial Conduct Reporter* (Fall 2011), available at [www.ncsc.org/cje](http://www.ncsc.org/cje).

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## Cousins

A cousin is not within the third degree of relationship, and, therefore, a judge is not disqualified under Rule 2.11(A)(2) if a cousin is involved in a case. However, a judge may be disqualified by a specific cousin's involvement if they have a very close relationship that raises a reasonable question about the judge's impartiality under Rule 2.11(A) or if the judge has a personal bias or prejudice regarding the cousin under Rule 2.11(A)(1). See *Arkansas Advisory Opinion 2013-3* (a judge is not automatically disqualified from cases in which her first or third cousin is one of the attorneys but should be alert to situations in which her cousin's appearance would raise a reasonable question about her impartiality); *Florida Advisory Opinion 1997-13* (a judge is not disqualified from a proceeding in which a lawyer or a party is a first cousin, but should recuse if they have a close family tie); *Illinois Advisory Opinion 2000-2* (whether a judge is disqualified when his spouse's cousin appears in a case depends on the nature of the case; whether the relative is a partner, shareholder, associate, or of counsel; and the size of the firm); *Indiana Advisory Opinion 3-1990* (a judge is not disqualified from cases involving her cousin, the cousin's children, or their spouses as long as there is no other disqualifying factor); *Kentucky Advisory Opinion JE-48* (1984) (a judge is not required to disqualify himself from a proceeding in which his first cousin is acting as a lawyer unless there are special circumstances, such as a near-sibling relationship, that would raise a reasonable question about his impartiality).

Further, some states have adopted broader rules in which disqualification is required for relatives within the fourth degree (Alabama, Nebraska, and Vermont) or sixth degree (Georgia). In New York, the fourth degree is the measure for some disqualifying circumstances, and the sixth for others.

## Economic interest

Imposing an additional disqualification obligation but for a smaller group of relatives, Rule 2.11(A)(3) disqualifies a judge when the judge knows that "the judge, the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding." "Economic interest" is defined as "ownership of more than a de minimis legal or equitable interest;" "de minimis" is

defined as "an insignificant interest that could not raise a reasonable question regarding the judge's impartiality." In other words, a judge is disqualified if the judge knows that the judge, the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household owns a significant legal or equitable interest in the subject matter in controversy or in a party to the proceeding that could raise a reasonable question regarding the judge's impartiality. To comply with Rule 2.11(A)(3), a judge is required to make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household, as well as keeping informed of the judge's own personal and fiduciary economic interests. Rule 2.11(B).

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A judge may be disqualified by a specific cousin's involvement if they have a very close relationship . . . .

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## Other definitions

"Domestic partner" is defined as "a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married." The term

was added to the model code in 2007, but the principle that any ethical obligation relating to a spouse also applies to a domestic partner was implied in the code previously.

In addition, a disqualifying family relationship begins no later than an engagement because an engagement reflects a "firm intention to become legally married in the near future." *Colorado Advisory Opinion 2012-7* (a judge whose daughter is engaged to a deputy district attorney has a family relationship with the deputy district attorney for purposes of disqualification). See also *Massachusetts Advisory Opinion 2002-17* (a judge whose fiancé is an assistant district attorney is disqualified from any case on which the fiancé works or had any supervisory responsibility and from all cases from her unit); *New York Advisory Opinion 1997-39* (a judge whose fiancée is an assistant district attorney is disqualified from criminal matters in which the fiancé appears or was involved); *West Virginia Advisory Opinion* (January 28, 2013) (a judge is disqualified from cases directly involving his daughter's fiancé, a lawyer); *West Virginia Advisory Opinion* (January 20, 1995) (a judge may not enter orders in cases involving a lawyer who is engaged to her child, even uncontested divorce cases).

Whether disqualification survives a divorce depends on factors such as the length of time since the marriage ended, the nature of the relationship, and any continuing

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obligations under a court order. *South Carolina Advisory Opinion 19-2008*. See also *Florida Advisory Opinion 2015-1* (a judge who receives no alimony or support from his former spouse is not required to disclose or disqualify from a case involving the former spouse's former law partner); *Georgia Advisory Opinion 188* (1993) (a judge is not automatically disqualified from cases in which his niece's ex-husband appears as counsel even if they have joint custody of their children); *Kansas Advisory Opinion JE-93* (1999) (a judge is disqualified from cases in which a member of her former spouse's law firm is involved); *New Hampshire Advisory Opinion 2002-3* (a judge may hear cases in which a party is represented by a law firm to which his ex-spouse/ex-law partner is of counsel, unless he is actually biased or prejudiced, but should disclose the relationship); *New York Advisory Opinion 2012-36* (as long as child support obligations continue between a judge and his ex-spouse, who is a local prosecutor, the judge is disqualified when his ex-spouse or an attorney subject to her supervision appears before him; after the financial obligations are discharged, the judge must disclose the relationship when his ex-spouse appears but not when prosecutors subject to her supervision appear); *New York Advisory Opinion 2007-99* (a judge should disclose the former relationship when her ex-spouse appears as a prosecutor and may preside only if the parties consent).

### Family exceptions

The code of judicial conduct creates exceptions to some rules for "members of the judge's family," defined as the judge's "spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship." Thus, although the conduct is otherwise prohibited, a judge may:

- solicit contributions to a charitable organization from family members (Rule 3.7(A)(4));
- serve as a fiduciary for family members (Rule 3.8(A));
- give legal advice to and draft or review documents for family members (Rule 3.10(A));
- hold and manage family members' investments (Rule 3.11(A)); and
- serve as an officer, director, manager, general partner, advisor, or employee of a business closely held by the judge or family members or primarily engaged in the investment of the financial resources of the judge or family members (Rule 3.11(B)).

Although the code's limits on accepting gifts apply only to a judge, a gift or other benefit "given to the judge's spouse, domestic partner, or member of the judge's family residing in the judge's household . . . may be viewed as an attempt to . . . influence the judge indirectly." Rule 3.13, Comment

4. To address that appearance, Rule 3.13(B)(8) allows a judge to incidentally benefit from, without reporting, "gifts, awards, or benefits associated with the business, profession, or other separate activity of a spouse, a domestic partner, or other family member of a judge residing in the judge's household . . ." A "member of a judge's family residing in the judge's household" is defined as "any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household." Comment 4 directs judges to "remind family and household members of the restrictions imposed upon judges, and urge them to take these restrictions into account when making decisions about accepting such gifts or benefits."

Under Rule 3.13(C)(2), a judge's spouse, domestic partner, or guest may, with the judge, attend without charge (1) a law-related event or (2) any permitted educational, religious, charitable, fraternal, or civic event "if nonjudges engaged in similar ways in the activity as the judge receive the same invitation."

In contrast to the code's exceptions for family members, comment 5 to Rule 4.1 states:

[T]here is no "family exception" to the prohibition . . . against a judge . . . publicly endorsing candidates for public office. A judge . . . must not become involved in, or publicly associated with, a family member's political activity or campaign for public office. To avoid public misunderstanding, judges . . . should take, and should urge members of their families to take, reasonable steps to avoid any implication that they endorse any family member's candidacy or other political activity.

The comment notes that family members "are free to engage in their own political activity, including running for public office," and a previous requirement that a judge encourage family members to adhere to the same standards of political conduct that apply to the judge was eliminated from the model code in 1990. However, a judge is required by Rule 4.1(B) to "take reasonable measures to ensure that other persons do not undertake, on behalf of the judge . . . any activities prohibited under paragraph (A)," and "other persons" would include family members. ★

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or conducting an indigency hearing. The judge had also allowed defendants to donate items to charities specified by the judge as a requirement of probation or a prerequisite to obtain appointed counsel, ordered cash-only bonds in violation of law, and required defendants to waive their constitutional rights to counsel and a jury trial to receive a continuance.

### Blue humor

Based on the findings of the Commission on Judicial Qualifications, the Kansas Supreme Court suspended a judge for 90 days without pay for (1) making offensive and demeaning comments to female attorneys and staff members; (2) sending an ex parte e-mail to an attorney's client that expressed bias or prejudice toward the attorney; and (3) trying to broker an employment opportunity for his wife. *In the Matter of Henderson*, 343 P.3d 518 (Kansas 2015). The Commission hearing panel had recommended censure; the judge had not filed exceptions. The opinion noted that a minority of the Court would have imposed a more severe sanction. Because the judge did "not seem to appreciate why his conduct was unacceptable," the Court also ordered him to complete a course in sexual harassment and prohibited him from accepting for two years any position in which he would supervise any judicial branch employee other than his chambers staff.

(1) The judge's harassment and gender bias were directed toward multiple female attorneys. For example, over a few years, the judge repeatedly joked about whether Amanda Marino, an assistant district attorney, was pregnant or would be pregnant after vacations. The judge testified these comments were not sexual but rather celebrated children; the hearing panel did not find his explanation credible.

After a vacation to Las Vegas, Marino had started to comment that she liked to play a slot machine called Sex in the City, but was cut short, resulting in a statement that she liked sex. The judge repeated the statement numerous times to Marino's embarrassment.

On another occasion, the judge encouraged Marino to ask his court reporter about her back pain, twice stating, "Go ahead, ask her where she's been all weekend." When Marino did not respond, the judge commented, "Yeah, her back hurts because she's been with her boyfriend all weekend."

In 2012, Marino complained to her supervisor and was re-assigned so that she no longer appeared before the

judge. She testified that she had not reported the incidents before because the judge was a judge and she felt he would retaliate. Other assistant district attorneys also explained they had not come forward initially because they were afraid the judge, who had made clear he was politically well connected, could jeopardize their careers. Their supervisor decided something needed to be done when she saw a pattern in the judge's behavior toward women. Ultimately, it was the district attorney's decision to file the complaint against the judge.

In an evidentiary deposition, Chief Judge James Fleetwood answered yes when asked if Judge Henderson used "off color or blue humor" of a sexual nature. In response, Judge Henderson testified:

The case I'm thinking that Judge Fleetwood is—I can't speculate—obviously for the purposes of this hearing didn't ask me if my memory was the same as his memory, is we have a gentleman in Topeka—excuse me, in Wichita named King David David. And King David David whenever he would have

sexual relationships with a woman he would collect her [sic] undergarments and put it [sic] in a Brandy sniffer on his fireplace mantle. I recall talking over lunch about what a crazy strange case I had in that regard. I'm assuming that's what he means. We'd talk about our cases. Sometimes cases are sexual and those things get talked about. Judge Fleetwood is a very devout Mormon Elder and I'm sure I've used vulgar language or a cuss word at times that probably offended him. I told him afterwards I do apologize if I did offend you.

The panel did not find the judge's explanation credible.

The Court concluded that the judge's sexual harassment had been "wide-ranging." It noted his "'off color or blue humor' was pervasive and ongoing," he "subjected multiple female attorneys and staff members to repeated inappropriate and offensive comments for literally years," and he often directed comments at the women "in front of other persons, thereby further broadcasting the denigration of the judiciary's integrity."

(2) The judge sent from his personal account an e-mail to two employees of the Department of Children and Families regarding Martin Bauer's employment in adult guardianship cases. The e-mail commented on Bauer's presumed hourly rate and stated, "For many years he [Martin Bauer] handled the life [sic] birth adoptions from Dr. Tiller. Rick Macias can tell you about his very liberal positions on the national adoption attorneys [a]ssociation. Judge Brooks

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The Court concluded that the judge's sexual harassment had been "wide-ranging."

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## Recent Cases (continued from page 11)

can tell you about the gay adoptions and custodianship's [sic] that he has attempted to establish. Your call of course, but I wanted to make you aware of the situation."

The e-mail was forwarded until it reached the assistant program director. One of the forwarding e-mails indicated the sender "would like to take Martin Pringle [Bauer's law firm] off of the list." Bauer and his law firm were removed from the DCF appointment list. Two of the employees testified that weight was placed on the judge's view or that Bauer was removed solely because of the judge's e-mail.

The hearing panel found that the e-mail exhibited a negative stereotype and/or a hostility or aversion toward Bauer and conveyed the appearance of bias and prejudice, that the judge had inappropriately mixed his personal views on socio-political issues with his role as a judge, and that he had engaged in an ex parte communication.

(3) In June 2012, Lanora Nolan was a member of the Wichita Board of Education and was working with the judge as the juvenile justice education liaison for the county department of corrections. The judge approached Nolan at the courthouse and asked her to investigate why his wife had not been offered a teaching contract, if appropriate records had been kept, and if there had been any foul play. Nolan discovered that the judge's wife had been offered a contract for a full-time position and communicated this

information to the judge. The judge contacted Nolan again and asked if there might be a half-time position available as his wife had decided to return to school.

Nolan felt that the judge was using his position to request her to compromise her position on the school board on behalf of his wife. Nolan testified that there was no overt pressure, but she was influenced by the fact that he was a judge. The panel found that the judge asked Nolan for a favor to gain an employment opportunity for his wife.

The Court emphasized that the judge "exhibited extremely poor judgment or blatantly misused the power of his judicial position" by making offensive and demeaning comments of a sexual nature to female attorneys and staff members, interfering "with an attorney's practice by sending an ex parte email communication to the attorney's client that expressed bias or prejudice toward the attorney, founded in part on the Respondent's apparent disagreement with the attorney's moral beliefs," and trying "to use the influence of his judicial position for personal gain by brokering an employment opportunity for his wife." The Court concluded "these offenses were not inadvertent 'technical' missteps. The nature of Respondent's misconduct struck at the very heart of the honor and dignity that the public expects and the legal profession demands from a judge." ★

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