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JUDICIAL CONDUCT REPORTER

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Ex Parte Communications

A core provision in the code of judicial conduct, the prohibition on ex parte communications, ensures that both sides get the same opportunities to present their case to the judge. Ex parte communications undermine a judge's impartiality and the integrity of the judicial process. The excluded party will feel that his or her opponent gained an unfair advantage regardless whether the judge was swayed. Even the most conscientious judge may be subtly and unknowingly influenced by even seemingly innocuous ex parte contacts, and the prohibition applies regardless how well-intentioned the judge may be. Further, in an ex parte communication, a judge may receive inaccurate or incomplete information that might easily be corrected if all parties had been present. *See Rose v. State*, 601 So. 2d 1181 (Florida 1992). So fundamental is the principle

that a judge's ex parte communications may lead to reversal of a judgment and the rules of professional conduct also bar an attorney from communicating ex parte with a judge.

Thus, the code of judicial conduct provides:

A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter.

That rule is contained in Canon 3B(7) of the 1990 American Bar Association *Model Code of Judicial Conduct* and Rule 2.9(A) of the 2007 model code.

Comments note that the proscription against communica-

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The Judicial Ethics Expert

by Marla N. Greenstein and Steven Scheckman

The use of experts in judicial disciplinary proceedings is rare and the use of a "judicial ethics expert" even rarer. Often submitted to aid the defense of a judge charged with misconduct, the judicial ethics expert is offered to instruct the disciplinary body on the law that it is charged to adjudicate and enforce.

Judicial conduct organizations often determine ethical issues of first impression in their states or, perhaps, nationally. That difficult and important job should not be delegated to an expert witness. No legal scholar or judge familiar with the customs of a judicial community possesses unique knowledge of ethical standards that is more reliable than the independent decision-making of the members of the judicial conduct organization. By relying on its members' own

expertise as representatives of the public and legal community, rather than the opinions of experts, a judicial conduct commission fulfills its official public responsibility to formulate the appropriate ethical standards for its state. Any questions that judicial conduct fact-finders may have concerning the standards to apply are best addressed through briefing by the counsel who are presenting and defending the charges against the judge.

Case law in this area is created when the hearing body — the disciplinary commission or hearing officer — excludes the proffered judicial ethics expert testimony. In 2002, the Ohio Supreme Court determined that a hearing panel was justified in excluding expert testimony regarding the

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Recent Advisory Opinions

 A judge may submit a letter to the legislature requesting continued funding for a parenting education program, operated through the Department of Health and Human Services, to which the judge frequently refers parents and that the judge uses to facilitate custody and visitation solutions and avoid abuse and neglect proceedings. *Nevada Opinion JE11-003.*

 A judicial association may charge a vendor a fee that represents the costs of making space available to display services and products at a conference or that is accounted as a contribution to the association, not used to offset the costs of the conference. The judge who is the treasurer of the organization may receive the fee and deposit the funds in the organization's bank account. The association cannot directly solicit a vendor to participate in the conference to raise funds for the organization. *Michigan Opinion JI-136 (2010).*

 A judge may maintain an internet blog and comment on current events. *New York Opinion 10-138.*

 A justice court may maintain a web-site on a municipality's web-site but should ensure that court information is not misrepresented. A judge should not maintain a personal judicial web-site. *New York Opinion 10-172.*

 A judge may participate in a panel discussion about the findings and proposed justice court reforms detailed in a study by a university-based research center. *New York Opinion 10-171.*

 A judge may be on a panel with a prosecutor at a neighborhood watch meeting to provide information about their respective roles in "law enforcement" but should avoid topics such as how to provide better security in the neighborhood. *South Carolina Opinion 2-2011.*

 A judge may attend a holiday celebration hosted by the prosecutor's office where he worked just prior to assuming the bench. *New York Opinion 10-195.*

 A judge may perform a marriage ceremony for an attorney or party who has matters pending before the judge except in rare circumstances in which performing the marriage ceremony may undermine public confidence, for example, in a high profile case or if the marriage is likely to affect the outcome of a case. *Utah Informal Opinion 11-1.*

 A judge may contribute a recipe to a cookbook that will raise funds for a counseling center and be identified as a donor as long as his recipe will not be singled out or used individually to solicit contributions. *New York Opinion 10-141.*

 A judge may not distribute flyers at a grocery store asking customers to donate food or collect donations of food or cash, but may assist a charitable organization by packing food donations, loading them into a truck, delivering food baskets to needy families using his personal vehicle bearing judicial license plates, and serving food at a lunch for needy families even though the local media will cover the event and publish pictures of the participants. *New York Opinion 10-157.*

 A judge may compile humorous letters and/or pleadings into a publication that could be sold to benefit a charity if the judge will not use staff, will work outside of court hours, will redact all identifying information, and will exercise caution so that it does not appear that she is trivializing or in any way disparaging the persons who authored the letters or pleadings, and if the charitable organization will not raise questions about the judge's impartiality. *Washington Opinion 11-1.*

 A judge is not required to disqualify from a case in which a former judge with whom he served appears as an attorney. *Nebraska Opinion 11-1.*

 A judge may preside in cases in which one of the parties is represented by an attorney with whom the judge had a romantic relationship 15 years earlier that lasted less than a year during which they shared a residence part of the time unless the judge has a personal bias or prejudice. *Nevada Opinion JE11-1.*

 A judge who has known the attorney general for more than 20 years, who speaks with him on the telephone periodically, and who socialized with him at each other's home (most recently approximately 1 ½ to 2 years ago) is not disqualified when a member of the attorney general's office appears but should disclose the relationship. *Connecticut Informal Opinion 2011-6.*

 A judge must resign before running for fire district commissioner. *New York Opinion 10-207.*

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

Performing marriage

Based on a stipulation of facts and waiver of hearing, the Maryland Commission on Judicial Disabilities released its private reprimand of a judge who performed the marriage between a victim and defendant in a domestic violence case. The judge agreed to retire on or before December 18, 2011, and not to sit after his retirement. *In the Matter of Russell*, Private Reprimand (Maryland Commission on Judicial Disabilities January 10, 2011) (www.mdcourts.gov/cjd/publications.html).

Frederick Wood was charged with second degree assault against a woman with whom he lived and had two children. When the case was called, Wood's attorney asked the judge for a postponement so Wood could marry the victim; the plan was for the victim to invoke the marital privilege after they were married. The judge stated, "Well, . . . why don't I just marry them today in court . . . ?" The judge allowed the parties to leave and obtain a marriage license and proposed that they come back in the afternoon when he would marry them. At 1:52 p.m., the case was recalled, and the judge stated on the record, "I can take notice of that since I just . . . performed the ceremony back in my chambers." The victim then took the witness stand and invoked the marital privilege. The judge found Wood not guilty and commented to him, "I can't sentence you as a defendant in any crimes you're found guilty of. I earlier today sentenced you to life — marriage to her."

Failing to following the law

Based on a stipulation, the Washington State Commission on Judicial Conduct admonished a judge for failing to hold mitigation hearings when requested and reducing fines based solely on review of the citation and the person's driving record. *In the Matter of Hille*, Stipulation, Agreement,

and Order (Washington State Commission on Judicial Conduct December 3, 2010) (www.cjc.state.wa.us/Case%20Material/2010/6392%20Hille%20Stip.pdf).

Under Washington law, a person cited for a civil infraction is entitled to explain mitigating circumstances that might justify a reduction in the monetary penalty at a hearing or through a sworn written statement. Between February 2009 and April 2010, whenever someone requested a mitigation hearing, the judge's court automatically reduced the penalty without a hearing or sworn statement.

There was no evidence the practice was implemented in bad faith or for improper purposes; according to the judge, it was designed to promote judicial economy, save individuals the cost of traveling to court, and simplify court procedures. The Commission found that the practice was contrary to clear and established law and denied individuals their right to be heard according to the law. The Commission

added that, although the practice may have benefitted some people and the court, judges may not disregard the law for the sake of expediency.

Recent Decisions

Handling traffic cases

Accepting an agreement, the Indiana Supreme Court suspended a judge for 30 days without pay for his practices in traffic infraction cases and exhibiting impatience and frustration with a defendant and her attorney. *In the Matter of Young*, 943 N.E.2d 1276 (Indiana 2011).

Throughout 2009, the judge imposed penalties on traffic infraction litigants who exercised their right to trial and lost that were substantially higher than those imposed on litigants who pleaded guilty and waived their right to trial. In one instance, when a traffic infraction defendant was trying to decide whether to admit or deny her infraction, the judge stated, "I'm a great listener but sometimes I'm very expensive." The judge admitted he engaged in this practice because he believed the litigants should not have pursued trials and wanted to discourage others from exercising their constitutional right to trial.

The judge also routinely failed to consider the specific circumstances of cases when he assessed penalties, instead, giving the majority of traffic infraction defendants who lost at trial fines of \$300 or more plus court costs, regardless of their particular situations. When he gave general advisements before each traffic court session, the judge would explain that the state's burden of proof, which was a preponderance of the evidence, was "very slim," or that he "just sort of had to believe" the defendant committed the infraction. On several occasions, when defendants were indecisive about whether to contest their infractions, he verbally speculated about what the state's evidence likely would be. 

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Ex Parte Communications *(continued from page 1)*

tions concerning a proceeding includes not just communications with those directly involved in the case, but also “communications with lawyers, law teachers, and other persons who are not participants in the proceeding.” *See also New York Advisory Opinion 96-95* (a judge should not consider a letter from a bar association concerning a pending proceeding and should send the letter to the defendant’s lawyer and the district attorney); *Virginia Advisory Opinion 00-7* (a judge may not respond to a letter or inquiry from a legislator on behalf of a constituent concerning a pending or impending case except to inform the legislator that the judge may not permit or consider an ex parte communication).

Initiating ex parte communications

The perils of ex parte communications are illustrated by *In the Matter of Kaufman*, 416 S.E.2d 480 (West Virginia 1992). The judge was presiding over an inter-pleader action involving disbursement of an insurance payment to an infant who had been injured in an accident involving a vehicle. After a medical center that had treated the infant objected to a motion to award the infant the entire amount, the judge placed an ex parte call to the president of the medical center. During the call, the hospital’s president stated that he did not know anything about the case, and the judge explained the background, the nature of the issues, and the current posture, but did not address any substantive issues.

According to the judge, he made the call to ensure that the president would be present at the next hearing because the medical center’s attorney had no experience in handling inter-pleader actions. The president testified, however, that his interpretation of the call was that “the judge was unhappy with our action in this case, and it was intended to cause me to review the case, and withdraw our action in the case as it related to the attempts to collect the bill.”

In the judicial disciplinary proceeding, the judge argued that it is a common practice for judges to telephone parties to proceedings in their courtrooms, primarily to speed things along. Rejecting that argument, the West Virginia Supreme Court of Appeals warned:

Regardless of how well-intentioned the judges may be, these “routine” types of ex parte communications can expose the court system in general, and the individual judge in particular, to precisely the types of charges which Canon 3 is designed to prevent. Judges must refrain from taking actions which increase the potential for harm to both their own reputations and careers and the court system in general.

... By their very one-sided nature, ex parte communications raise questions about motivations and impartiality which can never be resolved to everyone’s satisfaction.

Certainly, that is in evidence in this case, where each side has accused the other of harboring ulterior motives. Although judicial economy is a worthwhile goal, the cost is too great when the integrity of the judicial process is called into question. Quite simply, the end does not justify the means.

The court also rejected the judge’s argument that the party to whom a communication was made had no right to complain about its ex parte nature.

Ex parte communications are most likely to raise questions about a judge’s impartiality when the judge initiates the communication. Judges have been disciplined, for example, for ex parte requests for advice on how to handle a case. *See In re Anderson*, 814 P.2d 773 (Arizona 1991) (using a telephone next to the bench, a judge repeatedly asked for assistance with the resolution of matters in ex parte calls to people he referred to as “friends of the court,” which included, among others, arresting officers in criminal cases); *Public Admonishment of Caskey* (California Commission on Judicial Performance July 6, 1998) (cjp.ca.gov/pubdisc.htm) (in an ex parte e-mail message to an attorney in a juvenile dependency matter, a judge asked, “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 DCA reverses?”); *In the Matter of More*, Determination (New York State Commission on Judicial Conduct March 13, 1995) (www.scjc.state.ny.us) (after oral argument on a motion to dismiss, a judge called the assistant district attorney and defense counsel separately to ask how he should rule); *In the Matter of Valentino*, Determination (New York State Commission on Judicial Conduct February 3, 2003) (www.scjc.state.ny.us/) (in an ex parte conversation, a judge asked a prosecutor not assigned to a case for his opinion on the lawfulness of the arrest).

Further, judges have been disciplined for ex parte coaching of attorneys and witnesses. For example, a judge called an assistant prosecuting attorney who was trying a case before the judge in which a defendant was accused of sexually assaulting several female university students. The judge advised the attorney to have some supporters (for example, the victims, a police officer, and female attorneys) present during closing argument, to use the term “serial rapist” frequently, and to be more emotional before the jury. *In the Matter of Starcher*, 457 S.E.2d 147 (West Virginia 1995).

In *Public Admonishment of Maciel* (California Commission on Judicial Performance December 1, 1997) (<http://cjp.ca.gov/>), a judge had three ex parte contacts with

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The 22nd National College on Judicial Conduct and Ethics

October 26-28, 2011 • Wyndham Chicago

The 22nd National College on Judicial Conduct and Ethics will provide a forum for judicial conduct commission members and staff, judges, judicial ethics advisory committees, and attorneys to learn about and discuss professional standards for judges and current issues in judicial discipline. The College will begin Wednesday October 26 with registration and a reception. Thursday morning there will be a

plenary session, followed by concurrent break-out sessions through Friday noon. The topics for discussion are described below. The Center will apply for certification for continuing legal education credit for the College.

The registration fee is \$325 through August 25; \$350 beginning August 26. College registration is also available on-line at www.ajs.org/ethics/College.asp.

Hotel Information

National College room rates at the Wyndham Chicago (+15.4% tax): Single rate \$219, Double rate \$229, Triple rate \$249, Quad rate \$269. When making reservations, you must use the **group code “National College”** to obtain the negotiated rate. Reservation cut-off is **September 23, 2011** or when the College block is filled. If available, rooms may be booked at College rates for October 23–30, 2011. Rates

includes a breakfast buffet in the hotel’s Caliterra Restaurant. Hotel reservations may be made by calling (800) 996-3426 or by clicking on the hotel reservation link at www.ajs.org/ethics/College.asp. You must register for the College and the hotel separately. The Wyndham Chicago is at 633 N. St. Clair, Erie at St. Clair, Chicago.

Plenary Session

A Conversation about Judicial Disqualification: Reasonable People Discuss Impartiality

Several recent high profile state and federal cases have attracted national attention to the challenge of assuring the public that judicial decisions are being made by impartial judges, with increasing interest in how a disqualification determination will be made and who will be making it. With help from the audience, the panelists for this session will consider a wide range of issues, such as, whether judges should explain their disqualification decisions, whether motions to disqualify should be transferred to another judge, when campaign contributions should result in dis-

qualification, whether there is a duty to sit, and, for purposes of the appearance of impartiality standard, who is a reasonable person and what does he or she know. **Facilitators:** *Richard E. Flamm*, Law Offices of Richard E. Flamm, Berkeley, California; Author, *Judicial Disqualification: Recusal and Disqualification of Judges* • *Peter D. Webster*, President-Elect, American Judicature Society; soon-to-be former trial and appellate judge and partner Carlton Fields, Tallahassee • *Cynthia Gray*, Director, American Judicature Society Center for Judicial Ethics

Break-out Sessions

Appearance of Impropriety

This session will review the use and possible misuse of the appearance of impropriety standard in judicial ethics advisory opinions and judicial discipline decisions and debate whether the rule is unfairly vague or necessary and appropriate. **Facilitators:** *Raymond J. McKoski*, Retired Judge, 19th Judicial Circuit Court; Member, Illinois Judicial Ethics Committee • *Robert H. Tembeckjian*, Administrator and Counsel, New York State Commission on Judicial Conduct.

Big Money and Judicial Elections

The U.S. Supreme Court’s 2010 decision in *Citizens United v. Federal Election Commission*, which lifted limits on corporate and third-party campaign spending, is already having an effect in judicial elections, particularly retention elections. This session will discuss the threat to judicial independence posed by campaign attacks funded by third-party

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COLLEGE REGISTRATION FORM

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Wyndham Chicago

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Registration Fee: \$325 a person prior to August 26; \$350 beginning August 26 \$ _____

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interests and consider the interplay between *Citizens United*, the decision on disqualification in *Caperton v. A.T. Massey Coal Co.*, and the challenges to restrictions on judicial candidates following *Republican Party of Minnesota v. White*. Participants will share and develop tools judicial candidates, campaign oversight committees, and others can use to ethically and effectively respond to third-party efforts to unseat judges. **Facilitators:** *Marla N. Greenstein*, Executive Director, Alaska Commission on Judicial Conduct • *Robert P. Cummins*, The Cummins Law Firm P.C.; Chair, Illinois Supreme/Appellate Court Election Campaign Tone and Conduct Committee.

Determining the Appropriate Sanction

Examining recent judicial discipline cases, this session will review the criteria for imposing sanctions and discuss issues such as the relevance of a judge's failure to express remorse and when removal is appropriate. Participants will "vote" on what sanctions they would have imposed in actual judicial discipline cases. **Facilitators:** *Steven Scheckman*, Schiff, Scheckman & White LLP; General Counsel, Ethics Review Board of the City of New Orleans • *Judge James R. Wolf*, First District Court of Appeal; Member, Florida Judicial Qualifications Commission.

Judges' Personal Relationships: On-Line and Face-to-Face

There have always been friendships between judges and lawyers, but the redefinition of "friend" as a verb in social media has brought new attention to the ethical implications of those relationships. This program will address at what point a personal relationship with an attorney requires a judge to disqualify and will cover the advice ethics committees have given judges to ensure that their use of new technologies does not conflict with traditional principles of judicial impartiality. **Facilitators:** *Ruth Bope Dangel*, Senior Staff Counsel, Ohio Board of Commissioners on Grievances and Discipline • *Judge M. Sue Kurita*, Judge, County Court at Law #6; Member, Texas State Commission on Judicial Conduct.

Judicial Ethics in Problem-Solving Courts

Hundreds of special courts have been established to try a different approach to problems such as drug addiction, domestic violence, and mental illness. This session will consider the ethical issues raised for judges who preside in these courts where their role differs significantly from the judge's role in traditional courts. Among the topics to be considered: ex parte communications, demeanor, fund-raising, and relationships with service providers. **Facilitators:** *Judge Don Ash*, Judge, 16th Judicial District; Presiding Judge, Tennessee Court of the Judiciary • *Judge Royal I. Hansen*, Associate Presiding Judge, 3rd District Court; Member, Utah Judicial Conduct Commission.

Investigating "Judge Judy:" A Judicial Discipline Case Study

In 2010, based on a recommendation by the State Commission on Judicial Conduct, the Washington Supreme Court suspended Judge Judith Eiler for five days without pay for deriding and rudely and impatiently interrupting prose litigants who appeared before her. This session will describe how the case got there — from the initial complaints against the judge in 2004, through an agreed disposition in 2005, to renewed complaints about her conduct beginning in 2006, followed by the Commission's investigation, hearing, and findings, and then the Court's review. Procedural variations among the state commissions will be identified. **Facilitators:** *Kurt Twitty*, Senior Investigative Counsel, Washington State Commission on Judicial Conduct • *Victoria B. Henley*, Director-Chief Counsel, California Commission on Judicial Performance.

The Line Between Legal Error and Judicial Misconduct

Although mere legal error or abuse of discretion by a judge does not violate the code of judicial conduct, "something more" can transform legal error into judicial misconduct and subject a judge to discipline for a decision that may be subject to appeal. This session will review cases in which a finding of misconduct was based on legal error and cases in which legal error was not sanctioned to draw the line and describe the exceptions. **Facilitators:** *Randall D. Roybal*, Executive Director, New Mexico Judicial Standards Commission • *Cynthia Gray*, Director, American Judicature Society Center for Judicial Ethics.

The Role of Public Members

Participants will share their experiences as public members of judicial conduct commissions and discuss what impact their perspective has on deliberations, training, and the perception of the commissions by the public and judges. **Facilitators:** *Rosemary J. Corley*, Member, Massachusetts Commission on Judicial Conduct; *Dr. Daryl Yost*, Member, Indiana Commission on Judicial Qualifications.

Introduction to the Canons for New Members of Judicial Conduct Commissions

This session will give new members of judicial conduct commissions an overview of the ethical standards they will be enforcing and focus on those provisions that result in the most judicial discipline cases. **Facilitators:** *James C. Alexander*, Executive Director, Wisconsin Judicial Commission • *Judge Randall L. Cole*, Presiding Circuit Judge for the 9th Judicial Circuit; Member, Alabama Judicial Inquiry Commission.

Ex Parte Communications *(continued from page 4)*

a defense attorney in a capital murder case. In a telephone call, the judge advised the attorney that he had assigned the case to another judge, discussed with the attorney the option of filing a peremptory challenge against the second judge, and suggested that she request investigator funds and a polygraph test. After realizing he had given her incorrect information about the statutory period for filing a peremptory challenge, the judge attempted to reach the attorney by telephone, left the court's telephone number on her pager, and instructed a clerk to tell her the correct deadline. Two days later, the judge initiated another conversation with the attorney in which he discussed a hearing in the case, asked if she had applied for investigator expenses, and made suggestions related to defense strategies.

In *In re Cummings*, 211 P.2d 1136 (Alaska 2009), a judge passed a note to a state trooper who was a witness in a trial and had a subsequent communication with the trooper about the note. The judge was presiding over the criminal jury trial of a man charged with violating the terms of an ex parte domestic violence protective order issued to his wife. Although the order explicitly indicated that the defendant was not allowed visitation with his four children, a state trooper called as a witness by the prosecution testified on cross-examination that the order did not prohibit contact between the defendant and his children. During a recess, the judge called a different trooper to the bench, handed him a note, and stated: "Just in case you want to go fishing." The note stated: "Look at page 4 DVRO just above paragraph (d). About custody of children — [] cannot be protected no visitation." During a break later that day, the judge asked the second trooper if he had any questions about the note. The judge did not give a copy of the note to defense counsel that day although the prosecutor informed the defense about the note, apparently after the trial day ended.

Judges have also been disciplined for giving ex parte warnings to litigants or attorneys. For example, after signing a warrant, a judge informed a company's attorney of the impending search of the company's premises for evidence of environmental violations. In *The Matter of Gibbons*, 778 N.E.2d 104 (New York 2002). A second judge warned a defendant that a bail bondsman might be on the way to try to take him into custody after the bondsman obtained a certified copy of the bond in the judge's court. In *The Matter of Aldaz-Mills*, Formal Reprimand (New Mexico Supreme Court May 21, 2009).

Influencing

Ex parte contacts with victims or law enforcement officials to attempt to influence their action in a criminal case

are also prohibited. For example, in *In the Matter of Cerbone*, Determination (New York State Commission on Judicial Conduct March 21, 1996) (www.scjc.state.ny.us), a judge made an improper, ex parte telephone call to the victim in an assault case. After arraigning the defendant, whose parents he had represented seven to eight years earlier, the judge released the defendant on his own recognizance and issued an order of protection in favor of the complainant.

The next day, the judge called the complainant; there were no other parties to the conversation, and neither the prosecution nor the defense was given notice. The judge told the complainant that she could choose to continue the case in his court or have it transferred to family court. The judge also said that the defendant appeared to be a "decent guy" who had "made a mistake" but did not pose a threat to the complainant, adding that he felt the defendant was "sincere about not causing any more trouble." The judge also asked the complainant whether she intended to permit the defendant to visit their two-year-old son and suggested that he might modify the order of protection to permit visitation. The complainant testified that, as a result of the conversation, she felt that she had no one behind her and that she may have been making a mistake by going through with the charges. Several months later, the complainant appeared before the judge and asked that the charge be dropped. However, the assistant district attorney objected; without conducting a trial, the judge dismissed the charge. *See also In the Matter of McCormick*, Determination (New York State Commission on Judicial Conduct June 9, 1993) (www.scjc.state.ny.us) (a judge concluded, based on an ex parte conversation, that the defendant's purported diabetic condition was a justification for the criminal conduct and initiated an ex parte contact with the complaining witness that conveyed the impression that the judge wanted him to withdraw his complaint).

In *Commission on Judicial Performance v. Sanford*, 941 So.2d 209 (Mississippi 2006), a judge pressured the sheriff to get DUI charges dismissed. A few days after a DUI arrest, the sheriff advised the arresting officer that the judge wanted the charges against the defendant dismissed. The sheriff approached the officer later to tell him that the judge wanted him to be late for court the next day so that the charges against the defendant could be dismissed. The officer stayed at the sheriff's department on the court date until the judge dismissed the case, although the officer subsequently attended court that day on additional cases pending before the judge in which he was the arresting officer. *See also In the Matter of Reese*, 495 S.E.2d 548 (West Virginia 1997) (a

judge contacted a police officer about reducing a charge of second offense DUI against an acquaintance).

Changing a decision

In a common scenario, a judge is contacted ex parte by a litigant after entering an order, and the judge commits misconduct if the judge vacates or otherwise changes the order based on that communication. For example, in *Commission on Judicial Performance v. McPhail*, 874 So. 2d 441 (Mississippi 2004), in one case, a judge entered a judgment for a plaintiff based on an ex parte communication after initially dismissing it and, in a second case, set aside a judgment following an ex parte communication with the defendant's attorney.

Initially, the judge had dismissed *Check 4 Cash v. Rodgers* when neither party appeared for trial. Several weeks later, after an ex parte contact with a representative of the plaintiff, the judge notified the clerk that a judgment for the plaintiff was being entered for \$206. The judgment was prepared and signed without notice to the defendant or a hearing.

Ten months after presiding over the trial in a second civil case, the judge signed a judgment against the defendant for \$800. The defendant filed a motion to correct judgment or in the alternative to reconsider. The judge set aside the original judgment several days later following an ex parte communication with the defendant's attorney. No notice of hearing was given to the plaintiff. Neither the motion nor the order stated what was incorrect or improper about the original judgment.

In *In re Hurtado*, Stipulation, Agreement and Order of Admonishment (Washington State Commission on Judicial Conduct October 4, 2002) (www.cjc.state.wa.us), a judge vacated an order in a vehicle impound case following an ex parte communication with the prosecution. After hearing a challenge to a vehicle impound, the judge had ruled that the city failed to produce evidence that the ticket was properly issued and signed an order finding that the vehicle was improperly impounded.

Later that afternoon, the city prosecutor requested that the judge hear from the towing company witness in the case. The judge heard the witness without the presence of the petitioner, who had already left the courthouse. After hearing the towing company witness, the judge vacated

the order entered earlier that day.

In *Commission on Judicial Performance v. Sutton*, 985 So. 2d 322 (Mississippi 2008), a judge engaged in several ex parte communications in a landlord tenant case. Initially, the judge had entered a judgment in favor of the landlord for past-due rents and removal of the tenant from the apartment complex and signed a warrant of removal to evict the tenant by 5:00 p.m. on that date.

Several days later, the judge contacted the landlord, and reported that he had spoken with the evicted tenant and had decided to stay the warrant of removal. The next day, the landlord received a fax from the court demanding that he return the key to the court or face arrest for contempt. The tenant remained in possession of the apartment after the judge stayed the warrant of removal. After the tenant failed to pay rent for the next two months, the landlord instituted another suit to remove him from the apartment. *See also In the Matter of LaBombard*, 898 N.E.2d 14 (New York 2008) (a judge arraigned a former co-worker's son and changed a bail decision after an ex parte call from the defendant's mother); *In the Matter of Beckham*, 620 S.E.2d 69 (South Carolina 2005) (after finding a defendant guilty, a judge reopened a case based on an ex parte communication with the defendant's attorney); *In re Lewis*, Order (Utah Supreme Court August 31, 2007) (<http://jcc.utah.gov/discipline/documents/LewisLeslie-2007Censure.pdf>) (a judge changed a defendant's sentence after an ex parte communication with the defendant's attorney expressing concerns for how he had been treated in the judge's courtroom). 

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

judge's contempt power. *Office of Disciplinary Counsel v. Karto*, 760 N.E.2d 412 (Ohio 2002). Noting the panel members consisted of an attorney, a judge, and a layperson who had served on the Board for several years, the Court stated, "these individuals were qualified to decide the issues of whether the judge had abused his contempt power and whether his actions constituted judicial misconduct," and no expert testimony was necessary.

The Ohio Supreme Court recently revisited the issue in *Office of Disciplinary Counsel v. Gaul*, 936 N.E.2d 28 (Ohio 2010). The hearing panel had excluded the testimony of an ethics expert on whether the judge had violated the code of judicial conduct. The Court held, "it was not an abuse of discretion to exclude the expert testimony because the panel was capable of interpreting and applying the Code of Judicial Conduct without an expert's opinion." (The Court accepted findings that the judge violated the code by stating a defendant had engaged in obstruction of justice when a witness could not be found and misusing the Amber Alert system to attract media attention.)

Unnecessary and irrelevant

Courts in other states have come to similar conclusions. In *In the Matter of Mosley*, 102 P.3d 555 (Nevada 2004), for example, the judge asserted on review that the Commission on Judicial Discipline violated due process by excluding the testimony of his expert, a law professor who had watched the discipline hearing from the beginning. The expert was to act "as a summary witness," giving his opinion as to whether the judge had committed an ethics violation. Relying on the Nevada rules of evidence (an expert may testify "if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue"), the Nevada Supreme Court held that the Commission did not abuse its discretion in excluding the judge's ethics expert witness. Noting that "both sides had elicited opinions on ethics throughout the hearing from most witnesses," the Court opined that it was possible that the testimony would have been merely cumulative. (The Court affirmed findings that the judge violated the code of judicial conduct by writing two letters on official letterhead to his son's school, engaging in ex parte conversations with an attorney representing a criminal defendant, and failing to recuse himself from a criminal case until after the defendant's wife had testified in the judge's custody case.)

In a subsequent judicial discipline matter, *In re Assad*, 185 P.3d 1044 (Nevada 2008), the Nevada Supreme Court made a similar statement concerning the Commission's decision to exclude the same expert's testimony. At the Assad hearing,

the expert was prepared to testify about credibility determinations and how the Commission should evaluate or weigh the evidence. Noting those are tasks "reserved to the Commission," the Court found that expert testimony on those issues would not have been helpful. The Court noted, however, that judicial ethics expert testimony should not be routinely rejected but should be evaluated as to the substance of the testimony applied to the facts of the case. (The Court affirmed findings that the judge violated the code of judicial conduct by threatening to detain a woman until her boyfriend arrived and using language that his marshal reasonably believed instructed him to detain her.)

While not specifically addressing the issue as an appellate point, the Vermont Supreme Court noted that a disciplinary body composed of judges, lawyers, and lay people experienced in judicial ethics "does not require expert evidence to support its findings and conclusions." *In re Boardman*, 979 A.2d 1010 (Vermont 2009). Similarly, the Connecticut Supreme Court stated that questions about public confidence in the judiciary "may be answered as competently by those without formal legal training as by those with such training." *In re Flanagan*, 690 A.2d 865 (Connecticut 1997). In that case, the Court rejected the judge's argument that, because a majority of the members of the Judicial Review Council were neither judges nor lawyers, expert testimony was necessary to support the Council's finding that the judge violated the code by engaging in a consensual sexual relationship with a married court reporter regularly assigned to his courtroom. The Council had found the expert opinion evidence offered by the judge was not persuasive.

On review, the Court stated that expert testimony, although possibly admissible, was not necessary to a determination whether certain conduct has the effect of reducing public confidence in the integrity of the judiciary. In fact, the Court emphasized "to create a rule of law requiring expert testimony in judicial discipline cases focusing on the public's perception of the judiciary would contravene the legislature's desire to have an equal 'lay' voice" on the Council, which has six public members, three judges members, and three attorney members.

Similarly, expert witnesses on whether an attorney committed an ethical violation are not generally allowed in bar disciplinary proceedings. *See, e.g., In re Masters*, 438 N.E.2d 187 (Illinois 1982); *In re Crossen*, 880 N.E.2d 352 (Massachusetts 2008); *In re Potts*, 158 P.3d 418 (Montana 2007); *In re McKechnie*, 657 N.W.2d 287 (North Dakota 2003); *In re Leonard*, 784 P.2d 95 (Oregon 1989).

Further, expert testimony that a respondent-judge's con-

duct is no different from that of other judges in a community is irrelevant and should be excluded. In *Sardino v. State Commission on Judicial Conduct*, 448 N.E.2d 83 (1983), the New York Court of Appeals explained that “each Judge is personally obligated to act in accordance with the law and the standards of judicial conduct. If a Judge disregards or fails to meet these obligations the fact that others may be similarly derelict can provide no defense.” Therefore, the Court held that the State Commission on Judicial Conduct properly refused to allow a judge to present evidence that his practices regarding informing defendants of the right to counsel were consistent with the general practice of other judges. *Accord In re Duckman*, 699 N.E.2d 872 (New York 1998) (re-affirming the holding that evidence many other judges engaged in similar misconduct is irrelevant in judicial discipline proceedings).

To clarify the role of judicial experts in proceedings before it, the Judiciary Commission of Louisiana adopted Rule VIII(C)(3):

Testimony by judges other than the respondent judge that the respondent did or did not violate the Code of Judicial Conduct or the Louisiana Constitution or that the Code should be interpreted in any particular manner will not be admitted into evidence, the Commission itself being vested with the sole authority to make such a determination as part of its recommendation to the Louisiana Supreme Court. If subpoenaed to testify, a judge other than the respondent may be called as a witness to testify to relevant facts about the underlying basis for the complaint that gave rise to formal charges or to otherwise give relevant factual testimony to try to provide to the Commission a contextual perspective about the respondent’s conduct. The Commission does not deem such testimony by a judge to be “expert testimony.”

In a comment, the Commission expressed its view that expert testimony is “rarely relevant or necessary,” noting “one example of when expert testimony might be relevant and admitted in a Commission proceedings would be with regard to a physical or mental alleged disability of a respondent judge, when such judge’s health is at issue before the Commission.” See, e.g., *In re Alford*, 977 So. 2d 811 (Louisiana 2008) (on behalf of the Commission, a psycho-pharmacologist testified as an expert about a judge’s drug use

based upon his review of the judge’s medical and pharmaceutical records).

In short, a commission’s reasoned conclusion based upon evidentiary rules to exclude a judicial ethics expert’s testimony will not be found to be an abuse of discretion. In fact, because the expertise to apply the code of judicial conduct to given facts in a case lies with the disciplinary body itself, it may be an improper delegation of decision-making authority to defer to an outside expert’s opinion. 🗑️

This article up-dates “The Judicial Ethics Expert Witness” by the authors, published in the winter 2001 Judicial Conduct Reporter. Marla Greenstein is Executive Director of the Alaska Commission on Judicial Conduct. Steven Scheckman is a partner in Schiff, Scheckman & White LLP and also serves as the General Counsel to the Ethics Review Board of New Orleans. He previously served as the Deputy Administrator of the New York State Commission on Judicial Conduct and the Special Counsel to the Judiciary Commission of Louisiana.

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