

JUDICIAL CONDUCT REPORTER

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Independent investigations by Cynthia Gray

As a corollary to the prohibition on ex parte communications, the code of judicial conduct prohibits judges from “investigat[ing] facts in a matter independently” and requires that they “consider only the evidence presented and any facts that may properly be judicially noticed.” The rule was in commentary to Canon 3B(7) of the 1990 American Bar Association *Model Code of Judicial Conduct* and was moved to the text, in Rule 2.9(C), in the 2007 model code. Also in 2007, a new comment 6 was added clarifying that “the prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.” (The Montana and North Dakota codes of judicial conduct, however, state that the prohibition on independent investigations “does not apply to a judge’s effort to obtain general information about a specialized area of knowledge that does not include the application of such information in a specific case.”)

Taking judicial notice is different than conducting an independent investigation because a judge discloses on the record when he or she is taking judicial notice of a fact, and the parties may contest the propriety of taking judicial notice and the nature of the fact to be noticed. In addition, in an “independent” investigation, by definition, a judge will feel free to inquire into any fact using any source, while a judge can only take judicial notice of a fact “that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Rule 201, *Federal Rules of Evidence*.

Like the rule prohibiting ex parte communications, the rule prohibiting independent investigations ensures that cases are tried in the courtroom and judicial decisions

continued on page 5

Explaining the role of judicial conduct commissions

Most complaints against judges are dismissed every year. To educate the public about why the dismissal rate is so high and to provide guidance for potential complainants, many judicial conduct commission web-sites describe what the commissions can do and the limits to their authority. As the **Washington State** Commission on Judicial Conduct notes on its site, “we often find that people expect more from us than we can legally do.”

Most web-sites emphasize that the commission’s role is not that of an appellate court and that the commission cannot change a judge’s decision. The **Alaska** Commission on Judicial Conduct states on its web-site:

The most common complaints that the Commission has no authority to address are questions of law. Frequently,

complaints allege dissatisfaction with decisions that judges make in their judicial capacity. For example, individuals often complain of wrong child custody awards or sentences that judges impose in criminal cases. The Commission cannot enter into cases or reverse judicial decisions. That role belongs to the appellate courts.

The **Texas** site (which includes information in Spanish) explains:

The State Commission on Judicial Conduct cannot exercise appellate review of a case or change the decision or ruling of any court. For example, if the Commission finds a judge’s actions to be misconduct, the Commission can issue

continued on page 8

- A judge may not participate in a program that uses a mock court to prepare children to testify in child abuse cases. *Oklahoma Opinion 2012-1*.

- Absent authorization by ordinance, a municipal judge may not require, as a condition of a deferred sentence, that an offender make a donation to a community crime stopper program. *New Mexico Opinion 12-4*.

- A judge should not meet alone with the state police to discuss overtime expenses incurred when troopers appear in his court but may meet with representatives of both law enforcement and the criminal defense bar and, when making administrative changes, may consider the needs of law enforcement, the needs of defendants, their attorneys, and witnesses, and the court's limited resources. *New York Opinion 11-144*.

- Video monitors in court lobbies may show programming, provided by a private company, that includes advertisements if there is a prominent disclaimer that the court does not endorse the products and services advertised and if the ads are screened to ensure there is no sexual advertising, no ads for firearms, alcohol, lawyers, bail bond companies, apartment complexes, or groups that have frequent interaction with the court, and no ads related to active and recent cases, court employees, or people or entities that have relationships with the court. *Delaware Opinion 2012-2*.

- Whether a judge must disclose a relationship with an attorney or disqualify himself when the attorney appears depends on whether the judge and the attorney are acquaintances, have a close social relationship, or have a close personal relationship. *New York Opinion 11-125*.

- A trial judge is not disqualified from a matter that involves legal issues similar to those his attorney-spouse is litigating before other judges in unrelated matters. *New York Opinion 12-75*.

- For two years after criminal charges against her child are completely resolved, a judge must disclose the prosecution when a prosecutor who was involved in the matter appears, but is not disqualified. *New York Opinion 11-95*.

- A judge may not co-host a commercial television program with interviews with notable personalities in the legal, cultural, and charitable communities. *Nevada Opinion JE12-007*.

- A judge may not host a commercially-sponsored cable television show in which guests discuss topical issues. *Michigan Opinion JI-137 (2012)*.

- A judge may publish a blog that reports on state supreme court and court of appeal cases if she does not editorialize, criticize, or otherwise evaluate the opinions. *Connecticut Emergency Staff Opinion 2012-8*.

- A judge may not add lawyers who may appear before him as connections on the professional networking site LinkedIn or permit such lawyers to add him. *Florida Opinion 2012-12*.

- A judge must use social media cautiously, but the mere fact of a social connection does not create a conflict. *Maryland Opinion 2012-7*.

- A judge may sign a statement of support for a school district's campaign to promote good attendance. *New York Opinion 11-110*.

- A judge may speak to students and families at a school orientation about the consequences of continued absences from school. *New York Opinion 11-133*.

- A judge may address a local school board's suspension policy committee about court procedures and ways in which the court's orders could intersect with a school's suspension policy. *New York Opinion 11-134*.

- A judge may not permit students in a law school clinical program to sit at the bench while he conducts arraignments as preparation for the students to represent criminal defendants before the judge. *New York Opinion 11-130*.

- A judge may serve as the executor of the estate of a first cousin who resides outside of the state. *Connecticut Informal Opinion 2012-4*.

- A judge who hears child-in-need-of-care cases may act as a foster parent for a child whose case is assigned to a judge in a different division. *Kansas Opinion JE-174 (2012)*.

- A judge may not own a substance abuse facility or provide substance abuse assessment and treatment at the request of the court. *Kansas Opinion JE-173 (2012)*.

- A judge may join the state chapter of a national ethnic bar association. *Connecticut Informal Opinion 2012-10*.

- A judge may serve as master of ceremonies for a community parade sponsored by a non-profit organization. *New York Opinion 12-59*.

- A judge who is a director of a non-profit organization may be listed with the other directors on the organization's web-site even if each page has links that solicit donations. *New York Opinion 11-136*.

- A judge may testify as a fact witness in a court proceeding regarding a commission dispute for the attorney and personal representative of an estate she represented while an attorney. *Maryland Opinion 2012-61*.

- A judge who is the only member of the board of a homeowners' association who has knowledge of the facts may sign a verification to a civil complaint. *Pennsylvania Informal Advisory 4/16a/10*.

- A judicial candidate may not wear jewelry or apparel depicting an elephant or donkey if a reasonable person objectively would conclude that he is commenting on his affiliation with a political party or suggesting or appearing to suggest support of a political party. *Florida Opinion 2012-13*. ★

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

Recent advisory opinions

Ex parte communications with defense counsel, police chief

Based on a stipulation, the New York State Commission on Judicial Conduct censured a judge for ex parte communications about an impending sentencing with the defendant's attorney and the police chief. *In the Matter of Lamson*, Determination (March 20, 2012) (www.cjc.ny.gov/Determinations/L/Lamson.Paul.pdf).

While at the county public defender's office to visit an acquaintance, the judge saw Steven Ballan, the public defender who was representing Alan Bigwarfe on charges of criminal contempt, assault, unlawful imprisonment, and resisting arrest. Ballan told the judge that he was attempting to get the district attorney to agree to time-served for Bigwarfe in exchange for a guilty plea to resisting arrest. The judge told Ballan that he could not agree to time-served but would think about an appropriate sentence. Later that day, the judge sent Ballan an e-mail that stated:

I gave some thought to our conversation on the way home. If the DA offers the Resisting Arrest and [sic] Harassment charge in Satisfaction, I would agree to a CD for 12 months. If the DA gives it to you in Writing, the Minute you get a copy to me I will release him. he would do no more time. With his history, I think a CD would be appropriate.

The judge did not copy the district attorney's office.

Subsequently, while at the municipal building, the judge and the police chief discussed restitution for damages to officers' uniforms. When he returned to the courthouse, the judge realized the police chief had been talking about the Bigwarfe cases and sent a second e-mail to Ballan:

One issue not addressed is restitution for the officers [sic] uniforms. I beleive [sic] there was damage to the police uniforms, not positive though. If there was and restitution and its [sic] paid prior to sentencing then I will waive surcharge.

Later, the police chief sent a letter to the judge requesting that Bigwarfe pay restitution of \$241.01; neither the police chief nor the judge sent the letter to the probation department, the district attorney, or the public defender.

The judge accepted Bigwarfe's guilty plea to two charges, sentenced him to consecutive jail terms, and ordered restitution of \$241.01. The judge never disclosed his communications with Ballan and the police chief.

Ex parte communication with prosecutor

Adopting the findings and recommendation of the Advisory Committee on Judicial Conduct, which the judge accepted, the New Jersey Supreme Court publicly reprimanded a judge for directing a prosecutor, in an ex parte conversation during a driving under the influence trial, to

ask state witnesses certain questions concerning issues relevant to the state's case and critical to the defense. *In the Matter of McCloskey*, Order (February 24, 2012) (www.judiciary.state.nj.us/pressrel/2012/pr120224a.htm). The Court's order does not describe the judge's conduct; this summary is based on the Committee's presentment.

The defendant learned of the ex parte conversation while appealing his conviction. Finding that the communication denied the defendant his right to a fair trial, the superior court reversed the conviction and remanded for a new trial with a different judge and different prosecutor.

The superior court judge also referred the matter to the Committee.

The Committee found that the judge's ex parte conversation with the prosecutor, "contrary to his judicial obligations in its own right, was rendered considerably worse by the fact that he used that conversation to assist one party." The Committee noted that the questions were not only posed "outside the presence of defense counsel, but outwardly demonstrated Respondent's reservations as to the defendant's defense in the case," "coached" the prosecutor, and "highlighted the Judge's private perspective of the case and its merits."

After disconnecting

Based on a stipulated resolution, the Arizona Supreme Court publicly censured a judge for taking testimony from a plaintiff in a harassment case after disconnecting from the defendant, who was appearing by telephone, and for making misrepresentations to the Commission on Judicial Conduct. *Inquiry Concerning Parker*, Case 11-259, Order (June 4, 2012) (www.azcourts.gov/ethics/JudicialComplaints/2011.aspx). The Court's order does not describe the misconduct; this summary is based on the pleadings.

On January 27, 2011, the judge presided over a hearing in which the plaintiff, who was requesting an injunction against harassment, appeared in person, while the defendant, who was in New Mexico, appeared by telephone. The hearing lasted approximately 28 minutes, according to the audio recording. Approximately 16 minutes into the hearing, the judge stated, "It is clear to me that the two of you must be kept apart. I'm going to leave this order intact." At just over 17 minutes into the hearing, the judge stated that a copy of the order would be sent in the mail, added "that concludes these proceedings," and then disconnected the call with the defendant.

The judge continued to speak with the plaintiff for 10 minutes. The judge advised the plaintiff that her other option would be to pursue criminal charges and made several comments about the defendant, including "people

Recent cases

continued on page 11

Serving on boards of legal aid organizations and similar groups

by Steven Scheckman

Judicial ethics advisory committees have overwhelmingly opined that a judge should not serve as an officer or on the board of directors of a non-profit legal services organization that frequently engages in adversary proceedings in court. The opinions rely on provisions based on Canon 4C(1)(a) of the American Bar Association *Model Code of Judicial Conduct*, which is Rule 3.7(A)(6) in the 2007 model code. See *Alaska Advisory Opinion 98-4* (a judge may not hold a leadership position in the Alaska Legal Services Corporation, except for the Chief Justice in the role of chief administrator of the state courts); *California Advisory Opinion 46* (1997) (a judge may not serve on the board of the national legal services corporation because the affiliated local organization appears regularly in the judge's court); *Connecticut Formal Advisory Opinion JE 2009-10* (a judge may not serve on the Greater Hartford Legal Aid board); *Massachusetts Advisory Opinion 96-2* (a judge should not serve on the board of a non-profit corporation that provides legal representation to financially disadvantaged people); *Massachusetts Advisory Opinion 89-2* (a judge may not remain on the board of an organization that provides legal services in civil matters to indigent people in the judge's area); *New York Advisory Opinion 97-70* (a judge may not serve as a board member of an organization that provides legal services to low income, elderly landlords and tenants in housing code and eviction cases in the judge's court); *New York Advisory Opinion 06-83* (a judge who presides over a domestic violence court should not serve on an advisory board for an organization that represents victims of domestic violence and serves as their courtroom advocate); *Texas Advisory Opinion 281* (2001) (a judge may not serve on the board of a volunteer lawyers program whose staff and volunteer attorneys appear in the judge's court); *West Virginia Advisory Opinion* (October 7, 1994) (a judge may not serve on the legal services board). See also *Florida Advisory Opinions 2011-19* (a judge may not be on the board of an organization that investigates cases in which persons may have been wrongfully convicted). But see *Michigan Advisory Opinion JI-38* (1991) (a judge may serve on the board of a non-profit legal aid organization but should not hear cases in which it represents a litigant).

Some committees distinguish between types of legal services organization. For example, some opinions prohibit a judge from serving as director of a legal aid organization that engages in litigation directly or represents litigants through staff counsel, but allow a judge to do so if the organization acts only as an administrative body that assigns

cases to lawyers on a pro bono basis. See *Florida Advisory Opinion 2000-25*; *Florida Advisory Opinion 86-16*. In *Washington Advisory Opinion 93-26*, the Washington committee withdrew a previous advisory opinion that had prohibited service on a legal services board because the opinion had "erroneously assumed" the organization employed attorneys who appeared in the judge's court. The subsequent opinion stated that a judge may serve on the board of a program if the attorneys who participate and may appear before the judge are volunteers who are not employed by the organization. See also *Washington Advisory Opinion 01-2* (a judge may serve on the board for a non-profit volunteer lawyers program that employs attorneys if none of those attorneys appear before the judge).

Further, some committees allow a judge to serve on the board of a lawyer referral organization that does not directly provide representation. Compare *New York Advisory Opinion 91-121* (a judge may serve on the board of a local bar association legal referral project when neither the organization itself nor its representatives will appear in court) with *New York Advisory Opinion 96-84* (a judge may not serve on the board of an organization that provides free legal services to low income residents).

Similarly, other committees allow a judge to serve on the board of an organization that funds legal services but does not provide those services. *Washington Advisory Opinion 92-1* (a judge may serve on the board of a legal aid fund that seeks private funding for civil legal services but does not directly provide legal services). Compare *Pennsylvania Informal Advisory Opinion 1/7/2010* (a judge may serve as an officer and president of a non-profit organization that provides funding to other organizations that provide legal services to low income people or victims of domestic violence, setting general policy for types of cases the other organizations handle without intervening in a particular case) with *Pennsylvania Informal Advisory Opinion 2/25/08* (a judge may not serve as an officer of a non-profit organization that provides legal services to the indigent).

Other organizations

The prohibition on board service also applies to organizations that support and promote volunteer court-appointed special advocate programs for abused and neglected children. *Louisiana Advisory Opinion 213* (2009). *Accord Nebraska Advisory Opinion 05-1* (a judge may not serve on a CASA board even for a county outside the judge's district);

The prohibition applies to organizations that advocate social goals through litigation.

continued on page 10

are based on evidence in the record where the parties can contest its accuracy, reliability, and credibility and appellate courts can review it. Further, an independent factual inquiry raises questions about a judge's impartiality as he or she is undertaking to fill gaps in the evidence with information that may benefit one party over another.

Requiring reversal

The concept is so fundamental to the adversary system that judicial decisions have been reversed when based on an independent investigation.

For example, in *State v. McCrary*, 676 N.W.2d 116 (South Dakota 2004), the South Dakota Supreme Court reversed a defendant's sentence after a guilty plea imposed by a judge who, as he explained at sentencing, "took it upon" himself to call the victim's therapist and ask whether "he had reason to believe ... that the child was not molested by the father and his answer was no." Remanding for re-sentencing by a different judge, the Court explained:

The roles of the various participants in the judicial process are well defined by the judicial canons and the attorney's rules of professional responsibility. A judge simply cannot be both a judge and a prosecutor searching out facts favorable to the state without abandoning his or her judicial neutrality. By initiating communication with [the therapist], that is what happened in this case.

In *Albert v. Rogers*, 57 So. 3d 233 (Florida District Court of Appeal 2011), the appellate court reversed the trial judge's finding that the mother in a child custody dispute was in contempt, in part because the judge had undermined the mother's testimony in an independent inquiry. After the mother had testified that the father was the secondary emergency contact for the children at school, the judge called the school, and someone there gave him information that was, he stated in his contempt ruling, "totally inconsistent with the testimony given under oath by the mother. Therefore, I find it very difficult to accept or believe anything that [is] uttered from her mouth." When the mother's counsel asked for the name of the person he spoke to, the judge replied that he had thrown it away.

The appellate court noted that "the cold neutrality of an impartial judge" to which every litigant is entitled "is destroyed when the judge himself becomes part of the fact-gathering process." The court held that "by initiating

communication with the children's school administration and independently investigating the facts, the trial judge abandoned his role as a neutral arbiter of the dispute. The independent investigation served to deny the mother due process."

In *NYC Medical and Neurodiagnostic, P.C. v. Republic Western Insurance Co.*, 798 N.Y.S.2d 309 (New York Supreme Court, Appellate Term 2004), the appellate court reversed a trial judge who had denied a motion to dismiss based on his Internet research into whether the defendant corporation transacted business in New York. A medical provider had sued to recover benefits for medical services provided

to its assignor for injuries she allegedly sustained in an automobile accident in the Bronx while a passenger in a U-Haul vehicle insured by the defendant, an Arizona corporation. One of the issues was whether a New York City court had jurisdiction over the defendant.

In the decision denying the defendant's motion to dismiss, the trial judge based his findings of fact on his own review of the web-sites of the defendant, of U-Haul, and of the state department of insurance. Finding that the trial judge had erred, the appellate court noted that a plaintiff has the burden of proving that jurisdiction has been properly obtained. The appellate court concluded:

In conducting its own independent factual research, the court improperly went outside the record in order to arrive at its conclusions, and deprived the parties an opportunity to respond to its factual findings. In effect, it usurped the role of counsel and went beyond its judicial mandate of impartiality. Even assuming the court was taking judicial notice of the facts, there was no showing that the Web sites consulted were of undisputed reliability, and the parties had no opportunity to be heard as to the propriety of taking judicial notice in the particular instance

See also Catchpole v. Brannon, 42 Cal. Rptr. 2d 440 (California Court of Appeal 1995) (reversing judgment in favor of employer after trial in a sexual harassment lawsuit in part because the judge had looked up U.S. Weather Bureau records on rainfall and used "the putative discrepancy" between the plaintiff's testimony and those records to question her credibility); *DeSalle v. Appelberg*, 688 A.2d 1356 (Connecticut Appellate Court 1997) (reversing judgment in a breach of agreement lawsuit because the referee had asked the plaintiff's former attorney for a copy of a promissory

The rule prohibiting independent investigations ensures that cases are tried in the courtroom and judicial decisions are based on evidence in the record.

Independent investigations continued from page 5

note that had not been admitted into evidence); *Wilson v. Armstrong*, 686 So. 2d 647 (Florida District Court of Appeal 1996) (reversing approval of an estate's accounts because the judge had had ex parte discussions with the accountant and examined his working papers); *In the Matter of the Guardianship of Garrard*, 624 N.E.2d 68 (Indiana Court of Appeals 1993) (reversing decision regarding guardianship of a child because, without informing the parties, the judge had initiated a telephone conversation with a therapist); *State v. Vanmanivong*, 661 N.W.2d 76 (Wisconsin 2003) (trial judge erred in independently requesting additional information from a detective and in relying on the detective's unsworn memorandum when determining whether to disclose a confidential informant's identity, but the error was harmless).

Discipline for independent investigations

Judges have been disciplined for independently investigating facts by, for example, contacting experts or reviewing documents not in evidence.

The Florida Supreme Court admonished a judge who, while presiding over a breach of contract suit between two software developers, solicited information from unnamed computer consultants and experts on technical issues relating to damages without the involvement of the litigants or their attorneys. *Inquiry Concerning Baker*, 813 So. 2d 36 (Florida 2002). The judge had reduced a jury verdict to a nominal amount, finding that the plaintiff had not established the fair market value of the software at issue.

Explaining his decision, the judge disclosed that he had "made a few inquiries of computer consultants and experts, describing the general nature of this task and asking if there were a practical way to approximate the cost to a retailer to take the [plaintiff's] original . . . software and bring it up to the 'modified version'" used by the defendant. At the discipline hearing, the judge said he could not remember with whom he talked or what they said, but one was his son-in-law, another was a friend, and he was not sure if there were others. The Florida District Court of Appeal had already reversed the judge's decision, in part, because he improperly considered the information learned in the ex parte communications. See *Universal Business Systems, Inc. v. Disney Vacation Club Management Corp.*, 768 So.2d 7 (Florida District Court of Appeal 2000).

In *In re Hutchinson*, Decision (Washington State Commission on Judicial Conduct February 3, 1995) (www.cjc.state.wa.us), the Washington State Commission on Judicial Conduct censured a judge who relied on personal knowledge about gender re-assignment acquired in independent contacts with several medical societies. Two men who were going through gender re-assignment therapy petitioned to have their names changed to female names. After the judge denied the petition, the two men filed a motion for reconsideration.

During a hearing on the motion, the judge reported that his independent factual inquiry had led him to decide he should not do anything to encourage the petitioner's gender re-assignment. Based on his communications with medical organizations, which he undertook without notice to the petitioners, the judge concluded that gender re-assignment

Court records

Advisory committees have addressed the issue whether a judge may consult court records and similar official documents without violating the prohibition on ex parte communications. The Washington judicial ethics committee, for example, advised that a judge may, in open court, consider the judicial information system screen for a defendant when setting conditions of release if the judge informs the defendant that she is looking at the screen and recites the criminal history or other relevant information displayed so that the defendant can dispute that information if it is not correct. *Washington Advisory Opinion 04-7*. See also *Minnesota Advisory Opinion* (2010) (a judge may consider an electronic judicial information system in setting bail and sentencing for misdemeanors if all interested parties are present, the pertinent information is provided to the defendant in open court, and the defendant has an opportunity to dispute the information or otherwise be heard); *New York Advisory Opinion 09-96* (a judge may consider a defendant's criminal record and/or driver's abstract when setting bail if he is authorized to do so by law or if both the defense and prosecution have access to the same information); *South Carolina Advisory Opinion 1-2005* (a judge should not use a National Crime Information Center program to run criminal histories during the guilt phase of a case but may do so to assist during bail proceedings, sentencing, and similar situations); *Tennessee Advisory Opinion 97-1* (a judge may not consider information available through the state child support enforcement computer system without all parties present and given the right to be heard); *Tennessee Advisory Opinion 97-5* (when a petition for an order of protection is filed, prior to the hearing, a judge may not request that a local law enforcement agency furnish the criminal history of the petitioner and respondent); *Utah Informal Advisory Opinion 07-3* (a juvenile court judge presiding over a petition for judicial bypass to parental consent for abortion may consider the history of the minor's involvement, if any, with the juvenile court, and the court file in any previous case, but the judge must reveal to the juvenile all of the information reviewed and should not investigate beyond matters already in the court's possession).

surgery had a high rate of failure, was probably illegal in most states, was not offered in Washington, and a physician performing the surgery in Washington might be guilty of a felony. The judge also stated: "I personally feel that this whole procedure is immoral. It evidences a mentally ill and diseased mind. I am grateful that the physicians of this state and the rest of the United States apparently have the attitude that this surgical amputation is something beyond the medical pale."

The Commission noted that expert medical testimony introduced during the discipline hearing established that the judge's conclusions about gender re-assignment surgery based on his own research were incorrect or, at best, disputed. The Commission found that the judge's ex parte investigation contributed to his personal bias against the petitioners and resulted in his reaching a conclusion before he gave the petitioners a right to be heard.

The Commission stated that, to the extent that his investigation related to opinions on the law, the judge should have received the communications through amicus briefs. The Commission also found that the judge's moral pronouncements and demeaning statements deprived the petitioners of an impartial and unbiased forum.

The North Carolina Judicial Standards Commission publicly reprimanded a judge for independently gathering information by viewing a party's web-site, in addition to other misconduct. *Public Reprimand of Terry* (North Carolina Judicial Standards Commission April 1, 2009) (www.nccourts.org/Courts/CRS/Councils/JudicialStandards/PublicReprimands.asp). While presiding over a child custody and support hearing, the judge used Google to find information about the mother's photography business; he visited her web-site and viewed her photographs and read her poems. At least one of the poems gave the judge "hope for the kids and showed that [the mother] was not as bitter as he first thought," which may have affected his decision.

Cases involving children appear to present a particular temptation to engage in independent investigations. See *In the Matter of Fine*, 13 P.3d 400 (Nevada 2000) (the judge engaged in numerous and repeated ex parte communications with experts retained by the parties or appointed by her in child custody proceedings); *Disciplinary Counsel v. Squire*, 876 N.E.2d 933 (Ohio 2007) (in two civil protection cases, the judge told the parties that she was going to conduct an investigation, consulted with county children services, and called the children's grandparents ex parte); *In re Tollefson*, Stipulation, Agreement and Order (Washington State Commission on Judicial Conduct August 21, 2000) (www.cjc.state.wa.us) (in a petition to modify a parenting plan, the judge called and solicited information from the

father's former wife and questioned a child psychiatrist about how she arrived at the conclusions in her report).

Other discipline cases

See also *Inquiry Concerning Andress*, Case 10-099, Order (Arizona Supreme Court October 26, 2010) (www.azcourts.gov/ethics/JudicialComplaints/2010.aspx) (in request for an injunction to keep a parent off the field as a coach and away from the officers of a girls' softball league, the judge did "some digging," contacting at least one other coach in the league and city officials regarding the league's authority and use of city parks); *Letter to Hall* (Arkansas Judicial Discipline & Disability Commission November 22, 1999) (www.arkansas.gov/jddc/pdf/sanctions/hall_98-284.pdf) (in a small claims case filed by a bank against an individual, the judge went to the bank, spoke with a representative,

reviewed the bank's documents and evidence, and indicated that the bank had sufficient documentation to proceed); *Inquiry Concerning Nuss*, Findings of Fact, Conclusions of Law, and Disposition (Kansas Commission on Judicial Qualifications August 18, 2006) (in a school funding case, a supreme court justice asked

An independent factual inquiry raises questions about a judge's impartiality as he or she is undertaking to fill gaps in the evidence with information that may benefit one party over another.

two state senators about the accuracy of the dollar amounts reported in newspapers); *Commission on Judicial Performance v. Sutton*, 985 So. 2d 322 (Mississippi 2008) (in an eviction case alleging lease violations, the judge visited the apartment without the landlord's representative present); *In the Matter of Bishop*, Determination (New York State Commission on Judicial Conduct March 18, 2009) (www.cjc.ny.gov) (in a summary eviction matter, the judge visited the office of an attorney who represented the defendant in a related matter, questioned the attorney's secretary about the defendant's finances, and issued an order of eviction based on the information); *In the Matter of Miller*, Determination (New York State Commission on Judicial Conduct October 7, 1994) (www.cjc.ny.gov) (the judge set restitution in a criminal case after soliciting and receiving information from the two victims outside the presence of the defendant or his counsel and without a hearing); *In re McCulloch*, Stipulation, Agreement and Order (Washington State Commission on Judicial Conduct October 5, 2001) (www.cjc.state.wa.us) (the judge called an attorney ex parte to ask whether he had told the defendant in a civil case that she could charge a management fee for certain properties). ★

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Explaining the role of judicial conduct commissions continued from page 1

sanctions against the judge, or seek the judge's removal from the bench. However, even removal would not change the judge's ruling in a case. Only the appellate process can change the decision of a court.

On its site, the **Colorado** Commission on Judicial Discipline answers the question, "Why can't the Commission overrule a judge's decision?"

The Commission was established by the Colorado Constitution, just as the courts were established under the Constitution. The Commission reviews conduct, while the appellate courts review the facts and applicable law. The Commission is not authorized to rule on factual and legal disputes involved in motions and trials since the courts themselves are given exclusive jurisdiction over trials and appeals under the Constitution and also by Colorado Revised Statutes. If the Commission attempted to revise or reverse a judge's decision, then it would be displacing the function that is reserved for the courts. It simply does not have the jurisdiction to modify or reverse decisions of a trial or appellate court or to intervene in a trial or an appeal.

Similarly, in the "how to file a complaint" section of its site, the **California** Commission on Judicial Performance answers the question, "What if I think the judge's ruling was wrong?"

An error in a judge's decision or ruling, by itself, is not misconduct. Appeal may be the only remedy for such an error, or there may be no remedy. The Commission is not an appellate court. The Commission's authority is limited by law to investigating the complaint and, if appropriate, imposing discipline. The Commission does not have the authority to change a judge's decision or ruling or to issue orders in any case, including ordering anyone to be released from jail, granting a new trial, disqualifying a judge from hearing a case, assigning a new judge to a case, or granting or changing custody, visitation or child support orders.

Thus, several commission web-sites include warnings to litigants not to forego or postpone pursuing other remedies in the mistaken belief that a complaint is a substitute for an appeal. For example, the **Kentucky** Judicial Conduct

Explaining dismissals

Orders by the Chief Judge of the U.S. Court of Appeals for the 7th Circuit explain the dismissal of merits-related judicial conduct complaints by referring to the judicial hierarchy and describing a judge's job as "identifying winners and losers." (Orders dismissing complaints against federal judges under the Judicial Conduct and Disability Act of 1980 are public with the name of the subject judge and other identifying information redacted.) For example, one order states (www.ca7.uscourts.gov/JM_Memo/07-12-90017.pdf):

Complainant believes that the judge has made incorrect decisions, but that argument should be presented to the court of appeals, not the Judicial Council, which is an administrative body.

What is more, the district court's rulings are the only basis for the assertion of bias. Adverse decisions, even a cascade of adverse decisions, do not imply bias. . . . Every suit, indeed every motion within a suit, produces a loser as well as a winner. Identifying winners and losers is a judge's job, not a basis for thinking that the judge is biased. A litigant's belief that he should have prevailed may imply an issue for the court of appeals; it does not imply bias. Complainant believes that the subject judge made an error in another case that complainant deems similar. In that other case, the subject judge was reversed by the court of appeals. It is debatable whether the cases are similar, but I shall assume that they are. Still, making the same mistake twice does not imply bias. Error is part

of human nature and is why there is a hierarchy of courts, allowing review by larger panels of judges. Complainant should press his arguments in the appellate forum.

Dismissing a litigant's complaints that "the district judge must be biased against poor or disabled persons and has committed 'treason' or engaged in 'corruption,'" a second order explains (www.ca7.uscourts.gov/JM_Memo/07-12-90013.pdf) that the requirement that a complaint cannot be directly related to the merits of a decision "cannot be sidestepped by accusing the judge of corruption, treason, or bias."

Serious charges require serious evidence, and complainant offers none other than the fact that his suits have been decided against him. At least one litigant is disappointed in every suit; if complainant had prevailed in any of these suits, his adversaries would have lost—but the fact that the business of the judiciary is deciding contested matters does not give either side evidence that the judge is biased, has lied when explaining his decisions, has been bribed (that's what corruption means), or has betrayed his country (that's what treason means). It takes more than a series of adverse decisions to support an inference of bias or other wrongdoing. . . . Complainant believes that the judge erred in evaluating the merits, but the remedy for judicial error is appeal within the judicial hierarchy, not a complaint under the 1980 Act.

Commission cautions that “If you want to change the outcome of your case, discuss this with an attorney without delay.” Other examples:

- “Please understand that filing a complaint with the Commission will not stay or extend any time limits that may apply to a motion for new trial or an appeal.” **Colorado** Commission on Judicial Discipline.

- “You must immediately proceed with whatever remedy is available to you within the court system to correct any judicial errors you believe were committed in your case. Usually you must appeal within 30 days of the date of the decision with which you disagree, or you may lose your right to appeal.” **Tennessee** Board of Judicial Conduct.

- “To contest a court ruling or order, the proper course of action is to appeal to a higher court. Therefore, if your complaint is about the ‘correctness’ of a judge’s ruling or decision, you should consult with an attorney about whether to file an appeal with a higher court.” **Iowa** Commission on Judicial Qualifications.

- “Complainants should not wait to hear from the Commission before pursuing legal remedies or seeking the advice of an attorney.” **Nevada** Commission on Judicial Discipline.

- “You must take prompt action within the court system to appeal or correct any judicial errors that you believe have occurred in your case.” **New Mexico** Judicial Standards Commission.

- “The Commission is not a substitute for protecting your legal rights. You should contact a practicing lawyer to protect your rights.” **North Carolina** Commission on Judicial Standards.

Many commissions also stress that they “cannot get a judge taken off a case or have a matter transferred to another judge,” as the **Massachusetts** Commission on Judicial Conduct states on its home-page, and that “the filing of a request for an investigation of the judge’s conduct does not by itself entitle a complainant to a different judge,” as the **Arkansas** Commission on Discipline and Disability states. Similarly, sites note that, as the **Michigan** Judicial Tenure Commission puts it, a commission “cannot provide legal assistance to individuals, explain legal procedures, intervene in litigation on behalf of a party, or become otherwise involved in legal proceedings.”

Some commissions, like the **Arizona** Commission on Judicial Conduct, note that they cannot “award damages or other monetary relief to litigants.” In its section on “what not to expect” (which

follows a list of “what to expect”), the **Vermont** Judicial Conduct Board cautions “you should not expect the Board to interpret, explain, or justify the meaning of a court’s order.” As the **Kansas** Commission on Judicial Qualifications and **Idaho** Judicial Council explain to potential complainants, “Your complaint of judicial misconduct is a matter totally independent of your litigation.”

Describing misconduct

Some commissions describe what is not judicial misconduct to describe what types of complaints they cannot address. Several examples:

- “Judicial misconduct does not include: rulings on the law and/or the facts, matters within the discretion of the trial court, rulings on the admissibility of evidence, rulings involving alimony, child support, custody or visitation rights, sentences imposed by the Court, and believing or disbelieving witnesses.” **Georgia** Judicial Qualifications Commission.

- “‘Wrong’ decisions by a judge are not misconduct, even if those decisions appear to fly in the face of the evidence or appear to be based upon ‘perjured’ testimony, and even if the judge misapplies the law... Granting of custody or visitation, or setting child support are generally decisions within the discretion of the trial court. Any fine or sentence imposed by a judge in a traffic or criminal matter, if it is within the parameters set by law for the offense charged, is not usually a matter for Commission consideration.” **Texas** State Commission on Judicial Conduct.

The Center for Judicial Ethics has links
to the web-sites of commissions at
www.ajs.org/ethics/eth_conduct-orgs.asp/.



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Seth S. Andersen
Executive Director

Cynthia Gray
Director
Center for Judicial Ethics
cgray@ajs.org

American Judicature Society
The Opperman Center
at Drake University
2700 University Avenue
Des Moines, IA 50311

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change of address, contact 515-
271-2285 or llieurance@ajs.org

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continued on page 10

Explaining the role of judicial conduct commissions continued from page 9

- “Good faith errors in legal or factual determinations or in the court’s processing of a case do not constitute grounds for judicial discipline, even though they may constitute reversible error.” **Wisconsin** Judicial Commission.

The **Indiana** Commission on Judicial Qualifications even provides examples of dismissed complaints on its web-site:

- A defendant complained that the judge acted unethically and violated courthouse security rules when the judge allowed the prosecutor to bring into the courtroom the weapon the defendant allegedly used in the commission of his crime.

- A party in a divorce case complained that the judge modified custody and ordered the complaining party to begin payments on a child support arrearage.

- A defendant alleged he was being held without bond after he was sentenced. Court documents, and the complainant’s attorney, showed that the defendant was being held on other charges.

- A litigant complained that the judge should have disqualified on the basis that the litigant once dated the judge’s spouse’s distant relative whom the judge did not know.

- A defendant in a child molestation case protested that the judge found his lack of remorse as an aggravating factor at sentencing after the defendant stated that, although he recognized society “had a problem” with his relationship with his young victim, he simply was in love and was not a predator.

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

To help illustrate the types of complaints they can address, some commissions provide examples of what is judicial misconduct. In its frequently asked questions section, the **Maryland** Commission on Judicial Disabilities answers the question “what is ‘sanctionable misconduct?’”

Serving on boards of legal aid organizations and similar groups continued from page 4

Nevada Advisory Opinion JE11-009 (a judge may not serve on the CASA Foundation board). In *Public Statement 2006-1* (www.scjc.state.tx.us/pubstats.asp), the Texas State Commission on Judicial Conduct cautioned family court judges about “serving an organization, even one as noble and praiseworthy as CASA” that “advocates a particular legal philosophy or position,” especially if “the organization will be involved in proceedings likely to come before the judge.

Finally, the prohibition applies to organizations that advocate social goals through litigation. *Wisconsin Advisory Opinion 00-5*. See also *Pennsylvania Informal Advisory Opinion 7/16/2008* (a judge assigned to family law matters may not serve on the board of directors of a non-profit gay,

with the following list:

- inappropriate or demeaning courtroom conduct, such as yelling, profanity, or racist, sexist or other discriminating comments;

- using the prestige of judicial office to advance the private interests of the judge and others;

- hearing a case in which the judge has a personal or financial interest in the outcome;

- public comment regarding a pending case;

- persistent failure to dispose of court business promptly and responsibly;

- hearing a case in which the parties or attorneys are related to the judge within a prohibited degree of kinship;

- improper communication with only one of the parties or attorneys in a case;

- sleeping or drunkenness during a court proceeding;

- out of court behavior such as sexual harassment, bribery, theft, driving while intoxicated, making threats, making racist comments, ticket-fixing, or criminal behavior;

- endorsement of a specific political candidate or other improper political campaign activities.

The **New Jersey** Advisory Committee on Judicial Conduct explains:

Judicial misconduct is behavior by a judge that violates the Code of Judicial Conduct, as determined by the ACJC and the Supreme Court. It includes a wide range of conduct, from improper language in the courtroom and simple discourtesy all the way up to bribery. There is no simple listing of all the kinds of behaviors that constitute judicial misconduct. That is why it is essential that a person making a complaint about a judge be as specific as possible because all these matters are fact-sensitive. ★

The Center for Judicial Ethics has links to the web-sites of judicial conduct commissions at www.ajs.org/ethics/eth_conduct-orgs.asp/.

lesbian, bisexual, and transgender civil rights organization that takes positions on controversial issues that are the subject of litigation); *U.S. Advisory Opinion 40* (2009) (a judge may not serve as a director of a non-profit organization that, in pursuit of its goals, regularly becomes involved in legal proceedings). ★

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.

don't understand that the way they comport themselves in a hearing is important." The judge also asked the plaintiff whether any third parties were to be included in the injunction, and the plaintiff provided information about alleged contacts with her daughter.

During the Commission investigation, the judge failed to address issues as requested, denied having ex parte communications, and made statements that were inconsistent with the audio recording of the hearing.

Statements at city council meeting

Adopting the findings of the Commission on Judicial Conduct, to which the judge agreed, the Wyoming Supreme Court censured a municipal judge for comments he made at a public meeting of the Laramie City Council. *In the Matter of Lopez*, 274 P.3d 405 (Wyoming 2012). After identifying himself at the meeting, the judge had suggested that the council address the issue of towing charges. He stated that the issue comes before the municipal court about three times a year and expressed his opinion that "quite frankly the towing people are gouging 'em If you can make some amendment to the ordinance dealing with that as to the maximum amount, anything else is usurious or ridiculous or unconscionable."

The Commission concluded:

When a judge speaks publicly in strong and derogatory terms regarding a matter that occasionally arises in his court, this would appear to compromise the impartiality of a judge. The public should not be expected to understand the fine points regarding the limits of a judge's discretion in order to have faith in the judiciary's impartiality.

Inappropriate order

Pursuant to an agreement, the Tennessee Court of the Judiciary publicly reprimanded a judge who, in an order denying a motion to recuse, recited facts he should not have considered and accused the attorneys who filed the motion of misconduct. *Re Gasaway* (July 2, 2012) (www.tsc.state.tn.us/sites/default/files/docs/public_reprimand_-_judge_john_gasaway.pdf).

Several attorneys who left a law practice where the judge's wife was a partner filed a motion to recuse the judge from their cases. Without conducting a hearing, the judge denied the motion in an order published on the court website. But the judge also concluded that he had developed a prejudice against the attorneys that required that their cases be transferred out of his division, stating they had intended in the motion to defame his reputation and that of his wife. The order recited numerous facts about a dispute between the judge's wife and one of the attorneys that the

judge had not learned in any hearing and that were not proper for him to consider. The order also inappropriately and incorrectly accused the attorneys of violating the rules of confidentiality for the Board of Professional Responsibility and the rules involving candor to the court.

Playing poker

Accepting an agreed statement of facts, the New York State Commission on Judicial Conduct censured a judge for participating in for-profit poker games and gratuitously referring to his judicial status when the police arrived. *In the Matter of Hensley*, Determination (June 22, 2012) (www.cjc.ny.gov/Determinations/H/Hensley.html).

On August 13 and August 20, 2008, the judge played in for-profit tournament card games organized by an individual at a facility rented from the Fraternal Order of Eagles. The total amount of the prizes paid out was less than the amount of entry fees collected from the players; the remaining funds were kept by the "house." On September 10 and October 22, the judge attended for-profit cash card games during which the dealer "raked the pot," but the judge did not play in the games.

On November 5, the judge arrived at the Fraternal Order of Eagles at approximately 11:45 p.m. to celebrate his having been re-elected the day before. About 10 minutes after the judge arrived, officers from the police department arrived and executed a search warrant. In response to a police officer's directions that everyone produce identification, the judge showed a detective his driver's license and judicial identification card. While speaking to the "person in charge" at his request, the judge said he had been re-elected to the bench the day before, was there to celebrate, and had not played in any card games that night.

The man who organized the games was arrested and charged with gambling-related offenses. Neither the judge nor any of the other players were arrested.

The Commission concluded:

While it has been stipulated that respondent's involvement in gambling activities as a player did not violate the law, the person or persons who ran and profited from the games were engaging in criminal conduct, as respondent should have recognized. Thus, respondent and the other players who participated in the poker games made it possible for the crimes to occur. Significantly, even after learning that a police sergeant had come to the premises to investigate a complaint about the poker games, respondent continued to attend the games. This reckless behavior showed extremely poor judgment. Moreover, since respondent's judicial status was well known at the facility, his presence at and participation in the games gave his judicial imprimatur to this unlawful activity. ★



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