JUDICIAL CONDUCT REPORTER

★★★★★ A PUBLICATION OF THE NATIONAL CENTER FOR STATE COURTS CENTER FOR JUDICIAL ETHICS

VOLUME 37, NO. 4 • WINTER 2016

State judicial discipline in 2015

From 1980 through 2014, approximately 415 judges were removed from office as a result of state disciplinary proceedings. In 2015, nine judges (or former judge in one case) were removed, including one who was removed for a mental disability. In addition, two judges were retired due to permanent disabilities, and 19 judges or former judges resigned or retired in lieu of discipline pursuant to public agreements with conduct commissions.

Further, 85 judges (or former judges) received other public sanctions.

• 15 judges were suspended without pay for from seven days to two years (although the two-year suspension was stayed on condition the judge commit no further misconduct). Several of the suspensions included reprimands, censures, and/or fines, including one fine of $10,000.

• 11 judges were publicly censured; one censure was severe, and one was based on the judge's irrevocable resignation.

• 31 judges were publicly reprimanded; one reprimand also included a cease and desist order, and two included orders of additional education.

• 17 judges were publicly admonished; one admonishment also included an order of additional education.

• Three judges received public warnings; two warnings also included orders of additional education.

• Civil penalties were imposed on two judges for failing to file their financial disclosure statements.

• One judge was placed on supervised probation with

continued on page 2

Top judicial ethics stories of 2015 by Cynthia Gray

Harsher penalties

On June 2, 2014, assistant public defender Andrew Weinstock appeared before Judge John Murphy. When Weinstock refused to waive speedy trial for a client, the judge stated, "You know if I had a rock, I would throw it at your [sic] right now. Stop pissing me off. Just sit down." When Weinstock refused to sit down, asserting his right to stand and represent his clients, the judge shouted, "I said sit down. If you want to fight, let's go out back and I'll just beat your ass." The two men left the courtroom and met in the hallway.

Although there is no video of the events in the hallway, the courtroom audio captured the judge saying, "Alright you, you want to f––k with me?" and sounds of a scuffle. A hearing panel of the Judicial Qualifications Commission did not find clear and convincing evidence that the judge struck Weinstock and could not determine which man initiated physical contact.

The judge, but not Weinstock, returned to the courtroom. The judge then, even though no assistant public defender was present, took action in eight cases in which the defendants were represented by the public defender's office, for example, setting two cases for trial, waiving speedy trial in

continued on page 7

IN THIS ISSUE

1 State judicial discipline in 2015
1 Top judicial ethics stories of 2015
6 What they said that got them in trouble: In the courthouse
12 What they said that got them in trouble: Extra-judicial comments

NCSC
NATIONAL CENTER FOR STATE COURTS
Center for Judicial Ethics

numerous conditions including a mentorship until the end of her term.

• One private reprimand and one private letter of counsel were made public pursuant to the judges' waivers.

• One former judge's law license was suspended for one year in attorney discipline proceedings for her conduct as a judge.

• Two judges were found to have violated the code of judicial conduct, but no sanctions were imposed.

Two Florida judges removed

The Florida Supreme Court removed a judge for threatening to commit violence against an assistant public defender, engaging in a physical altercation with him, and then resuming the docket while defendants were without counsel. *Inquiry Concerning Murphy*, 181 So. 3d 1169 (Florida 2015). For a longer discussion of the case, *see* "Top Judicial Ethics Stories of 2015: Harsher penalties," on page 1, *infra*.

* * *

The Florida Supreme Court removed a judge for her deceptive conduct as an attorney toward her clients and co-counsel in the settlement of multi-party litigation. *Inquiry Concerning Watson*, 174 So. 3d 987 (Florida 2015). "Despite Judge Watson's protestations to the contrary," the Court emphasized, the Judicial Qualifications Commission and the Court have jurisdiction over misconduct committed by an attorney who subsequently becomes a judge, "no matter how remote."

Prior to 2002, Watson's law firm and two other firms represented 441 health care providers in numerous lawsuits against Progressive Insurance for systematically under-paying personal injury protection ("PIP") claims. The "PIP attorneys" retained other attorneys to initiate a bad faith case against Progressive on behalf of 40 of their clients. The clients were to receive 60% of the recovery, the attorneys' fees would be 40%, and the bad faith attorneys would receive 60% of the attorneys' fees.

On May 14, without notifying the bad faith attorneys, Watson and the other PIP attorneys accepted an offer from Progressive of $14.5 million to settle the PIP claims and all the bad faith claims. The agreement did not allocate any recovery to the bad faith claims but did require the release of those claims.

The bad faith attorneys sued the PIP attorneys for fraudulent inducement and in quantum meruit for the work they had performed. In April 2008, after a bench trial, the trial judge found that the PIP attorneys had violated several rules of professional conduct by settling the bad faith claims without notifying the bad faith attorneys and without notifying their clients that the bad faith claims would be released without compensation. The trial judge sent a copy of his order to The Florida Bar. The Florida Bar began grievance proceedings, but Watson requested that the matter be deferred while she appealed the trial court decision. The Court of Appeal affirmed the judgment in February 2012, and the grievance committee found probable cause in October. In November, Watson was elected to the bench, assuming judicial office in January 2013. The Bar forwarded its file to the Commission, which filed formal charges.

After a hearing and extensive findings of fact, the Commission concluded, "[w]hen Progressive dangled a pot of money, ethical restraints were swept aside," noting lawyers who violate the professional conduct rules cannot "escape to the bench." On review, the Court held that the Commission's findings and conclusions were supported by clear and convincing evidence, stating the judge's arguments were "not a reasonable inference from this record" or were "belied by her e-mail correspondence." Finally, it concluded that the judge's conduct was "fundamentally inconsistent with the responsibilities of judicial office" and her "actions while a practicing attorney, and her demeanor during these proceedings 'cast[] serious doubts' on her 'ability to be perceived as truthful by those who may appear before her in her courtroom.'"

Two Mississippi judges removed

The Mississippi Supreme Court removed a judge and fined him $3,500 for (1) failing to follow the law in drug court; (2) depriving a drug court participant of her right to counsel of her choosing by threatening to hold her retained counsel in contempt if she did not sit down; and (3) attending a meeting between a suspended bail bondsman and the sheriff. *Commission on Judicial Performance v. Thompson*, 169 So. 3d 857 (Mississippi 2015).

Participants in the county justice court drug court over which the judge presided were arrested and jailed for "contempt of orders of the drug court" for failure to appear at a monthly meeting, for example, even though they were in the program for offenses that were not punishable with jail time. Further, participants were routinely jailed for violations that were discussed at "staffing meetings" at which they were not present and without receiving written notice of specific violations prior to or during hearings and without affidavits or sworn evidence presented at the hearings. Finally, participants were routinely kept in the program for more than two years, contrary to statute.

The Court agreed with the Judicial Performance Commission that the judge's "lack of understanding and appreciation for the basic legal principles of contempt of court and due-process safeguards cannot be overlooked." Noting that the judge had "received information from numerous sources regarding the impropriety of his actions, yet he continued without regard to a proper understanding of the

continued on page 3

law," the Court concluded that his conduct "was knowing and deliberate.'"

* * *

The Mississippi Court removed a former judge who had pled guilty in federal court to felony obstruction of justice. *Commission on Judicial Performance v. Walker*, 172 So. 3d 1165 (Mississippi 2015). A federal grand jury had been convened following the FBI's investigation of the judge's mismanagement of a conservatorship. Subsequently, the judge pled guilty to attempting to corruptly influence a witness subpoenaed to appear before the grand jury and attempting to impede the provision of documents by the witness with the intent to influence the outcome of the proceeding. The former judge had agreed that removal was an appropriate sanction.

> In 2015, nine judges (or former judge in one case) were removed, including one who was removed for a mental disability.

Two Pennsylvania judges removed

The Court of Judicial Discipline removed a former Pennsylvania Supreme Court justice based on her conviction by a jury on three state counts of theft/diversion of service, criminal conspiracy, and misapplication of entrusted property. *In re Orie Melvin*, Opinion and order (Pennsylvania Court of Judicial Discipline August 14, 2015) (http://www.pacourts.us/assets/files/setting-3437/file-4655.pdf?cb=a64cdc). The criminal charges arose from her use of her judicial staff and her sister's legislative staff in connection with her 2003 and 2009 campaigns for the supreme court.

* * *

The Pennsylvania Court of Judicial Discipline removed a judge for not filing state and federal tax returns for five years, failing to remit approximately $130 in sales tax owed by a shoe store she owned, opening the shoe store without a license, and pleading guilty to three misdemeanors (for dismissing several of her own tickets) and one summary offense (the business license violation). *In re Ballentine*, Opinion and order (Pennsylvania Court of Judicial Discipline August 4, 2015) (http://www.pacourts.us/assets/files/setting-3414/file-4646.pdf?cb=b4fe6d). The judge admitted the factual allegations.

In 2013, the Court had found that the judge dismissed three parking tickets she had received, ordered her to reimburse the Commonwealth for the compensation she received while suspended with pay for almost four months, and placed her on probation until December 31, 2014. In the 2015 proceeding, the Court concluded that the judge had violated her probation when she failed to file income tax returns due on April 15, 2014. Three members of the Court dissented from the sanction and would have suspended the judge.

Without opinion, the Pennsylvania Supreme Court affirmed the order of removal. *In re Ballentine*, Order (Pennsylvania Supreme Court February 16, 2016) (http://www.pacourts.us/assets/opinions/Supreme/out/73MAP2015pco%20-%2010254633561473 77.pdf?cb=1).

Intent to deceive

The Minnesota Supreme Court removed a judge for failing to reside within his judicial district and knowingly making a false statement regarding his residency in his affidavit of candidacy. *Inquiry into the Conduct of Pendleton*, 870 N.W.2d 367 (Minnesota 2015).

The judge sat in the 10th Judicial District and lived within the district in a townhouse in Anoka until he sold the townhouse in 2013, primarily for financial reasons. After the sale closed on November 27, the judge began staying at his second wife's house within the 4th Judicial District. From late November through December 20, the judge looked for an apartment in Anoka. He was on vacation from December 20 through January 6, 2014, then he was out sick for several days. He returned to work on January 13. From mid-January through the end of May 2014, the judge, as he admitted, chose not to attempt to find housing in the 10th Judicial District while he tried to resolve issues about where his son with his ex-wife would attend school.

On May 22, when filling out an affidavit of candidacy for the November election, the judge listed the Anoka townhouse as his address even though he had not lived there since November. The judge admitted that he knew at the time that "was not an accurate statement."

The judge resumed his search for housing in the 10th Judicial District after a June 2 incident between another son and his stepdaughter at his new wife's house. On August 1, he moved into a new apartment in the 10th Judicial District.

The panel that held a hearing on the complaint filed by the Board on Judicial Standards found that, from January 15 through June 2, 2014, the judge had not intended to remain a resident of the 10th Judicial District and had intended to abandon his residency there while he addressed family issues. The Court held that those findings were not clearly

continued on page 4

erroneous. The Court emphasized that, during that time, the judge failed to take reasonable steps to obtain housing in his judicial district and that his intent to reside at his wife's house was further demonstrated by steps he took to keep the fact he was staying there a secret.

Further, rejecting the judge's argument that he had not intended to deceive when he signed the residency affidavit, the Court stated that deceptive intent is not required to prove a violation of the rules and that, even if intent was necessary, the panel's finding of intent was supported by the judge's admission that he knew he had listed a false address on the affidavit and by his failure to correct his false statement before or after the filing deadline. The Court stated it was "especially troubling" that the judge's false statement was made on his affidavit of candidacy because the "integrity of the judiciary is severely undermined if a judge deceives voters by falsely representing that he or she satisfies a constitutional requirement to hold office."

85 judges (or former judges) received other public sanctions.

The Court noted that, in 2011, it had suspended a judge without pay for six months for failing to comply with the constitutional residency requirement and making an affirmative misrepresentation and material omissions to the Board. *See Inquiry into Karasov*, 805 N.W.2d 255 (Minnesota 2011). Thus, in *Pendleton*, the Court stated:

> The integrity of the judicial system is seriously undermined when a judge not only violates his or her constitutional obligations but also flouts a discipline decision of our court. . . . . The public's trust and confidence in the Minnesota judiciary will be eroded if the disciplinary system is unable to deter similar acts of serious misconduct by other judges. . . .

From the totality of the circumstances, the Court held, the judge "must be removed from office."

Deceitful, calculated, and unseemly

The California Commission on Judicial Performance removed a judge for authoring and showing to his courtroom clerk an anonymous letter accusing her of infidelity in order to promote a closer personal relationship with her; engaging in a course of conduct, including numerous texts and gifts, intended to promote the relationship; and related misconduct. *Inquiry Concerning Saucedo*, Decision and order (California Commission on Judicial Performance December 1, 2015) (http://cjp.ca.gov/res/docs/removals/Saucedo_12-01-15.pdf). The Commission adopted the findings of fact of the three masters who conducted the hearing, including their credibility determination that, when the judge's testimony conflicted with the clerk's, the clerk's testimony was credible and her version of events was true.

On September 17, 2013, an anonymous letter was delivered to the judge's home accusing his courtroom clerk of having an affair with a court bailiff. The "crude and vile" letter was purportedly a copy of a letter to the clerk's husband sent to the hospital where he worked.

The next day, the judge called the clerk into his chambers, told her to close the door, and showed her the letter. The clerk began crying and said she needed to report the letter to court administration or law enforcement. The judge responded that she could not "tell anybody" about the letter and claimed she could be fired if she reported it. The judge told her that, if she trusted him completely, he would call her husband's employer and ensure that the letter would be intercepted. Later, the judge told the clerk that, when he called the hospital, "John," the human resources manager, told him the anonymous letter was sitting on his desk and that "John" had shredded the letter during their phone conversation. In the Commission proceedings, the judge acknowledged that he had not attempted to contact anyone at the hospital but that he made these false statements to make the clerk "feel better."

In the two months following the letter, the judge sent the clerk about 445 texts and notes, many "overly personal and emotional," and gave her gifts, including flowers, $9,200 in cash, a car worth $15,000, a trip to Disneyland for her and her family worth $3,202, and payment of a $533 car repair bill. The judge used the anonymous letter to pressure the clerk when she sought to distance herself from him, for example, stating "Do you want your husband to find out about the letter?"

The judge denied writing the anonymous letter. The Commission, however, found that he had written the letter and mailed it to himself as part of a "predesigned plan to manufacture the clerk's dependence on him, hoping it would lead to a closer personal or 'emotional' relationship with [the clerk]." The Commission stated that the judge's actions after receiving the letter – falsely telling the clerk he had contacted her husband's employer and demanding that she tell no one – "make sense only if he was the author" and, therefore, could be certain that the clerk's husband would never receive the letter.

continued on page 5

 (continued from page 4)

The Commission also rejected the judge's claim that he intended only to "mentor" the clerk by helping with her finances.

> Mentoring involves advice, direction, referrals and encouragement. As stated by the special masters, "Mentoring is not accomplished by providing a subordinate with thousands of dollars in gifts, including a BMW car and vacation," an offer to pay for "body sculpting" or "expecting a 'special' friendship in exchange.'"
>
> Further, the overly personal and emotional language the judge used in his text messages and notes to [the clerk] is far from the type of supportive but professional communication one would expect in a mentoring relationship (i.e., "It's silly but still feeling under appreciated"; "I, too, am human and have an ego. Feel free, if you wish, to compliment me if you like things I do or wear"). Further, the judge repeatedly stated and suggested that he wanted a closer or "special" relationship with [the clerk] in exchange for his "gifts," something that would not be expected or appropriate in a mentoring relationship ("If you want me to be an ordinary friend like I was before September, I will provide only moral support. But if you want me for a special friend, everything is on line with full financial and moral support going forward. Special friend means you want to make time and effort to share thoughts and experiences with me"; telling [the clerk] that his accountant questioned why he was buying her all of these gifts and whether this was a "one sided friendship").

The Commission concluded:

> The deceitful, calculated, and unseemly nature of the judge's misconduct, compounded by his lack of candor in response to the commission's investigation and untruthful testimony under oath before the masters compels our decision to remove Judge Saucedo from office. We recognize Judge Saucedo is a well-respected jurist who has devoted many hours to giving back to the community. Nonetheless, his reputation cannot redeem the seriousness of his wrongdoing, nor obviate the need for removal in order to fulfill our mandate to protect the public and maintain public confidence in the integrity of the judiciary.

Removal for disability

The Michigan Supreme Court removed a judge for a mental disability that prevents her from performing her judicial duties, failing to cooperate with the Judicial Tenure Commission investigation, and making intentional misrepresentations to the Commission, to her employer, and to courts in which she was involved in litigation. *In re Sanders*, 865 N.W.2d 30 (Michigan 2015).

The master appointed to hear the complaint had relied on the testimony of a board-certified psychiatrist that the judge suffered from a psychotic disorder manifested by delusions that prevented her from correctly interpreting reality and making rational decisions. The clearest evidence of the delusions, the master noted, was a letter the judge sent to the U.S. Attorney in December 2013. The letter stated in part:

> There are judges who suddenly died under suspicious circumstances in the last two years; I believe they were murdered because they spoke out against some of the wrongs that were being committed at the court; one newspaper tried to name me as a suspect in one of the murders; I was at work on the day of the crime; the chief judge of the court was interviewed on the scene of the crime when my name was mentioned; the Detroit Free Press indicated that I was in a hotly contested race with one of the judges possibly suggesting that I may be a suspect.

The master noted that the deaths to which the letter referred apparently were those of a judge who died as the result of an accident and a judge who committed suicide. The newspaper had not mentioned Judge Sanders as a possible suspect.

Counsel for the judge argued that the psychiatrist never interviewed the judge and, therefore, his diagnosis was based upon insufficient information. However, the master noted that the psychiatrist had made himself available for an evaluation on 11 dates, but the judge had failed to appear for any of the three appointments that were scheduled. Acknowledging "it would have been preferable" for the psychiatrist to interview the judge, the master concluded: "The inability of Dr. Miller to personally interview Respondent was solely the responsibility of Respondent . . . Dr. Miller made it abundantly clear that he had 'enough information to come up with [a diagnosis that] she's psychotic.'"

In September 2013, the judge falsely told her court that she required a long leave of absence to have surgeries on her knee. Although the medical leave was granted, the surgeries were never performed. The judge made numerous intentional misrepresentations to the Commission regarding her medical condition, efforts to treat it, including efforts to schedule an independent medical examination, and the scheduling of an independent psychiatric examination. She also made false statements in pleadings filed in federal and state court. ★

Follow the Center for Judicial Ethics blog at **www.ncscjudicialethicsblog.org**. New posts every Tuesday plus Throwback Thursdays.

What they said that got them in trouble

In the courthouse

"You know if I had a rock, I would throw it at your [sic] right now. Stop pissing me off. Just sit down. . . . I said sit down. If you want to fight, let's go out back and I'll just beat your ass. . . . Alright you, you want to f—k with me?" Judge to assistant public defender prior to a physical altercation in the hallway. *Murphy* (Florida 2015) (http://tinyurl.com/h8muedd).

"This is so goddamn simple. If you give the discovery and don't do all this bullshit, I don't have to sit here for hours and listen to this crap. So everybody's excused." Judge to attorneys in divorce matter. *Weithman*, 34 N.E.3d 865 (Ohio 2015).

"You look like a Muslim, and I wouldn't hire you with it," or words to that effect. Judge to bearded assistant district attorney in courtroom at the conclusion of the criminal docket. *Schildknecht* (Texas Commission 2015) (http://tinyurl.com/nzvw5wt).

"You're held in contempt at this time. All cases are dismissed." Judge to assistant city prosecutor who refused to meet with her outside the courtroom prior to the criminal docket. *Sims*, 159 So. 3d 1040 (Louisiana 2015).

"You're done. Really?" Judge sarcastically to a plaintiff after she made a statement of the relief she was requesting in an eviction case. *Fletcher* (Arizona Commission 2015) (http://tinyurl.com/gnr5jl6).

"And I better not hear either of you saying anything negative about the other party or y'all gonna get a little trip to the Durham County Bed and Breakfast for contempt of court. And there is no appeal, you stay until I say you get out." Judge to parties during contentious custody hearing in a divorce case. *Hill*, 778 S.E.2d 64 (North Carolina 2015).

"As he turned away he gave me a nice big smirk as if to say, blank you, Judge. That's 30 days contempt of court. Have a good day . . . ." Judge to a criminal defendant. *Popeo* (New York Commission 2015) (http://tinyurl.com/h8g8k4c).

"It's going to be an obvious conflict for me to stay in [the case]." Judge before proceeding with a hearing. *Newell* (Tennessee Board 2015) (http://tinyurl.com/jpvgkdp).

"If I determine that's not a valid religious belief I could require you to remove the hat." Judge to a defendant wearing a fedora in the courtroom as part of his Jewish faith. *Ladenburg* (Washington Commission 2015) (http://tinyurl.com/jydjdkx).

"Although this Court has some vague familiarity with the government theories of democracy, republicanism, socialism, fascism, theocracy, and even despotism, implantation of this apparently new 'super-federal-judicial' form of benign and benevolent government, termed 'kryptocracy' by some and 'judi-idiocracy' by others, with its iron first and limp wrist, represents quite a challenge for a state trial court." Judge in order dismissing a divorce complaint, arguing that the U.S. Supreme Court decision on same-sex marriage had preempted state court jurisdiction over contested divorces. *Atherton* (Tennessee Board 2015) (http://tinyurl.com/z539g6s).

"Yeah, her back hurts because she's been with her boyfriend all weekend." Judge encouraging an assistant district attorney to ask his court reporter about her back pain. *Henderson*, 343 P.3d 518 (Kansas 2015).

"Come on, come on." Judge to a drug court coordinator as he grasped her by the ear and escorted her out of the room at the conclusion of a team meeting. *Council* (New Jersey) (http://tinyurl.com/jd27tvg).

two cases, and accepting a no contest plea.

The videotape of that court session has been viewed over 200,000 times on-line, and the altercation has been featured in numerous news reports across the country, including many in which the headline refers to the judge as the "fighting judge." The psychologist who treated the judge after the incident described a "perfect storm" occurring within the judge emotionally: he was fatigued, his father had recently passed away, and a defendant had recently been killed outside the courthouse. Following the incident, the judge wrote letters apologizing to residents of the county, members of the legal community, and the public defender, specifically mentioning Weinstock.

In December, the Florida Supreme Court removed the judge from office, concluding that, even though he had been a "good judge" except for that "egregious" and "appalling" incident, "Judge Murphy's total lack of self-control became a national spectacle—an embarrassment not only to the judge himself but also to Florida's judicial system." *Inquiry Concerning Murphy*, 181 So. 3d 1169 (Florida 2015). The Court noted that the judge had submitted a Veterans Administration finding that he was 30% disabled based on post-traumatic stress disorder arising from his combat deployment in Afghanistan, that is, he suffered from "'[o]ccupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress.'" Agreeing with the Commission's statement that "a trial judge's duties frequently include periods of significant stress," the Court concluded:

> [T]he severity of Judge Murphy's behavior and the VA finding leave open the possibility of future misconduct. Based on the clear erosion of public faith in our court system caused by Judge Murphy's misconduct and the unmistakable possibility that he could have a similar outburst in the future, we must find that Judge Murphy is presently unfit to serve.

The Court's removal decision departed from the hearing panel recommendation that the judge be suspended without pay for 120 days, fined $50,000, and publicly reprimanded. *Murphy* was not the only case in 2015 in which the Florida Court imposed a higher sanction than that recommended by the Florida Commission; in three other cases, it refused to impose sanctions to which the judges had consented, remanding for the Commission "to fully develop the facts" or suggesting an alternate sanction.

For example, the Court disapproved the recommendation, based on an agreement, that a judge be publicly reprimanded (and ordered to write a letter of apology) for (1) using profanity and threatening to sue a storeowner who would not display her campaign sign and (2) removing original documents containing her notes from a case file. Instead, the Court proposed a 30-day suspension without pay and a $10,000 fine, as well as the reprimand and apology. The Court gave the parties 30 days to file a revised consent judgment or inform the Court that they had not reached an agreement and the case should be returned for a hearing before the Commission. The judge and the Commission agreed to the Court's proposal, and the Court subsequently entered the revised consent judgment. *Inquiry Concerning Schwartz*, 174 So. 3d 987 (Florida 2015).

In accordance with its usual practice, the Court ordered the judge to appear before it for administration of the public reprimand.

In accordance with its usual practice, the Court ordered the judge to appear before it for administration of the public reprimand. On December 9, the Chief Justice read the reprimand to the judge as she stood in the well of the Court prior to scheduled oral arguments in other cases. The reprimand included the following explanation by the Court:

> Judge Schwartz, this Court is increasingly facing cases such as yours where we are rejecting the recommended discipline in favor of harsher penalties. We view this as the only way we can assure the public that misconduct such as yours will be taken very seriously.

A video of the reprimand can be viewed on-line at http://wfsu.org/gavel2gavel/viewcase.php?eid=2308.

Federal judges

Misconduct by a federal judge—or an allegation of misconduct—is always a high profile matter, and discipline proceedings involving several federal judges and the revision of the discipline process itself were among the top judicial ethics stories of 2015.

In September, the U.S. Judicial Conference sent to the speaker of the House of Representatives its certification that the impeachment of former judge Mark Fuller may be warranted, based on the report of a special committee adopted by the 11th Circuit Judicial Council (http://online.wsj.com/public/resources/documents/

continued on page 8

Judicial_Conference09182015.pdf). Fuller, who sat in the Middle District of Alabama, had been arrested in August 2014 on misdemeanor battery charges for beating his wife. The criminal charges were dismissed following his compliance with a pre-trial diversion program. He resigned effective August 2015.

Noting that a resignation may obviate the need for certification to the House in a case "with less egregious and protracted conduct," the Conference stated its action was also a public censure of the judge for "reprehensible conduct." The Conference found that the judge had brought disrepute to the federal judiciary by physically abusing his wife "at least eight times, both before and after they were married, which included and culminated in the assault that took place on August 9, 2014, in the Ritz-Carlton Hotel in downtown Atlanta, Georgia" and by making "repeated statements under oath before the Special Committee that he never, at any time, hit, kicked, or punched" his wife that were false and material under the federal criminal perjury statute. The Conference also stated that the judge had "made false statements to the Chief Judge of the Eleventh Circuit in late September 2010 in a way that caused a massive disruption in the District Court's operation and loss of public confidence in the Court as an instrument of justice."

* * *

In December, based on the report of a special committee, the 5th Circuit Judicial Council publicly reprimanded Judge Walter Smith, of the Western District of Texas, for inappropriate and unwanted physical and non-physical sexual advances toward a court employee in 1998; the Council also directed that no new cases be assigned to the judge for one year and that he complete sensitivity training. *In re Smith*, Order and memorandum (5th Circuit Judicial Council December 4, 2015) (http://media.graytvinc.com/documents/Judicial+Council+Order.pdf). In addition, the Council found that the judge did not "understand the gravity of such inappropriate behavior and the serious effect that it has on the operations of the courts" and "allowed false factual assertions to be made in response to the complaint, which, together with the lateness of his admissions, contributed greatly to the duration and cost of the investigation."

The Council also noted that the judge had not followed appropriate procedures regarding recusal from cases in which the attorney representing him in the disciplinary proceeding was representing parties, and, as a result, at least one party in a case may not have been informed of that conflict. Therefore, Council also directed the judge to recuse in any cases involving an attorney who is representing him at the time; to recuse in any case in which his attorney in the disciplinary matter entered an appearance for three years after the conclusion of the representation (even though recusal is not usually required after the representation has been terminated); and "to follow the formal procedures mandated by 28 U.S.C. § 455(e) rather than attempting by informal means to obtain waivers of other potential conflicts of interest."

According to news reports, the complainant, an attorney, has asked the Committee on Judicial Conduct and Disability of the U.S. Judicial Conference to review the Council's decision not to seek the judge's impeachment.

* * *

In February, the U.S. Judicial Conference Committee denied a petition for review filed by 13 individuals and public interest groups from the dismissal of their complaint alleging that Judge Edith Jones, of the Court of Appeals for the 5th Circuit, made statements that exhibited bias or related to the merits of pending cases during a public lecture on the death penalty at the University of Pennsylvania Law School. *In re: Complaint of Judicial Misconduct (Jones)* (U.S. Judicial Conference Committee on Judicial Conduct and Disability February 19, 2015) (http://www.uscourts.gov/judges-judgeships/judicial-conduct-disability).

The complaint alleged, for example, that the judge had stated that certain "racial groups like African Americans and Hispanics are predisposed to crime," are "'prone' to commit acts of violence," and get involved in more violent and "heinous" crimes than people of other ethnicities. The special committee agreed that such suggestions would constitute misconduct but concluded that it could not "find, by a preponderance of the evidence, that Judge Jones made those comments in her initial remarks" and that, whatever her initial remarks, she "used the question-and-answer period to clarify that she did not adhere to such views." The special counsel hired to investigate the complaint had found no recording of the lecture, and the special committee's report, adopted by the Judicial Council of the D.C. Circuit, noted that "the judge and the complainants sharply disagree about the wording and tone of many of her comments."

On review, the U.S. Judicial Conference Committee found no error in the Judicial Council's conclusions.

* * *

In September, the Judicial Conference amended the Rules for Judicial-Conduct and Judicial-Disability Proceedings for federal judges, with "dozens of clarifications and restyling and policy changes" (http://www.uscourts.gov/news/2015/09/17/judicial-conference-updates-rules-judicial-conduct-proceedings-strategic-plan). The Conference emphasized:

continued on page 9

• A new "requirement that chief judge and circuit judicial council final orders disposing of a misconduct or disability complaint be published on a court's public website. . . . Previously the JC&D Rules only required that final orders be made public at the office of the circuit clerk or on the court's public website."

• The addition of two new grounds for "cognizable misconduct:" "retaliating against complainants, witnesses, or others for their participation in the complaint process" and "refusing without good cause shown, to cooperate in the investigation of a complaint under these rules."

• "An expansion of the meaning of 'disability' so it may include 'impairment of cognitive abilities that renders the judge unable to function effectively.'"

Performing same-sex marriages

In one of the top national news stories of 2015, in June, the U.S. Supreme Court held that "the Constitution . . . does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex." *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Shortly afterward, five judicial ethics committees issued advisory opinions stating that a judge cannot refuse to perform same-sex marriages if the judge performs opposite-sex marriages even if the refusal is based on sincerely held religious or personal beliefs. *Arizona Advisory Opinion 2015-1*; *Louisiana Advisory Opinion 263* (2015); *Nebraska Advisory Opinion 2015-1*; *Ohio Advisory Opinion 2015-1*; *Wisconsin Advisory Opinion 2015-1*. (Anecdotally, other state court agencies have given similar advice although not in formal advisory opinions.)

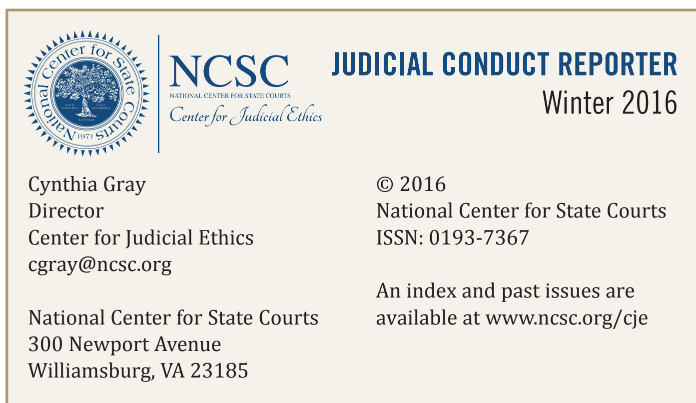
According to news reports, at the end of 2015, discipline charges against judges who have refused to perform same-sex marriages after the *Obergefell* decision were pending in at least two states. In 2013, the Washington State Commission on Judicial Conduct had admonished a judge for publicly stating, following voter passage of a referendum approving same-sex marriage, that he would not perform same-sex marriages, while he continued to perform opposite-sex marriages. *In re Tabor*, Stipulation, agreement, and order of admonishment (Washington State Commission on Judicial Conduct October 4, 2013) (http://www.cjc.state.wa.us/Case%20Material/2013/7251%20Tabor%20Stip%20FINAL.pdf). In 2014, the Pennsylvania Judicial Conduct Board had published an article reaching the same conclusion following a federal district court decision overturning the state's ban on same-sex marriage. *Pennsylvania Judicial Conduct Board Newsletter* (summer 2014) (http://judicialconductboardofpa.org/wp-content/uploads/JCB_Summer_2014_Newsletter.pdf).

These authorities treat performing a marriage ceremony as a judicial duty (Arizona, Ohio) or as an extra-judicial activity (Nebraska, Washington) or as either or both (Pennsylvania, Wisconsin). Regardless how they characterize a judge's role at a wedding, the opinions agree that refusing to perform same-sex marriages, while continuing to perform other marriages, is an indication of bias prohibited by the code of judicial conduct. The Washington Commission notes that a judge's obligations to avoid bias and the appearance of bias go "beyond those imposed on others who serve the general public, reflecting the unique and integral role judicial officers play in our constitutional scheme of justice honoring the rule of law."

Emphasizing that judges take an oath when they take office, the opinions also rely on the requirement in the code that "a judge shall comply with the law." For example, the Wisconsin opinion states: "That the 14th Amendment to the U.S. Constitution requires states to license same-sex marriages . . . is now the law of the land which judicial officers in Wisconsin under their oath have sworn to support." The Arizona, Nebraska, and Ohio committees also cite the provision that "a judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially" and that "while each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question."

Several opinions (Nebraska, Ohio, Pennsylvania, Washington, and Wisconsin) also rely on the code requirement that a judge "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." For example, the Ohio committee explains that "public confidence in the independence of the judiciary is undermined when a judge allows his or her beliefs concerning the societal or religious acceptance or validity of same-sex marriage to affect the performance of a judicial function or duty." Several agencies (Nebraska, Ohio, Pennsylvania, and Washington) also cite the requirement that a judge "avoid impropriety and the appearance of impropriety."

continued on page 10



JUDICIAL CONDUCT REPORTER
Winter 2016

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

National Center for State Courts
300 Newport Avenue
Williamsburg, VA 23185

© 2016
National Center for State Courts
ISSN: 0193-7367

An index and past issues are available at www.ncsc.org/cje

The Ohio committee notes that the code requires a judge to avoid being swayed "by public clamor or fear of criticism" and to avoid permitting outside interests and relationships to influence the judge's conduct or judgment, regardless, as a comment explains, whether the law is "popular or unpopular with the public, the media, government officials, or the judge's friends or family." The committee concludes that "a judge who permits these external factors to influence his or her execution of a judicial function erodes public confidence in the judiciary."

A judge cannot refuse to perform a same-sex ceremony even if the judge refers the couple to another court or individual who is willing to do so (*see* the Arizona and Nebraska opinions) and even if the judge only conducts opposite-sex ceremonies at locations other than court facilities (*see* the Arizona opinion).

> Five judicial ethics committees issued advisory opinions stating that a judge cannot refuse to perform same-sex marriages if the judge performs opposite-sex marriages . . . .

Because performing marriages is discretionary, the Arizona, Nebraska, and Wisconsin committees advise that a judge may choose not to conduct any marriages to avoid personal or religious conflicts in conducting same-sex marriages. (The Arizona and Nebraska opinions do allow a judge to choose to conduct marriage ceremonies only for friends and relatives as long as the judge does not refuse to conduct a same-sex ceremony for a friend or relative; the Pennsylvania article questions whether that exception is appropriate.) The Ohio opinion, however, advises that a "judge may not decline to perform all marriages in order to avoid marrying same-sex couples" because doing so "may reflect adversely on perceptions regarding the judge's performance of other judicial functions and duties" and create grounds for disqualification in matters where the sexual orientation of the parties is at issue. The Louisiana committee also cautions judges to be mindful that, if they formerly performed marriages and now choose not to, "gay or lesbian individuals who perceive such refusal as indicative of animus" could file motions to recuse. Similarly, the Pennsylvania Board article directs that, in cases in which a judge knows that a litigant is gay or lesbian, "the judge has an affirmative duty to disclose his change in position about performing wedding ceremonies because it may be perceived as relevant to the judge's ability to rule impartially on those cases."

Judges and Boy Scouts

Rule 3.6(A) of the American Bar Association *Model Code of Judicial Conduct* provides: "A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or *sexual orientation*" (emphasis added). Approximately 28 jurisdictions (27 states and the District of Columbia) have adopted that rule (or a variation) with "sexual orientation" specifically included in the list. (An additional 20 states and the federal judiciary have provisions in their codes prohibiting judges from being members of organizations that practice invidious or unlawful discrimination but without an express reference to sexual orientation. The three states without any specific provision regarding discriminatory organizations are Alabama, Illinois, and Louisiana.)

Since 1996, California has had an exception for non-profit youth organizations to accommodate judges who were members of or active in the Boy Scouts of America, which historically had prohibited openly gay leaders. In January 2015, the California Supreme Court eliminated that exception (http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf). Therefore, after January 1, 2016, California judges would no longer have been able to be members of the Boy Scouts – except the organization changed.

In July 2015, the Boy Scouts amended its adult leadership policy to remove "the national restriction on openly gay adult leaders and employees" although local religious chartered organizations "may continue to use religious beliefs as criteria for selecting adult leaders, including matters of sexuality" (http://scoutingnewsroom.org/blog/boy-scouts-of-america-amends-adult-leadership-policy/).

Thus, in November 2015, the California Supreme Court Committee on Judicial Ethics Opinions advised that, despite the elimination of the youth group exception, "judicial membership in a BSA-sponsored eagle scout alumni organization is not prohibited because, due to recent changes, current Boy Scouts of America policy precludes invidious discrimination on the basis of sexual orientation for non-unit-serving volunteers such as the eagle scout alumni members." *California Oral Advice Summary 2015-13*.

Similarly, as a result of the recent change in Boy Scouts policy, the Connecticut Committee on Judicial Ethics advised in late 2015 that a judicial official may participate in the Boy Scouts by teaching ethics courses as a regional or high level volunteer (*Connecticut Informal Advisory Opinion*

continued on page 11

2015-15A) or by serving as a board member of a regional council (*Connecticut Informal Advisory Opinion 2015-15B*). Prior to the policy change, the Connecticut committee had issued an advisory opinion stating that a judicial officer may not hold adult volunteer leadership positions with the Boy Scouts that gay persons are barred from holding. *Connecticut Informal Advisory Opinion 2014-1*.

Both the California and Connecticut codes, like the model code, contain exceptions to Rule 3.6(A) for religious organizations. Local Boy Scout organizations chartered by religious organizations, even after the national policy change, can still discriminate based on sexual orientation as a matter of religious belief. The California committee said that a judge may be a scoutmaster for his church-sponsored Boy Scouts troop if he is satisfied that the troop is dedicated to the preservation of religious values of legitimate common interest to the troop members. *California Oral Advice Summary 2015-14*. The Connecticut committee advised that a judge may, as the lawful exercise of his religious freedom, be a member of a Catholic archdiocese committee on scouting. *Connecticut Informal Advisory Opinion 2015-15B*.

Personal solicitation of campaign contributions

In its 2002 decision *Republican Party of Minnesota v. White*, the United States Supreme Court held unconstitutional a clause in the Minnesota code of judicial conduct that prohibited judicial candidates from announcing their views on disputed legal and political issues. After that decision, numerous lawsuits were filed in federal courts challenging other restrictions on campaign and political conduct by judges and judicial candidates, and judges have raised constitutional arguments in discipline proceedings. (For more information, *see* "Caselaw Following *Republican Party of Minnesota v. White*" at http://www.ncsc.org/cje.) One of the rules that has been frequently challenged is the prohibition on personal solicitation of campaign contributions. Some courts upheld the rule; others overturned it as a violation of the First Amendment.

In 2015, the U.S. Supreme Court eliminated that conflict, and, in a 5-4 vote, rejected a First Amendment challenge to the personal solicitation clause. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015). The Court emphasized:

> Judges are not politicians, even when they come to the bench by way of the ballot. And a State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office. A State may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money.

Thus, the Court affirmed the judgment of the Florida Supreme Court publicly reprimanding a former judicial candidate for asking for contributions to her campaign in a letter she had mailed and posted on her campaign web-site. (For a longer summary of the case, *see* the summer 2015 issue of the *Judicial Conduct Reporter* at http://www.ncsc.org/Topics/Judicial-Officers/Ethics/Center-for-Judicial-Ethics/Judicial-Conduct-Reporter.aspx.)

In its decision, the Court noted that "30 of the 39 States that elect trial or appellate judges have adopted restrictions similar to" Florida's challenged provision, citing the amicus brief of the American Bar Association. One of the nine states without the personal solicitation clause was New Mexico; in early 2015, the New Mexico code of judicial conduct stated in a comment "[c]andidates for judicial office may solicit contributions for their own campaigns, within the restrictions of this rule . . . ."

That changed, however, effective November 1, 2015, after the New Mexico Supreme Court amended the code and added a provision that states a judicial candidate shall not "solicit funds for a candidate or a political organization, or make a contribution to a candidate," deleted the prior comment, and substituted a comment that explains, "candidates for judicial office shall not personally solicit or personally accept campaign contributions."

Concluding that *Williams-Yulee* was controlling, in early 2016, the U.S. Court of Appeals for the 9th Circuit, sitting en banc, upheld clauses in the Arizona code of judicial conduct prohibiting judicial candidates from personally soliciting or accepting campaign contributions other than through a campaign committee, making speeches on behalf of a political organization or another candidate for public office, publicly endorsing or opposing another candidate for any public office, soliciting funds for or paying an assessment to a political organization or candidate, making contributions to any candidate or political organization in excess of the amounts permitted by law, or actively taking part in any political campaign other than his or her own campaign for election, re-election, or retention in office. *Wolfson v. Concannon*, 811 F.3d 1176 (9th Circuit en banc 2016). ★

View "Top Judicial Ethics Stories of 2015" webinar recorded in January 2016 at http://www.ncsc.org/cje.

What they said that got them in trouble

Extra-judicial comments

"Is this how you treat a Supreme Court Judge?" Judge to police after being arrested for driving under the influence on his way home from a judicial conference. *Landicino* (New York Commission 2015) (http://tinyurl.com/z8owa9g).

[I hope the police will not] **"go piling on"** or **"overcharge."** Judge in call to police chief's cell phone the day after his son was arrested. *Sullivan* (New York Commission 2015) (http://tinyurl.com/hcge2ox).

"The victim was not the victim she claimed to be" and the defendant was **"not your typical sex offender."** Judge to reporter after being criticized for sentencing a defendant who pled guilty to sexual assault of a 14-year-old girl to deferred adjudication and community supervision. *Howard* (Texas Commission 2015) (http://tinyurl.com/nzvw5wt).

"[Some people] need to be killed" and **"the state will never get an indictment."** Judge answering questions at a Kiwanis Club meeting about the murder of a local man. *Clifford* (Texas Commission 2015) (http://tinyurl.com/nzvw5wt).

"I wondered what was taking the jury so long, but a lot of times they want to just make it look official, so they'll spend 30, 40 minutes back there. . . ." Judge during a presentation about sex offenders before the Texas Patriots PAC. *Seiler* (Texas Commission 2015) (http://tinyurl.com/nzvw5wt).

"No." Judge's inaccurate response when asked by a judicial nominating commission if she had had any traffic stops that year. *Recksiedler*, 161 So. 3d 398 (Florida 2015).

"I'm going to come to your house and shoot you and run your family out of town." Judge to newspaper publisher. *Combs* (Kentucky Commission 2015) (http://tinyurl.com/z2jkavh).

"Coke-head" and **"dumbo."** Judge referring to the mayor and the city manager respectively. *Combs* (Kentucky Commission 2015) (http://tinyurl.com/z2jkavh).

"I'm canvassing your neighborhood and no one's home. Would you allow me to post a yard sign until the primary?" Judge in one of approximately 15 e-mails sent from his official court account about his re-election campaign. *In the Matter of Grodman*, 2015 Ariz. LEXIS 319 (Arizona 2015).

"I am not sure of your marital status. But if you are not, would you be interested in seeing me? Being on probation is a complication. I am interested if you are." Judge in note on court stationery to a woman he had placed on probation. *Mazur*, 871 N.W.2d 526 (Michigan 2015).

"Some things I guess will never change. I just love doing the stress of jury trials. In a Felony trial now State prosecuting a pimp. Cases are always difficult because the women (as in this case also) will not cooperate. We will see what the 12 citizens in the jury box do." Judge in Facebook post. *Bearse* (Minnesota Board 2015) (http://tinyurl.com/hzvhmln).

"Thank you God for keeping me right where you think I should be.......and to my opponent....here's an Italian wish...'bafongoo' and that's accompanied by a flick of the wrist under the chin. My spelling is phoenic [sic], I'll let you figure out what that means." Judge on her Facebook page after early voting results in her re-election. *Wright* (Texas Commission 2015) (http://tinyurl.com/nzvw5wt).

"Must be nice to take such an expensive trip but not pay your bills. Just sayin'." Judge about a photo of the father of her children on the Facebook page of his girlfriend. *Bennington*, 24 N.E.3d 958 (Indiana 2015).