

JUDICIAL CONDUCT REPORTER



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State judicial discipline in 2018

In 2018, as a result of state disciplinary proceedings, seven judges were removed from office. (See “Removal cases in 2017,” *infra.*) In addition, 25 judges or former judges resigned or retired in lieu of discipline pursuant to public agreements with conduct commissions. One judge agreed to resign and was publicly admonished.

Eleven judges were suspended without pay as a final sanction. One suspension was indefinite and included a public censure. The other suspensions ranged from six days to three years and included suspensions for 15 days, 30 days, 35 days (plus a public censure), 45 days (plus a public censure), 60 days, three months (plus a \$1,000 fine), six months, and 180 days (to be reduced to 90 days if the judge agreed to conditions such as a mentor and monthly reports on pending cases).

Eight-four judges (or former judges in 11 cases) received public censures, reprimands, admonishments, or warnings.

- There were 15 public censures. One censure included a \$2,000 fine, one included an agreement not to run for re-election, and three included orders of additional education.
- There were 39 public reprimands. One reprimand included a suspension without loss of compensation, and nine included conditions, such as additional education.
- There were 23 public admonishments, with additional education ordered in six of those cases.
- There were seven public warnings, with additional education ordered in five cases.
- There were three cease and desist orders.
- Five former judges were disbarred or had their law licenses suspended in attorney discipline proceedings for conduct while they were judges

Approximately 57% of the sanctions were entered pursuant to an agreement.

Not all sanctions are available in every state.

- In six states, removal is not available in discipline proceedings: Maine, Massachusetts, New Hampshire, Tennessee, Vermont, and West Virginia. (Judges can be removed in those states through impeachment.)
- In 11 states, suspension without pay is not available as a final sanction.
- Fines are available in only 11 states.

SAVE THE DATE:
The 26th National
College on Judicial
Conduct and
Ethics will be
held Wednesday
October 23 through
Friday October 25,
2019, in Chicago
at the Embassy
Suites Downtown
Lakefront

A sanction such as censure, reprimand, or admonishment is available in all states, and some states have more than one of those options. (Texas is the only state that issues public warnings.) “Censure,” “reprimand,” and “admonishment” may seem synonymous, but states use them as distinct, escalating forms of verbal rebuke. For example, the rules for the West Virginia Judicial Investigation define all three options:

- “An admonishment constitutes advice or caution to a judge to refrain from engaging in similar conduct which is deemed to constitute a violation of the Code of Judicial Conduct.”
- “A reprimand constitutes a severe reproof to a judge who has engaged in conduct which violated the Code of Judicial Conduct.”
- “A censure constitutes formal condemnation of a judge who has engaged in conduct which violated the Code of Judicial Conduct.”

What they said to or about litigants that got them in trouble

- “Mr. Maggot” or “Maggot Man.” Judge referring in court to a man who was the subject of a guardianship proceeding. *Cross* (Texas Commission 2018) (<https://tinyurl.com/y823b7kg>) (admonition for this and other misconduct).
- “You’re an animal,” and “I am not a potted plant.” Judge to defendant after rejecting agreed-on sentence in a plea agreement in a domestic violence case. *Wilson* (Washington Commission 2018) (<https://tinyurl.com/yasse892>) (admonishment).
- “This is a redneck court.” Judge at beginning of court session. *Lee* (Texas Commission 2018) (<https://tinyurl.com/y7ekoqfp>) (warning).
- “[A]s white as a piece of wonder bread, gets all kinds of protection and attention from the prosecution office.” Judge describing victim in domestic violence case. *Lord* (California Commission 2018) (<https://tinyurl.com/y7dc8zbu>) (admonishment for this and related misconduct).
- “It’s never a big deal when a woman hits a man, but when a man hits a woman all holy hell breaks loose. A man should be allowed to defend himself. If she hit me, I would have hit her back too.” Judge after finding a defendant not guilty of domestic violence. *Summers* (West Virginia 2018) (censure and \$2,000 fine).
- “You could have had a job. I had a job, okay. . . . Went to school full time, worked part-time.” Judge to college student who had failed to pay fees. *Elswick* (California Commission 2018) (<https://tinyurl.com/y8m353ox>) (admonishment for this and other misconduct).

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- “If you have [ADHD], then I don’t know how you can drive, but that’s a different story.” *Elswick* (California Commission 2018) (<https://tinyurl.com/y8m353ox>) (admonishment for this and other misconduct).
- “The tail does not wag the dog, okay. You are the criminal defendant . . .” *Elswick* (California Commission 2018) (<https://tinyurl.com/y8m353ox>) (admonishment for this and other misconduct).
- “Tattoo right now the next court date.” Judge to defendant before handing him a pen to write on his arm. *Ponomarchuk* (Washington Commission 2018) (<https://tinyurl.com/ybf5vmfg>) (admonishment).
- “I feel like I’ve sat for the last four and a half or five hours dealing with junior high school students, both of you, even though you have some gray over your ears, all right.” Judge before denying a woman’s request for a restraining order. *Stafford* (California Commission 2018) (<https://tinyurl.com/y8z5csrp>) (admonishment for this and similar comments).
- “I hope this follows you to prison.” Judge to defendant convicted of child abuse. *Smith* (Nevada Commission 2018) (<https://tinyurl.com/ybua7f3v>) (censure and \$1,500 fine for this and other misconduct).
- “Stay out of the street. It’s super annoying. I hate when people walk in front of my car. If there was [sic] no rules, I would totally run them over because it’s disrespectful.” Judge at arraignment of defendant charged with disorderly conduct for walking in the middle of the road. *Astacio*, 112 N.E.3d 851 (New York 2018) (removal for this and other misconduct).
- “I heard she’s going crazy;” “Well, tase her;” “Shoot her?;” “What do you do, billy-club people?;” “Well, punch her in the face and bring her out here. You can’t take a 16-year-old?;” “She needs a whoopin;” and “Is she crazy or is she bad?” Judge to sheriff’s deputy about a woman who had cursed, kicked, and punched deputies while being transported to the court. *Astacio*, 112 N.E.3d 851 (New York 2018) (removal for this and other misconduct).
- “Eric was not going to be released because he was a threat to society.” Judge to detention center staff about frequent defendant indefinitely detained without due process following arrest for indecent exposure. *Van Gundy* (New Mexico 2018) (<https://tinyurl.com/y7a9kdmg>) (censure).
- “[W]hen ... you said the name I’m like, ‘Aw, come on,’” and “He freak-ing just got out. I represented him.” Judge when former client appeared before her for arraignment. *Astacio*, 112 N.E.3d 851 (New York) (removal for this and other misconduct).
- “I remember telling the judge that I felt like it was outside of his character for him to do something like this.” New judge while sentencing defendant she had represented at the preliminary hearing in the same case. *O’Rourke* (Washington Commission 2018) (<https://tinyurl.com/y9bsnmwq>) (admonishment).

Removal cases in 2018

From 1980 through 2017, approximately 441 judges were removed from office as a result of state disciplinary proceedings. In 2018, there were seven removals.

Two New York judges

Accepting determinations of the State Commission on Judicial Conduct, the New York Court of Appeals removed two judges for a variety of misconduct. Both judges had admitted to at least some violations but argued that censure, rather than removal, was the appropriate sanction. (Suspension without pay is not available in New York.)

The Court removed one judge who (1) had been convicted of driving while intoxicated; been discourteous to and sought preferred treatment from the arresting officers; and violated the terms of her conditional discharge by drinking alcohol and going to Thailand for an extended vacation without notice; (2) had failed to disqualify herself from the arraignment of a former client and attempted to prevent his case from being transferred to a judge she thought was not very “nice to anyone;” and (3) had made discourteous, insensitive, and undignified comments in court. *In the Matter of Astacio*, 112 N.E.3d 851 (New York 2018). For examples of the judge’s comments to the police and in court, see “What they said that abused the prestige of office,” *infra*, and “What they said to or about litigants,” *supra*.

The Court acknowledged that the judge had “expressed some contrition” and stated that it did not expect judges to “adopt a posture of obedience.” However, noting the judge’s continued use of “external factors and justifications as excuses,” the Court concluded that she lacked “insight into the gravity and impact of her behavior on both public perception of her fitness to perform her duties and on the judiciary overall” and, therefore, that “any rupture in the public’s confidence cannot be repaired.”

* * *

The New York Court removed the second judge for (1) on numerous occasions, acting impatiently, raising his voice, and making demeaning and insulting remarks in open court; (2) twice striking witness testimony and dismissing petitions for insufficient proof because counsel reflexively kept saying “okay” after the witnesses’ answers; (3) awarding counsel fees without providing an opportunity to be heard; and (4) his “persistent failure” to cooperate with the Commission. *In the Matter of O’Connor*, 112

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N.E.3d 317 (New York 2018). For examples of the judge’s comments in court, see “What they said to or about attorneys,” *infra*. For a discussion of the inappropriate attorney fees awards, see “Legal error plus,” *infra*.

Noting that some of the judge’s misconduct took place within one year of a prior censure, the Court emphasized that his failure to exercise vigilance within just a year of “prior discipline is persuasive evidence that [he] lacks the judgment necessary to [his] position.” The Court rejected the judge’s argument that his failure to cooperate “should not elevate the sanction to removal.” Looking at the entirety of his behavior, the Court concluded:

If the public trust in the judiciary is to be maintained, as it must, those who don the robe and assume the role of arbiter of what is fair and just must do so with an acute appreciation both of their judicial obligations and of the Commission’s constitutional and statutory duties to investigate allegations of misconduct In short, willingness to cooperate with the Commission’s investigations and proceedings is not only required—it is essential.

Two Florida judges

The Florida Supreme Court removed two judges based on conduct during their judicial election campaigns. The Court emphasized its repeated past warnings that judges who commit “egregious misconduct during a judicial campaign in order to attain office” will not be allowed “to reap the benefits of their misconduct by continuing to serve the citizens of this state.” *Inquiry Concerning Santino*, 257 So.3d 25 (Florida 2018). The Court explained that any sanction other than removal “would send a message” to judicial candidates that they may adopt a “win-at-all-costs” strategy and “a suspension or a fine or both will be the only result.”

During then-candidate Santino’s 2016 campaign for an open judicial seat, a Facebook page titled, “The Truth About Gregg Lerman,” her campaign opponent, was created by Taxpayers for Public Integrity, an electioneering communications organization formed by her campaign consultant. The page stated: “Attorney Gregg Lerman has made a lot of money trying to free Palm Beach County’s worst criminals. Now he’s running for judge!” There was a photograph of Lerman surrounded by the words, “CHILD PORNOGRAPHY,” “DRUG TRAFFICKING,” “MURDER,” “Identity Theft,” “RAPE,” “Sexual Assault,” “Internet Solicitation of Minors,” and “PEDOPHILES.” The page also highlighted four high profile cases, stating, for example, “Instead of representing victims of crime, Gregg Lerman chose to represent convicted serial killer Ronald Knight who targeted gay men and brutally murdered them. Now, he’s running for Judge!”

The Court emphasized the hearing panel finding that the Facebook page had falsely communicated that the judge’s opponent “was unfit for judicial office because of the type of law he practiced, and the type of clients he represented.” The Court also explained that the judge’s campaign statements “evidenced a bias against criminal defendants, toward whom she imputed guilt; against criminal defense attorneys, whom she implied had some

“In short, willingness to cooperate with the Commission’s investigations and proceedings is not only required—it is essential.”

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character fault because they ‘choose’ to represent criminal defendants; and in favor of victims, whom she boasted that she worked to protect during her legal career.”

* * *

The Florida Court removed a second judge for (1) misrepresenting facts about his campaign opponent; (2) pledging during a televised candidate forum not to hold any statute unconstitutional; (3) holding first appearance hearings earlier than scheduled and without counsel present one Memorial Day weekend during the campaign; and (4) ordering the search of a litigant in open court and the seizure of money found on him. *Inquiry Concerning DuPont*, 252 So. 3d 1130 (Florida 2018). For examples of the judge’s campaign comments, see “What they said during campaigns,” *infra*.

Lack of “honor and integrity” in New Jersey

The New Jersey Supreme Court removed a judge for making material misrepresentations to influence the police to take action in a custody dispute. *In the Matter of DeAvila-Silebi*, 194 A.3d 497 (New Jersey 2018). The Court’s order does not describe the judge’s misconduct; this summary is based on the report of a three-judge panel (<https://tinyurl.com/ybmp3fal>).

The day before Mother’s Day 2015, the judge called the police, identified herself as the emergent duty judge, and said she wanted an officer to accompany a mother to retrieve her five-year-old son. She explained that she had received a phone call from an attorney who had filed an emergent application on behalf of a client and that she had seen the order indicating that the mother was supposed to have the boy that weekend.

The police department dispatched an officer with the mother to the home of the boy’s paternal grandmother; the officer took the boy from his grandmother and returned to police headquarters with the boy and the mother, after which the mother left with her son. The father appeared at police headquarters approximately two hours later, irate and questioning why police had removed his son.

Contrary to what she told the police sergeant, the judge had not received a phone call from an attorney, no emergent application had been filed, and she had not reviewed the court order regarding parenting time. The panel found that the judge’s misrepresentations to the police “demonstrated dishonesty, perversion of her judicial authority and betrayal of the public trust.”

In aggravation, the panel emphasized that the judge’s additional dishonesty during the discipline proceedings “transcended her right to present a defense.” Most significantly, the panel found that, despite her repeated denials, the judge did know the mother; the mother had been the judge’s intern for several months in 2014, and they had continued to have contact after the internship. In fact, they had exchanged texts just before and after

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the judge had intervened with the police, and the phone records the judge had produced to prove otherwise had obviously been altered. The panel emphasized that the judge’s “‘disturbing’ decision to perpetuate a defense without any ‘compunction about being less than credible’ . . . , ‘evidence[s] that [she] lacks the honor and integrity demanded of a judge.’”

Two Pennsylvania judges

Two Pennsylvania judges were removed based on their criminal conduct.

- Without opinion, the Pennsylvania Supreme Court affirmed the decision of the Court of Judicial Discipline to remove a former judge based on her conviction on two counts of perjury for her false testimony before a federal grand jury investigating preferential treatment of favored defendants in the Philadelphia Traffic Court and her negotiated guilty plea in state court to accepting improper influence for receiving a piece of jewelry while she was the president judge of the traffic court. *In re Tynes*, Order (Pennsylvania Supreme Court January 8, 2018) (<https://tinyurl.com/y9dpgk5v>), *affirming*, Opinion and order (Pennsylvania Court of Judicial Discipline 2016) (<https://tinyurl.com/y9df6fkj>).
- Based on joint stipulations of fact in lieu of trial, the Pennsylvania Court of Judicial Discipline removed a former judge who had pled nolo contendere to “criminal activity related to the exercise of his judicial duties,” that is, retaining the services of constables only if they agreed to contribute to his judicial re-election campaign. *In re Jennings*, Opinion and order (Pennsylvania Court of Judicial Discipline July 18 & December 19, 2018) (<https://tinyurl.com/yb74acky>).

What they said to or about attorneys that got them in trouble

- “[D]o you want to know what I would have done?” Judge offering ex parte advice to prosecutor about countering a defense in a DWI case. *Mills* (California Commission 2018) (<https://tinyurl.com/yb2sp7x2>) (censure for this and other misconduct).
- “I was hoping we could just get the State to dismiss it.” Judge in court to prosecutor about a ticket involving “a friend of mine.” *Johanningsmeier*, 103 N.E.3d 633 (Indiana 2018) (reprimand).

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- “You can have your temper tantrum outside of my courtroom.” Judge to attorney. *Novak* (California Commission 2018) (<https://tinyurl.com/y7yjtjss>) (admonishment for this and other misconduct).
- “You don’t have to sarcastically say thank you every time I make a ruling, okay counsel?” and “I don’t see any other way to take it, counsel ... It’s obviously clear.” Judge to attorney. *O’Connor*, 112 N.E.3d 317 (New York 2018) (removal for this and other misconduct).
- “No wonder people think lawyers are a disgrace. It’s people like you who give them that impression.” Judge to attorney. *O’Connor*, 112 N.E.3d 317 (New York 2018) (removal for this and other misconduct).
- “I understand there’s a battle between your office and myself okay. I’m not trying to make a battle is my point.” Judge to public defender after public defender’s office disqualified him in an unrelated case. *Elswick* (California Commission 2018) (<https://tinyurl.com/y8m353ox>) (admonishment for this and other misconduct).
- The prosecutor “didn’t think it was funny ... She was offended. I thought it was hilarious.” Judge after laughing when a defense attorney said that a request for an order of protection appears to be “a case of buyer’s remorse.” *Astacio*, 112 N.E.3d 851 (New York 2018) (removal for this and other misconduct).
- “And the District Attorney’s Office is apparently moving forward against your wishes, against the victim’s wishes, again. . . . I’m getting tired of the District Attorney’s Office using the victims as their own tools in my Court.” *Williams* (Texas Commission 2018) (<https://tinyurl.com/ydalkrfn>) (reprimand for this and other misconduct).

#MeToo and the judiciary

Top Judicial Ethics Stories of 2018

The #MeToo movement to hold accountable people in authority (predominantly men) for their sexual misconduct in the workplace began in the fall of 2017 in Hollywood and has since spread to many other professions. That the theme of “Time’s Up” would apply to the judiciary was clear by December 2017, with an article in *The Washington Post* entitled: “Prominent appeals court Judge Alex Kozinski accused of sexual misconduct” (<https://tinyurl.com/yb59x5zr>). Following a second article with additional allegations (<https://tinyurl.com/ybuysw9s>), Kozinski resigned from the U.S. Court of Appeals for the Ninth Circuit (<https://tinyurl.com/yauwm8e3>), resulting in the dismissal of the complaints against him (<https://tinyurl.com/yarbcy6k>), although the U.S. Judicial Conference Committee on Judicial Conduct and Disability did forward a copy of dismissal order to the

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House of Representatives Judiciary Committee (<https://tinyurl.com/ybrcdtdg>). In December 2018, Kozinski was co-counsel on a brief on behalf of the appellant filed before his former court (<https://tinyurl.com/yaqz6jxz>).

* * *

It is too early to tell whether the #MeToo movement will result in an increase in the number of judges publicly sanctioned for sexual harassment or similar misconduct. Even if there has been a recent increase in complaints about such conduct to discipline commissions, many of those matters would still be in the confidential investigation phase, particularly if the allegations are extensive and disputed.

There are several sanctions every year for sexual misconduct by judges, and, given the timing, most if not all of the 2018 cases were probably initiated long before.

- The Kansas Commission on Judicial Qualifications ordered a former judge to cease and desist from offensive and demeaning verbal and/or physical conduct toward female court reporters and other judges and to continue his retirement. *Inquiry Concerning Yeoman*, Order (Kansas Commission on Judicial Qualifications February 7, 2018).
- Accepting the parties' stipulation of facts, the Massachusetts Supreme Judicial Court indefinitely suspended a judge without pay and publicly censured him for his sexual relationship with a member of the drug court team. *In re Estes*, Order (Massachusetts Supreme Judicial Court May 24, 2018) (<https://tinyurl.com/ybtgguwt>). The Court, which cannot remove judges, provided that its order be delivered to the governor and the legislature. The judge resigned after the court's order.
- The Texas State Commission on Judicial Conduct publicly reprimanded a judge for hiring as his clerk a woman with whom he had an intimate relationship and making inappropriate comments to her during office hours, in addition to other misconduct. *Public Reprimand of Jasso and Order of Additional Education* (Texas State Commission on Judicial Conduct April 18, 2018) (<https://tinyurl.com/y8cb39m2>).
- The Texas State Commission on Judicial Conduct publicly reprimanded a judge for engaging in an intimate relationship with the city's prosecutor. *Public Reprimand of Berry and Order of Additional Education* (Texas State Commission on Judicial Conduct February 21, 2018) (<https://tinyurl.com/y8xabvtu>).
- The Texas State Commission on Judicial Conduct publicly reprimanded a judge for inappropriately touching another judge and two court clerks at a social function and sending the other judge an offensive text message, in addition to other misconduct. *Public Reprimand of Williams* (Texas State Commission on Judicial Conduct December 14, 2018) (<https://tinyurl.com/ydalkrfn>).
- Based on a stipulation and agreement, the Washington State Commission publicly admonished a judge for responding "nine inches"

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New posts every
Tuesday plus
Throwback
Thursdays.

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when a female court clerk stated, “I have a question for you” after a court session. *In re Kathren*, Stipulation, agreement, and order (Washington State Commission on Judicial Conduct December 7, 2018) (<https://tinyurl.com/y7xhvkb5>).

See also *In re Complaint No. 05-18-90083*, Memorandum (Judicial Council for the 5th Circuit November 9, 2018) (<https://tinyurl.com/yd79lly7>) (based on a finding that appropriate corrective action had been taken, concluding a proceeding against an unnamed magistrate judge for inappropriately pursuing social relationships with an attorney who practices before him and with a court employee).

In addition to Kozinski’s resignation, there were reports of several other resignations in 2018 that terminated investigations of workplace misconduct.

- Based on a stipulation and the judge’s resignation and agreement not to serve in judicial office, the Indiana Commission on Judicial Qualifications concluded its investigation of allegations that a magistrate had inappropriate relationships with court employees and attorneys during court hours and on court property. *In the Matter of Shoulders*, Stipulation and agreement (Indiana Commission on Judicial Qualifications May 2, 2018) (<https://tinyurl.com/y8lh7pu7>).
- According to the *Omaha World-Herald* (<https://tinyurl.com/yavcztef>), a Nebraska Supreme Court justice resigned following a complaint to the Judicial Qualifications Commission; reportedly, the allegations were “in line with the national #MeToo movement,” and attorneys and former colleagues told the newspaper that his judicial career “has been poked with sexual comments to women.”
- According to the *Washington Post* (<https://tinyurl.com/yczno44e>), the Maryland Commission on Judicial Disabilities told a former court administrative aide that it would file charges based on her complaint that a judge had created a sexually charged work environment but subsequently notified her that the charges were being “held in abeyance” in light of the judge’s announcement that he was retiring.
- Based on the judge’s resignation and agreement to be disqualified from judicial service in the state, the Texas State Commission on Judicial Conduct agreed not to proceed with its investigation of a judge’s alleged affair with an attorney representing a party in a high value probate matter before the judge, as described in an article in *D Magazine* entitled “Ardor in the Court.” *Peyton*, Voluntary agreement to resign from judicial office in lieu of disciplinary action (Texas State Commission on Judicial Conduct January 26, 2018) (<https://tinyurl.com/yd7nlxf8>).

Of course, other judges may also have resigned recently during investigations of allegations of sexual misconduct without disclosure by the commission or reporting by the media. Some state jurisdictions as well as the

federal judiciary by rule or policy discontinue investigations when a judge resigns or retires.

There are currently several pending public judicial discipline proceedings that include allegations of sexual misconduct.

- Based on a complaint by the Judicial Conduct Board, the Pennsylvania Court of Judicial Discipline has found that a judge committed misconduct by viewing images of naked and partially naked women while in his office, in addition to other misconduct (<https://tinyurl.com/yco3xu9d>). A hearing on sanctions will be scheduled.
- Following a hearing, the Ohio Board of Professional Conduct has recommended that a court of appeals judge be indefinitely suspended for a pattern of inappropriate sexual comments and conduct toward members of his staff at the courthouse and outside of work, in addition to other misconduct (<https://tinyurl.com/yamzxsjq>).
- In a notice of formal proceedings (<https://tinyurl.com/y93ae99l>), the California Commission on Judicial Performance has alleged that a judge engaged in a pattern of conduct towards a deputy public defender, other attorneys, and women who appeared or worked in his courtroom that was unwelcome, undignified, discourteous, and offensive and that would reasonably be perceived as sexual harassment or sexual discrimination.
- In a notice of formal proceedings (<https://tinyurl.com/y7yr8jbo>), the California Commission on Judicial Performance has alleged that an appellate justice engaged in a pattern of unwelcome, undignified, discourteous, and offensive conduct that would reasonably be perceived as sexual harassment or as bias or prejudice based on gender towards another justice on the court, highway patrol officers assigned to the judicial protection section, court attorneys, and other court personnel while on the state court of appeal and while a federal magistrate judge, beginning in 1999.

* * *

Separate from the discipline process, some courts have revised training, policies, and procedures to address sexual harassment and similar workplace misconduct.

Prompted by the Kozinski revelations, Chief Justice Roberts created a working group to examine the federal judiciary's practices for investigating and correcting sexual harassment (<https://tinyurl.com/yaxgx4gp>). In March, the group described nearly 20 improvements that have been implemented or were under development (<https://tinyurl.com/y6vft49p>), and in June, it issued a report with findings and recommendations (<https://tinyurl.com/yb6ag9dz>). In September, two committees of the U.S. Judicial Conference published for public comment proposed amendments to the Code of Conduct for U.S. Judges and to the Rules for Judicial-Conduct and Judicial-Disability Proceedings (<https://tinyurl.com/ybj9yexb>). A public hearing was held on

“Separate from the discipline process, some courts have taken steps to improve training, policies, and procedures to address sexual harassment and similar workplace misconduct.”

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the proposed changes in October (<https://tinyurl.com/yc6mjtx3>). In his *2018 Year-End Report on the Federal Judiciary* (<https://tinyurl.com/ybg3pk7f>), Chief Justice Roberts described the working group's efforts, endorsed its recommendations, and explained that the proposals will be fine-tuned before the next meeting of the Judicial Conference in March 2019. In addition, based on their own committees, the D.C., Seventh, Ninth, and Tenth Circuits have adopted revised policies and procedures regarding workplace environment. In December, the Administrative Office of the U.S. Courts appointed the first judicial integrity officer for the federal judiciary (<https://tinyurl.com/y8jtvzsm>).

With respect to state courts, on January 31, 2018, the Conference of Chief Justices adopted a resolution encouraging “the judicial branch of each state, territory, and the District of Columbia to establish and maintain policies: (1) to provide every judge and employee with training that addresses the various forms of workplace harassment, including sexual harassment, and related intimidation and reprisal that are prohibited by law; and (2) to establish procedures for recognizing and responding to harassment and harassment complaints” (<https://tinyurl.com/ydaqrtj5>). Many states already had sexual discrimination and harassment policies, but several have recently adopted new or revised procedures or announced committees to make recommendations for up-dates.

- The Chief Justice of the Alaska Supreme Court announced the creation of a working group to examine what changes are needed in the court system's anti-sexual harassment policy and procedures (<https://tinyurl.com/y8x3273x>).
- The Arizona Supreme Court adopted a new section on discrimination and harassment to the Code of Judicial Administration (<https://tinyurl.com/ybh3rbnv>).
- The Chief Justice of the California Supreme Court created a working “group to study and make recommendations for how the judicial branch can prevent and address harassment, discrimination, or inappropriate workplace conduct” (<https://tinyurl.com/y85m4roy>).
- The Florida Supreme Court adopted “Sexual Harassment Policy and Procedures for Sexual Harassment Complaints against Justices and Judges,” replacing a policy adopted in 2004 (<https://tinyurl.com/yccbngjng>).
- The New Jersey Supreme Court adopted a “Revised Judiciary Policy Statement on Equal Employment Opportunity, Affirmative Action and Anti-Discrimination” (<https://tinyurl.com/y9lljbvb>).

In October, the National Center for State Courts created a “repository for resources to assist the state courts in developing or updating training, policies, and procedures” regarding workplace harassment (<https://tinyurl.com/y7vgwwkh>).

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What they said to or about court staff or other judges that got them in trouble

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- “I heard [you were] one of my victims.” Judge to a clerk after social function at which he had inappropriately touched two clerks and another judge. *Williams* (Texas Commission 2018) (<https://tinyurl.com/ydalkrfn>) (reprimand for this and other misconduct).
- “[N]ice body for a 70 year old.” Judge in a text to another judge about a group photo taken at a social function. *Williams* (Texas Commission 2018) (<https://tinyurl.com/ydalkrfn>) (reprimand for this and other misconduct).
- “Nine inches.” Judge in response to a clerk stating, “I have a question for you,” after a court session. *Kathren* (Washington Commission 2018) (<https://tinyurl.com/y7xhvk5>) (admonishment).
- “Heifers” and “DW” (double wide). Judge referring to court personnel. *Peeler*, 818 S.E.2d 723 (South Carolina 2018) (reprimand for this and other misconduct).
- “[S]he would be here in hunter orange this morning, in chains, where she would stay and enjoy her Thanksgiving dinner, probably her Christmas dinner as well.” Judge about the elected county clerk in an ex parte hearing at which he barred her from the courthouse. *Young*, 92 N.E.3d 628 (Indiana 2018) (six-day suspension without pay for this and other misconduct).
- “I can take a lot of things, but I can’t take a liar.” Judge to a clerk about her cooperation in a discipline investigation. *Tidd*, 181 A.3d 14 (Pennsylvania Court of Judicial Discipline 2018) (reprimand for this and other misconduct).
- “I can do that” and “we do that all the time in St. Johns County.” Judge to administrative judge about ordering his bailiff to search a father and turn over his money to the mother in a child support hearing. *DuPont*, 252 So. 3d 1130 (Florida 2018) (removal for this and other misconduct).
- “Dragging [my] feet,” no excuse other than “dread” of the case, and “making a decision soon.” Judge to chief judge over a year and a half after taking a case under advisement and approximately nine months before issuing a decision. *Henderson*, 812 S.E.2d 826 (North Carolina) (reprimand).

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Indictments and impeachments in West Virginia

Top Judicial Ethics Stories of 2018

Of the five justices who were on the West Virginia Supreme Court of Appeals in late 2017, only two were still on the Court in late 2018:

- One justice resigned in June 2018 and subsequently pled guilty to a federal criminal charge.
- One resigned in August after being impeached by the House of Delegates.
- One resigned in November; there were pending judicial discipline charges against him, he had been impeached, and he had been convicted of federal criminal charges.

Of the two remaining:

- One was impeached in August but was acquitted after a trial in October although the senate reprimanded and censured her.
- One was impeached in August, but, in October, the Court, with five acting justices sitting, prohibited the senate from proceeding with the prosecution.

There is a timeline of the events in West Virginia on the Center for Judicial Ethics blog (<https://tinyurl.com/yaxqa8te>).

What they said that abused the prestige of office that got them in trouble

- “So, I live right there. I’m Judge Atwal from Ramsey County.” Judge to police officer in traffic stop that led to his arrest for driving while impaired. *Atwal* (Minnesota Board 2018) (<https://tinyurl.com/yd6ze79w>) (reprimand).
- “With all due respect, I don’t know you, so you don’t do DWIs, and you don’t know what you’re doing, but you’re making a very big mistake.” Judge to police officer arresting her for driving while intoxicated.

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Astacio, 112 N.E.3d 851 (New York 2018) (removal for this and other misconduct).

- “I’m a f**cking judge. I would never do anything to hurt you man. Come on.” Judge to police officer while being handcuffed during arrest for driving while intoxicated. *Benitez* (New Jersey 2018) (<https://tinyurl.com/ybxwbdq4>) (censure).
- “Just let it slide,” or words to that effect. Judge who gratuitously identified herself as a judge several times after striking a police van at a traffic light to the officer writing a report. *Michels* (New York Commission 2018) (<https://tinyurl.com/y855cthl>) (admonishment).
- “You the tax payers decided that a long time ago.” Judge referring to not getting a pay raise when explaining to court personnel that he wanted to dispute a cost of living increase applied to his child support payments. *Palmer* (New Jersey 2018) (<https://tinyurl.com/ybxwbdq4>) (censure).
- “Please help Boys & Girls Club.” Judge about a fund-rasier using his judicial e-mail account. *Castaneda* (New Mexico 2018) (<https://tinyurl.com/y8ogwu45>) (bar from judicial office for numerous inappropriate uses of state e-mail address).

Facebook fails

Top Judicial Ethics Stories of 2018

Several discipline cases in 2018 illustrate the perils of participating on social media that ethics advisory committees have warned judges about, for example, the thoughtlessness fostered by the ease of posting comments and the temptation to entertain on-line viewers. *See also* “What they said that got them in trouble on social media,” *infra*.

The Arizona Commission on Judicial Conduct publicly reprimanded a judge for mocking a litigant in a Facebook post that purported to be a verbatim account of an eviction proceeding and began: “In the category of, You can’t make this stuff up!” *Urie*, Order (Arizona Commission on Judicial Conduct June 12, 2018) (<https://tinyurl.com/y9d9surv>). The judge referred to the individuals by their role in the case.

The post described a maintenance man’s testimony about finding cocaine under the bathroom rug in the tenant’s apartment. Testifying that the heroin was not his, the tenant explained that cocaine was his drug of choice and that he keeps his drugs in a safe. When asked how the heroin got into his apartment, the tenant replied: “I don’t know. Maybe one of the hookers I had in my apartment left it.” The judge’s post ended: “Needless to say, the Court ruled in favor of the landlord.”

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When one of his Facebook friends asked if this was a true story, the judge posted: “Yes. It goes without saying but the tenant wasn’t the brightest bulb in the chandelier.”

Based on an agreement, the Kentucky Judicial Conduct Commission publicly reprimanded a judge for sharing a news story on her Facebook account with the comment: “This murder suspect was RELEASED FROM JAIL just hours after killing a man and confessing to police.” *In re the Matter of McLaughlin*, Agreed order of public reprimand (Kentucky Judicial Conduct Commission June 12, 2018) (<https://tinyurl.com/y9jrdlga>). The judge’s Facebook account was entitled “Judge Sandra McLaughlin.”

Even if a post does not use the judge’s title, it may constitute judicial misconduct. When a judge made disparaging posts about a private property dispute in retaliation for public accusations about his conduct in unrelated cases, the New York State Commission on Judicial Conduct noted that, although the posts did not refer to his judicial position or mention the litigant by name, “many in his small community would likely know that he is a judge and would recognize the property and individuals involved.” *In the Matter of Fisher*, Determination (New York State Commission on Judicial Conduct June 26, 2018) (<https://tinyurl.com/y94vg3rp>) (admonishment). The Commission explained:

Even if he was provoked by what he perceived as S.’s improper behavior, it was respondent’s obligation as a judge to observe high standards of conduct and to act with restraint and dignity instead of escalating the unseemly public accusations and debate over a private matter that played out on Facebook. Every judge must understand that a judge’s right to speak publicly is limited because of the important responsibilities a judge has in dispensing justice, maintaining impartiality and acting at all times in a manner that promotes public confidence in the judge’s integrity.

Responsibility

Several judges were sanctioned for content on their Facebook pages posted by others to whom they had delegated the task. For example, the Texas State Commission on Judicial Conduct admonished a judge for Facebook posts advertising a school supply drive, soliciting donations for an individual, and advertising his donation of a rifle to a charitable raffle, even though a member of his judicial staff handled his Facebook page, many posts were made without his prior authorization, and he was often unaware of what appeared on his page. *Public Admonition of Metts* (Texas State Commission on Judicial Conduct October 3, 2018) (<https://tinyurl.com/ycm2gp77>). Similarly, the Texas Commission reprimanded a judge for campaign advertisements for other candidates that were posted on his Facebook page even though he had not authorized the posts and did not know about them until he received the Commission’s inquiry. *Public Reprimand of Lopez* (Texas State Commission on Judicial Conduct June 6, 2018) (<https://tinyurl.com/ybmfteyn>).

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Similarly, judicial candidates are held accountable for their campaign Facebook pages. Removing a judge for unfair criticism of her campaign opponent on a Facebook page created by her campaign consultant, the Florida Supreme Court held that the judge “was ultimately responsible” and noted the hearing panel finding that nothing in the code of judicial conduct permitted the judge “to delegate to her campaign manager the responsibility for written materials created or distributed by the campaign.” *Inquiry Concerning Santino*, 257 So.3d 25 (Florida 2018). See also “Removal cases in 2018,” *supra*.

The Nevada Commission on Judicial Discipline reprimanded a former judge for a photoshopped picture of herself and an actor that her campaign manager had posted on her campaign Facebook page, which misled the public that the Rock had endorsed her campaign, and for her subsequent comment on the post: “I’m ‘almost’ taller than him. Almost.” *In the Matter of Almase*, Findings of fact, conclusions of law, and imposition of discipline (Nevada Commission on Judicial Discipline October 22, 2018) (<https://tinyurl.com/y865qdxxy>). The Commission found that the judge had not taken reasonable measures to ensure that her campaign representatives complied with the code of judicial conduct, noting that her contract with her campaign manager did not have any restrictions on the posting of social media materials or require the judge’s prior approval, and that the judge had not discussed with her campaign representatives the prohibitions in the code. The Commission reminded judicial candidates that “campaign-related social media platforms, such as Facebook, maintained by a campaign committee or others, do not insulate them from the strictures of the Code.”

Unfamiliarity with the technology

The importance of judges’ understanding the technical aspects of the social media they use was highlighted by a case in which a court commissioner told his presiding judge and the commission that he had taken posts down when that was not true, although the gravamen of the misconduct was the “egregious” content on his public Facebook page. *In the Matter Concerning Gianquinto*, Decision and order (California Commission on Judicial Performance August 22, 2018) (<https://tinyurl.com/ydguvlza>). After the presiding judge wrote the commissioner that there was “significant concern” about the “content” of his posts and the “impression” a member of the public might have on reviewing them, the commissioner responded that he had deleted the posts, had refrained from sharing similar posts, and had “designated my Facebook account as ‘private’ which means only my friends can view any future posts.” In his self-report to the Commission, the commissioner repeated those representations.

However, for at least four months longer, the commissioner’s Facebook page remained public, and several of the posts were still on the page. Although the commissioner had tried to change the page, his “unfamiliarity with the technology resulted in the changes not taking effect as

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intended.” When he was told that the posts were still public, “the commissioner immediately sought further assistance, deleted the offending posts, and increased the privacy settings on his Facebook profile.”

The commissioner’s page included original posts he wrote but also photos, videos, and material posted by others that he reposted and sometimes commented on. The Commission decision described at least 45 posts or reposts and included screenshots. The Commission found that his page “inherently” undermined public confidence in the judiciary and brought the judicial office into disrepute by reflecting anti-immigration sentiment, anti-Muslim sentiment, anti-Native American sentiment, anti-gay marriage and anti-transgender sentiment, anti-liberal and anti-Democrat sentiment, anti-California sentiment, opposition to then-presidential candidate Hillary Clinton, praise for then-candidate Donald Trump, accusations against President Barack Obama, a lack of respect for the federal justice system, and contempt for the poor. Based on a stipulation, the Commission publicly censured the now-former commissioner and barred him from receiving an appointment of work from any California state court, noting that, because he had retired, that was the strongest discipline it could impose.

As *Gianquinto* illustrates, a judge is responsible not only for content he creates on Facebook but also for material he shares. Similarly, the Texas State Commission on Judicial Conduct publicly reprimanded a judge for sharing a meme on his Facebook page that featured a picture of retired Marine Corps General James Mattis with the text: “Fired by Obama to please the Muslims, hired by Trump to exterminate them.” *Public Reprimand of Burkeen* (Texas State Commission on Judicial Conduct February 21, 2018) (<https://tinyurl.com/y9nnywla>). The reprimand was also for his own posts “railing or venting” about the intolerance of liberals.

Social media solicitations

Illustrating the need for more guidance on charitable activities and social media, the Washington State Commission on Judicial Conduct admonished two judicial officers for Facebook posts soliciting contributions to non-profit organizations. In both cases, the Commission noted that “social media is a relatively new form of communication,” and “the law tends to lag behind technology.” Stating that most judges “are quite conscious that they may not solicit funds for themselves or others in face-to-face encounters,” the Commission concluded that there is no “meaningful or workable distinction between in-person and written or electronic solicitations” The Commission emphasized that the “prohibition against judicial solicitation of money does not reflect on the worthiness or virtue of the charity or cause” but that “a near blanket prohibition” on fund-raising “is necessary as it would be impossible to exercise principled distinctions based on the nature of the charity involved, and it would be improper to have a government agency such as a conduct commission make such value choices.”

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Thus, the Commission publicly admonished a supreme court justice for two posts soliciting support for non-profit organizations. *In re Yu*, Stipulation, agreement, and order (Washington State Commission on Judicial Conduct December 7, 2018) (<https://tinyurl.com/yava9qfm>). The justice maintains a Facebook page that identifies her as a member of the judiciary and, “[i]n Facebook parlance,” is a “government official” page that anyone can access but that no one can “friend.” The justice is actively engaged in the community and uses the page to educate viewers about matters related to the judicial branch; her posts are intended to make the court and judicial officers more accessible and transparent to the public.

On April 22, 2018, the justice shared a post from a web-site on her Facebook page:

Join Lifelong for Dining Out For Life on April 26!

On Thursday, April 26, raise your fork for Dining Out For Life! Join Lifelong at one of 90 restaurants in the Greater Seattle Area who are set to donate 30-50% of their proceeds to vital programs that support people facing serious illness and poverty in our community.

(Lifelong is a non-profit organization that provides assistance for persons suffering from drug abuse and addiction.) Similarly, the justice posted about a newspaper that employs homeless and previously homeless people as vendors.

The Commission explained:

While these Facebook posts present no articulable element of coercion, the Commission finds that it is still an abuse of the prestige of judicial office. The prestige is appropriately reserved for the service of the office itself, and not to be used for the individual benefit of the judge or others, regardless how generally good the cause may be.

The justice did not believe her posts constituted a solicitation, but she acknowledged that the Commission is charged with enforcing the code and deferred to its determination that the posts were a violation. The justice believed the stipulation would provide needed guidance for other judicial officers and raise their awareness of the risks of sharing information on social media that could be construed as solicitations or endorsements. *See also In re Svaren*, Stipulation, agreement, and order (Washington State Commission on Judicial Conduct December 7, 2018) (<https://tinyurl.com/yd8drd98>) (admonishment for posting about a pancake breakfast fund-raiser).

Disqualification

Outside the context of a judicial discipline case, the Florida Supreme Court held that, standing alone, a judge’s Facebook “friendship” with an attorney appearing in a case did not disqualify the judge, the first decision on the issue by a supreme court. *Law Offices of Herssein and Herssein v. United*

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Services Automobile Association (Florida Supreme Court November 15, 2018) (<https://tinyurl.com/ybmvpec8>).

The Court began with the “general principal” that a traditional friendship between a judge and an attorney, standing alone, did not require disqualification, noting that traditional friendship “varies in degree from greatest intimacy to casual acquaintance.” There is “an even broader spectrum” for Facebook friendship, the Court found, varying “in degree from greatest intimacy to ‘virtual stranger’ or ‘complete stranger.’” Therefore, the Court held, disqualification was not required: no reasonably prudent person would fear that she could not receive a fair and impartial trial based solely on a judge’s Facebook friendship with an attorney that indicated only “a relationship of an indeterminate nature” and did not “signal the existence of a traditional ‘friendship’” much less “a close or intimate relationship.”

The Court disagreed with *Florida Advisory Opinion 2009-20* (<http://tinyurl.com/y1rw9zm>), which stated that a judge should not be friends on Facebook with lawyers who may appear before the judge. The advisory opinion had reasoned that a judge’s selection of some attorneys as friends on Facebook, rejection of others and communication of those choices conveyed, or permitted others to convey, the impression that they are in a special position to influence the judge. Citing advisory opinions from other states and noting that the Florida committee’s advice was the minority position, the Court explained that even “traditional ‘friendship’ involves a ‘selection and communication process,’ albeit one less formalized than the Facebook process,” as people “traditionally ‘select’ their friends by choosing to associate with them to the exclusion of others” and “traditionally ‘communicate’ the existence of their friendships by choosing to spend time with their friends in public, introducing their friends to others, or interacting with them in other ways that have a public dimension.”

In a dissent, one justice argued that, contrary to the premise of the majority, “equating friendships in the real world with friendships in cyberspace is a false equivalency,” noting that a Facebook friend “gains access to all of the personal information on the user’s profile page—including photographs, status updates, likes, dislikes, work information, school history, digital images, videos, content from other websites, and a host of other information—even when the user opts to make all of his or her information private to the general public. . . .” Further, the dissent argued, the majority’s standard would force a litigant to engage in “impractical and potentially invasive” discovery to determine if there was something more than a mere Facebook “friendship” that could justify filing a motion for recusal. The dissent urged the Court to “at least adopt parameters for judges to follow when engaging with social media” and determining whether to friend an attorney or disqualify from a case.

What they said on social media that got them in trouble

JUDICIAL CONDUCT REPORTER

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- “It goes without saying but the tenant wasn’t the brightest bulb in the chandelier.” Judge on Facebook mocking a litigant. *Urie* (Arizona Commission 2018) (<https://tinyurl.com/y9d9surv>) (reprimand).
- “This murder suspect was RELEASED FROM JAIL just hours after killing a man and confessing to police.” Judge’s post on Facebook commenting on a news story she shared. *McLaughlin* (Kentucky Commission 2018) (<https://tinyurl.com/y9jrdlga>) (reprimand).
- “The best part of Trump’s election has been that it has revealed once again how hateful, intolerant, arrogant and divisive liberals are, not to mention the fact that they have taken the word hypocrisy to new extreme.” Judge on Facebook. *Burkeen* (Texas Commission 2018) (<https://tinyurl.com/y9nnywla>) (reprimand).
- “For the Indian Rez that will not permit the wall built on 75 miles of border on their land — how about building the wall around that rez, fencing them into Mexico? That should please them.” Court commissioner on Facebook. *Gianquinto* (California Commission 2018) (<https://tinyurl.com/ydguvlza>) (censure for this and similar posts on Facebook).
- “The Burlington Fire Department Pancake Feed is happening now and 100% of the proceeds go to benefit the families of the victims of the recent tragedy at Cascade Mall. Please consider attending, it runs until noon today.” Judge in Facebook post. *Svaren* (Washington Commission 2018) (<https://tinyurl.com/yd8drd98>) (admonishment).
- “Support these folks who are just trying hard to earn some money in an honest way.” Supreme court justice in Facebook post about homeless people who sell a newspaper to raise funds. *Yu* (Washington Commission 2018) (<https://tinyurl.com/yava9qfm>) (admonishment).
- “Judge James Metts and Constable Rowdy Hayden’s Annual School Supply Drive” and “AR-15 Raffle Ticket \$10 Donated by Judge James Metts and Constable Rowdy Hayden” to charitable auction. On judge’s Facebook page. *Metts* (Texas Commission) (<https://tinyurl.com/ycm2gp77>).

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Legal error plus

Top Judicial Ethics Stories of 2018

Because, in effect, the complainant is asking the judicial conduct commission to act as an appellate court and review the merits of a judge's decision, every year, most complaints filed by litigants against judges are dismissed. However, a judge's legal errors are not always immune from discipline, and there are exceptions to the rule that a judge's appealable decision is not sanctionable. The exceptions ensure that judicial independence is not a cover for intentional abuse of judicial power and that ignorance of the law does not excuse the great harm judicial error can cause both to individual litigants and to the judicial system.

The exceptions are:

- Decisions made in bad faith,
- An intentional legal error,
- An egregious legal error, or
- A pattern of legal error.

Judicial discipline cases in 2018 provided several illustrations of those exceptions. For example, although ordinarily a judge's decision to dismiss a petition for an order of protection from domestic abuse would not be reviewable in discipline proceedings, the Mississippi Supreme Court sanctioned a judge for a pattern of dismissing petitions for orders of protection without holding the hearings required by statute. *Commission on Judicial Performance v. Curry*, 249 So.3d 369 (Mississippi 2018) (reprimand for this and other misconduct).

Similarly, although usually a complaint about a judge's decision to revoke probation would be dismissed, a Kansas judge was sanctioned for revoking a defendant's probation based only on the motion and without providing the defendant an opportunity to respond. *In the Matter of Trigg*, 414 P.3d 1203 (Kansas 2018) (censure for this and failing to cooperate with the commission). The transcript of the hearing on the motion to revoke reads in its entirety:

THE COURT: Court will call 10TR604 *State of Kansas v. Brandi Lee Heather*. Are you Brandi Heather?

THE DEFENDANT: Yes.

THE COURT: Show Mr. Andrews for the State. Defendant appears in person, in custody, pro se. There's a motion to revoke your probation for failure to comply on file for various reasons. I find that sufficient. I revoke your probation and remand you to the custody of the Sheriff's Office to serve the balance of your sentence. We're adjourned. Parties may withdraw.

The New York Court of Appeals removed a judge for, in addition to other misconduct, sua sponte awarding counsel fees in nine cases without giving the attorneys an opportunity to address whether such an award was justified and, if so, what amount was appropriate. *In the Matter of O'Connor*, 112 N.E.3d 317 (New York 2018). Rejecting the judge's argument that, at most, he had committed "harmless" legal errors that were not grounds for a finding of misconduct, the Court emphasized that his "failure to observe and follow the law resulted in substantial and unjustifiable adverse consequences for the parties that went uncorrected"

Bad faith reasons

The California Commission on Judicial Performance publicly censured a former judge and barred him from seeking or holding judicial office for, in addition to other misconduct, first modifying a contempt order to deny good time credits to a divorce litigant based on an ex parte communication with the sheriff's department and subsequently granting good time credits to the same litigant for an inappropriate reason. *Inquiry Concerning Mills*, Decision and order (California Commission on Judicial Performance August 28, 2018) (<https://tinyurl.com/yb2sp7x2>).

The Commission emphasized that the issue was not the judge's legal rulings and rejected his argument that he had erred because of the complexity of the law. Instead, it explained, the problem with his initial decision to deny good time credits was that it was "an ex parte modification of an order involving a deprivation of liberty without providing the parties an opportunity to be heard." The problem with his subsequent decision to grant the request for credits was that the judge changed his mind "for reasons unconnected to the merits," that is, his desire to avoid the challenge that was foreseeable from the litigant's history of filing appeals, motions, and complaints.

Egregious

A judge's error is more likely to be considered egregious and therefore subject to sanction if an individual lost her liberty as a result of the decision. For example, a Special Court of Review Appointed by the Texas Supreme Court admonished a former judge for issuing a writ of attachment that resulted in a witness's involuntary confinement for almost a month without due process. *In re Bond*, Opinion (Texas Special Court of Review August 10, 2018) (<https://tinyurl.com/ydb8sq5g>).

On December 8, 2015, the judge began presiding over the trial of a man charged with sexually assaulting a homeless woman, referred to as "Jane Doe." Doe appeared without being subpoenaed to testify, but she was incoherent on direct examination. After the lunch recess, outside the jury's presence, the assistant district attorney informed the judge that Doe had

"There are exceptions to the rule that a judge's appealable decision is not sanctionable, and a judge's legal errors are not absolutely immune from discipline."

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been taken into custody pursuant to a mental health warrant from another court. The judge recessed the case until January 11, 2016. At the prosecution's request, the judge then signed a form "Writ of Attachment or Bench Warrant" for Doe even though the code of criminal procedure only authorized such a writ if a witness failed to appear after being subpoenaed by the state.

As a result of the judge's writ, when Doe was released from custody on the mental health warrant on December 18, she was taken into custody by the sheriff's office and held in the general population at the jail, not in the mental health division. While in the jail, Doe was assaulted by another inmate and allegedly had an altercation with a guard, for which she was charged with a felony. She was not released until January 14.

The judge agreed that her writ played a part in Doe's confinement because it had not included language that would have required that Doe be brought before her immediately when released from the mental health confinement so she could hold a hearing, inform Doe of her rights and the consequences of failing to appear, and give Doe a personal recognizance bond. However, the judge contended, she should not be sanctioned for merely signing a poorly worded writ form.

Rejecting that argument, the court concluded that the judge's error was "egregious" because judges have "a responsibility to do more than sign the orders or forms placed before them by a prosecutor or attorney, and . . . must be particularly cognizant of the law and potential impact upon witnesses whose liberty interests are implicated by the issuance of a Writ of Attachment." The court acknowledged that criminal court judges have a heavy work load and that a judge may reasonably rely on attorneys as officers of the court. However, it emphasized, a judge has an "independent obligation . . . to act knowledgeably and within the confines of the law." The court noted that the consequences for Doe of her confinement had led to public outrage about the judge's actions.

Pre-judgment

Decisions that reflect pre-judgment are an abdication of judicial discretion and independence and, therefore, may be sanctionable. Thus, although complaints about a judge's bond decisions would usually be dismissed, the Texas State Commission on Judicial Conduct publicly admonished three hearing officers for never issuing personal recognizance bonds. *Public Admonition of Licata and Order of Additional Education* (Texas State Commission on Judicial Conduct January 10, 2018) (<https://tinyurl.com/ybbs4evg>); *Public Admonition of Hagstette and Order of Additional Education* (Texas State Commission on Judicial Conduct January 10, 2018) (<https://tinyurl.com/y8lyq6w3>); *Public Admonition of Wallace and Order of Additional Education* (Texas State Commission on Judicial Conduct January 10, 2018) (<https://tinyurl.com/y8gssdoc>).

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Following an eight-day hearing that included 2,300 video recordings of bail hearings, a federal judge had held that the county had a policy of denying personal recognizance bonds and that that policy violated equal protection rights and detained defendants pretrial without due process. The federal court found “little to no credibility” in the hearing officers’ claims that they had given “careful case-by-case consideration” to the question of bail, noting the high percentage of misdemeanor defendants who were detained rather than released and the infrequent deviations from the scheduled bail amount. The federal court also stated that the hearings officers had demonstrated consistent indifference to whether pretrial detention would result from their decisions, as evident from the videos of the probable cause hearings.

Similarly, the Commission concluded that the hearing officers failed to comply with the law and failed to maintain competence in the law by ignoring their constitutional and statutory obligation to consider all legally available bonds, including personal recognizance bond. The hearing officers were strictly following directives not to issue personal bonds from the judges in the court where the cases were assigned, which the Commission considered a mitigating factor.

What they said during campaigns that got them in trouble

- “But even though I’ve been asked to find a statute unconstitutional as a sitting judge, I have refused to do so. Because again, it’s not my job to legislate from the bench.” Judge explaining his judicial philosophy during a candidate forum. *DuPont*, 252 So. 3d 1130 (Florida 2018) (removal for this and other misconduct).
- Campaign opponent was “a member of www.hideyourpast.com, which is a website that you join to hide your personal history.” Judge while a candidate insinuating that his opponent was trying to conceal secrets. *DuPont*, 252 So. 3d 1130 (Florida 2018) (removal for this and other misconduct).
- “Instead of representing the victims of crime, Gregg Lerman chose to represent one of the convicted accomplices in the ‘Turnpike Murder’ of a family of four, including two children ages 3 and 4. Now, he’s running for Judge!” On a judicial candidate’s Facebook page about her opponent. *Santino*, 257 So.3d 25 (Florida 2018) (removal for this and related misconduct).
- “I’m ‘almost’ taller than him. Almost.” Judge in a comment to a photo-shopped picture of herself and an actor that was posted on her campaign

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Facebook page, which misled the public that “the Rock” had endorsed her campaign. *Almase* (Nevada Commission 2018) (<https://tinyurl.com/y865qdxxy>).

- “Keep this talented team working for our families and for our children.” Two judges in a joint mailer for their re-election campaigns. *Martin* (Texas Commission 2018) (<https://tinyurl.com/yaa4mzan>); *Cooks* (Texas Commission 2018) (<https://tinyurl.com/yd7n9mpu>) (warning).
- “Judge Eleazar Cano & Rep. Roland Gutierrez look forward to seeing you!” On a mailer advertising a campaign event for a state representative running for state senate. *Cano* (Texas Commission 2018) (<https://tinyurl.com/yan6c6x2>) (warning).
- “IN SUPPORT OF County Judge Trey Duhon & D.A. Elton Mathis and their 2018 Re-Election campaigns.” Flyer for joint campaign fund-raising event. *Duhon* (Texas Commission 2018) (<https://tinyurl.com/yap6ugcg>) (warning).

Recent posts on the blog of the Center for Judicial Ethics <https://ncscjudicialethicsblog.org>

[A sampling of recent judicial ethics advisory opinions \(November\)](#)

[A sampling of recent judicial ethics advisory opinions \(February\)](#)

[Recent cases \(December\)](#)

[Recent cases \(January\)](#)

[Death penalty controversy in Arkansas: Top judicial ethics stories of 2018](#)

[Marijuana and judicial ethics](#)

[The difference between reprimand, censure, and suspension
\(Palmer \(New Jersey 2018\)\)](#)

[To hear and decide \(Hiroshige \(California Commission 2018\)\)](#)

[Facebook codes](#)