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Representing family *by Cynthia Gray*

Since it was adopted in 1972, through the revision in 1990, and the current 2007 version, the American Bar Association *Model Code of Judicial Conduct* has prohibited full-time judges from practicing law. The notes for the 1972 model code explained, "the likelihood of conflicts of interest, the appearance of impropriety, and the appearance of impartiality—all have their greatest potential in the practice of law by a full-time judge." Thode, *Reporter's Notes to Code of Judicial Conduct*, at 90 (ABA 1973). The California judicial ethics advisory committee stated that the prohibition was adopted "to keep the judiciary above reproach or suspicion by eliminating the opportunity for fraud and the potential for undisclosed conflicts of interest that might arise if a judge were representing private clients as a lawyer" and to "ensure that judges would conserve their time and focus their energy on their judicial duties, rather than becoming distracted by the competing demands of a law practice." ***California Formal Opinion 2021-17***. Many state constitutions also prohibit judges from practicing law.

The prohibition is in **Rule 3.10** of the current model code and has two exceptions.

- A judge may act pro se.
- A judge "may, without compensation, give legal advice to and draft or review documents for a member of the judge's family, but is prohibited from serving as the family member's lawyer in any forum."

Examples

The family advice exception is limited, and judges have been disciplined for representing family members under circumstances beyond its scope.

- A judge filed a notice of appearance to represent his mother in foreclosure proceedings and communicated with counsel for the mortgagee on her behalf. *Inquiry Concerning Turner*, 76 So. 3d 898 (Florida 2011).
- A judge appeared at a first appearance hearing on behalf of her sister, vouched for her as a character witness, argued about the allegations in the probable cause affidavit, and requested that law enforcement be ordered to help her sister retrieve personal items. *Inquiry Concerning Kautz*, 149 So. 3d 681 (Florida 2014).
- A judge represented his son on a marijuana charge and represented his wife regarding a speeding ticket, for example, filing a notice of appearance and motions on behalf of his son, appearing in court as his son's attorney to conference the case with the judge and prosecutor, and, in a letter to the court, stating that he was a full-time judge and could not represent any client but then asking that a prior plea deal for his wife that had been discussed with a prosecutor be accepted.

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In the Matter of McGuire, Determination (New York State Commission on Judicial Conduct March 18, 2020), *Removal order* (New York Court of Appeals August 26, 2020).

- Without compensation, a judge represented his sister-in-law in a real estate purchase, reviewing and approving the abstract of title, survey, and proposed deed, contacting the seller's attorney and paralegal, arranging for his law clerk to represent her after he was injured, and taking other steps consistent with representing the buyer of a residence. *In the Matter of Ramich*, Determination (New York State Commission on Judicial Conduct December 27, 2002).
- During regular court hours and at the courthouse where he performed his judicial duties, a judge appeared on behalf of his sister-in-law at a motion hearing and addressed the court on several disputed issues. *In re Chow*, Stipulation and order of admonishment (Washington State Commission on Judicial Conduct February 2, 1996).

Sanctioning a judge for representing her son at the police station following his arrest, the Florida Supreme Court stated: "Although we are not unsympathetic to [the judge's] family situation, her violations of the Code of Judicial Conduct demonstrate a failure of judgment and a lack of appropriate boundaries between her judicial office and her personal life that cannot be tolerated in members of our judiciary." *Inquiry Concerning Hobbs*, 338 So. 3d 848 (Florida 2022).

On the evening of July 29, 2019, the judge's son was arrested after allegedly shooting a female acquaintance through the closed door of his home. After learning of the arrest, the judge went to the police station and asked to see her son. When she was told that only her son's lawyer could meet with him, the judge said that she was his lawyer and was then permitted to enter the interrogation room. They had a 19-minute conversation, which was not recorded because of the attorney/client privilege.

The judge stayed with her son while he was interviewed by police, and she interjected several times to ask questions or give advice to her son. At the end of the interview, the judge asked the officers to release her son into her custody and expressed concerns about his safety because she had sentenced inmates who were in the jail where he would be detained. The officers stated that releasing him was impossible due to the nature of the charges, but that they were aware of the potential safety issues.

After leaving the police station, the judge contacted an attorney who agreed to represent her son. The judge's representation of him ended at that point.

On the advice of her Chief Judge, the judge self-reported her conduct at the police station to the Commission. For this and related misconduct, the Court suspended the judge for 60 days without pay, fined her $30,000, and publicly reprimanded her.

The family advice exception is limited, and judges have been disciplined for representing family members under circumstances beyond its scope.

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"Any forum"

A violation of Rule 3.10 can be exacerbated if a judge also attempts to advance their family's member position in a legal matter by gratuitously referring to their judicial status, a violation of Rule 1.3. For example, the New York State Commission on Judicial Conduct publicly admonished a judge for acting as his daughter's attorney in three appearances in family court and invoking his judicial title multiple times during two of the appearances. ***In the Matter of Edwards*, Determination** (New York State Commission on Judicial Conduct December 20, 2019). During one appearance, for example, the judge stated regarding a petition for an order of protection, "Now as a parent I learned one thing, and as a judge, when you say stay away to a young person, they often don't stay away."

Based on the recommendation of the Commission on Judicial Discipline, which adopted the report of special masters following a hearing, the Colorado Supreme Court publicly censured a former judge for acting as counsel and exploiting his judicial position for his brother-in-law's benefit following a domestic violence incident. ***In the Matter of Kiesnowski*** (Colorado Supreme Court March 4, 2024).

On May 31, 2023, the judge's brother-in-law was admitted to intensive care for stab wounds received during a domestic violence incident with his girlfriend. The following day, an investigator with the district attorney's office sought to interview the judge's brother-in-law, but the judge's wife denied the request, indicating that her brother was in too much pain.

Later that day, the judge twice called the investigator. During the first call, he disclosed that he was a district court judge and relayed what his brother-in-law remembered from the incident. During the second call, he identified himself as "Judge Kiesnowski." The investigator told the judge that he would notify the judge before he went to the hospital to interview the judge's brother-in-law.

However, the next day, the investigator went to the hospital without first informing the judge. The judge's brother-in-law told the investigator that he did not want to consent to an interview without advice from the judge, who he referred to as "his lawyer." The investigator then called the judge, who said that he wanted to be present for the interview and could be at the hospital in approximately 40 minutes. Before leaving for the hospital, the judge reviewed the code of judicial conduct and concluded that it permitted him to represent his brother-in-law in the interview with the investigator.

After the judge arrived at the hospital, he consulted privately with his brother-in-law and then consented to a formal interview, which was recorded. The judge explicitly told the investigator that he was "acting as [an] attorney" for his brother-in-law, directed his brother-in-law to wait to answer each question until he gave him the green light, stopped the interview twice to confer privately with his brother-in-law, invoked the Fourth Amendment when he refused to agree to a search of his brother-in-law's cell phone, and invoked the Fifth Amendment when he terminated the interview. In addition, he called his brother-in-law's girlfriend a "total

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disaster," accused her of threatening to blame his brother-in-law for injuries she would inflict on herself, and described his brother-in-law as a "hard-working guy" who had been hit by his girlfriend in the past. At the end of the interview, the judge signed a medical release for his brother-in-law, noting that he was acting as a legal representative and providing his bar number.

The judge did not dispute that he had represented his brother-in-law during the interview but argued that, after quickly reviewing Rule 3.10, he had believed that the code only prohibited him from representing a family member in a "forum" and that, after consulting *Black's Law Dictionary* and *Heritage Dictionary*, he thought that "the word 'forum' in Rule 3.10 referred to a public, formal, adjudicatory setting and not to an interview in a private hospital room." However, the Court held:

> The language of Rule 3.10 is unambiguous. The operative word here is "any" because by qualifying "forum," it conveys broad inclusion of a variety of forums, both public and private. Kiesnowski's interpretation, on the other hand, is overly narrow and fails to give full effect to the word "any." . . . The rule's prohibition regarding representation in "any forum," when juxtaposed against the rule's provision expressly allowing a judge to give free legal advice to family members and to draft or review their legal documents, suggests that a judge's representation of family members is limited to a behind-the-scenes role.

The Court also rejected the judge's request that it consider his good faith belief that he was not representing his brother-in-law in a forum prohibited by the code and his assertion that "in his 'hurry scurry' to get to the hospital after the investigator showed up without warning, he did the best he could with his available research tools and limited time." The Court noted that the judge admitted that he knew that he could have simply directed his brother-in-law to refuse the interview, which would have allowed him to more thoroughly research the code and to retain another attorney to represent his brother-in-law.

The Court also found that the judge had abused the prestige of judicial office to advance his brother-in-law's interests when he told the investigator that he was a judge and then vouched for "his brother-in-law's good character while disparaging the character and credibility of the girlfriend." The Court noted that the masters "did not take issue" with judge's identification of himself as a judge in the first call, which he said was "purely for the sake of transparency." However, his "additional reminders" of his status that "were irrelevant to the investigator's attempts to conduct the interview" constituted misconduct. The Court also stated that, regardless of the judge's intent, "his repeated use of his title resulted in favorable treatment," noting that the investigator testified that the judge's judicial status "increased his credibility and led the investigator to conduct the interview in a more deferential manner."

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Family advice

In an advisory opinion, the California judicial ethics committee noted that the prohibition on practicing law "can put judges in an awkward situation of having to decline a request for legal advice or to limit the kind of information and guidance that they can provide family members who come to them with questions about law-related matters." *California Formal Opinion 2021-17*. It explained:

> It can be hard to resist the human impulse to assist family members when they ask for advice. Whether out of love, obligation, or a sense of responsibility, many parents, children, siblings, and other close family members would not think twice about providing whatever kind of advice they can to another member of their family who needs guidance, even when the advice relates to a legal matter. For a judge, however, the decision whether to advise a member of the judge's family on law-related matters can be complicated and often difficult.

As general guidance, the committee emphasized that a judge may not:

- Accept compensation for help with legal matters;
- Act, or appear to act, as an advocate;
- "Neglect official duties in favor of a matter involving a family member;" or
- "Provide advice that would cause a reasonable person to question the judge's independence or integrity."

The California committee stated that a judge could provide limited law-related advice to a family member, including statements of law, explanations of court procedures and court rules, and guidance about legal requirements. Relating the types of information that a judge may provide to a family member to the kinds of information that a judge may provide to a self-represented party appearing before the judge, the committee stated that a judge may, for example:

- Direct a family member to community resources for finding a lawyer,
- Explain court procedures,
- Inform a family member of the process for securing witnesses, and
- Inform a family member of elements of proof or other legal requirements.

In contrast, based on caselaw in other contexts that defines the practice of law, the committee advised that a judge may not on behalf of a relative:

- Perform professional services in a court proceeding,
- Prepare a legal instrument or contract,
- Assume the role of an advocate,
- Assist in the preparation of settlement conference briefs,
- Advise that a particular motion be filed,
- Attempt to negotiate the dismissal of a criminal matter,

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- Negotiate the settlement of a claim,
- Provide advice about potential penalties and defenses to an alcohol-related citation,
- Conduct legal research,
- Give advice on what to tell potential employers about indictments, or
- Attend a deposition if the parties are aware of their judicial position.

The opinion concluded that, "beyond providing moral support," a judge may only offer limited assistance to a family member involved in active litigation because that situation presents "the most obvious risks" of conflicts for the judge. *But see* ***West Virginia Advisory Opinion 2010-13*** (when a judge's wife and sister-in-law are representing themselves in a lawsuit, a judge may act as a ghostwriter for them by preparing the complaint, interrogatories, motions, and legal memorandum and may review legal documents filed by adverse parties).

An Indiana advisory opinion emphasized that the family advice exception "is narrow and essentially only allows judicial officers to give behind-the-scenes assistance" to family members, for example, drafting a will or trust agreement, reviewing documents incidental to a real estate transaction, conducting legal research, or drafting letters for the family member to sign. ***Indiana Advisory Opinion 2-2020***. The opinion also emphasized that judges must not, under any circumstances:

- Tell third parties in person or in correspondence that they are serving as a family member's lawyer, or
- Act as a family member's advocate before a tribunal.

As noted, the code allows a judge to act pro se, but that exception does not expand what a judge may do on behalf of family members who may also be involved in litigation in which the judge is representing themselves. The Arizona Commission on Judicial Conduct publicly reprimanded a judge for filing a lawsuit on behalf of herself and her husband and clearly designating herself as counsel of record for both parties. ***Segal*, Order** (Arizona Commission on Judicial Conduct December 4, 2012). *See also* ***California Formal Opinion 2021-17*** (a judge may provide advice to family members about a matter in which the judge is personally involved when the judge is acting in their own personal interest or in a representative capacity permitted under the code); ***Massachusetts Advisory Opinion 2002-2*** (a judge who owns land with their brother may appear pro se in a lawsuit filed against them by the owners of the abutting land but must guard against creating the perception that the judge is also acting on behalf of their brother); ***New York Advisory Opinion 2017-72*** (a judge may file a pro se answer in a real estate case in which they and their siblings are defendants but, even though their siblings' interest is identical to their own, may not file an answer on their siblings' behalf).

An Indiana advisory opinion emphasized that the family advice exception "is narrow and essentially only allows judicial officers to give behind-the-scenes assistance" to family members . . . .

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Other contexts

The Indiana committee encouraged judges to take a "cautious approach" when a family member seeks their advice about a potential or impending legal matter even if there is currently no active litigation. ***Indiana Advisory Opinion 2-2020***. For example, when a family member is under investigation or charged for a criminal offense and asks a relative/judge to communicate with law enforcement, prosecutor's office staff, or court personnel on their behalf, the committee directed the judge to decline the request because even if they only ask such authorities for general information, "there is a risk (especially if the listener knows the judicial officer) that the listener will interpret the judge's communication as a request for special treatment." The opinion did state that a judge could advise a "family member what questions to ask or what information to relay" to authorities.

Moreover, the committee noted that a judicial officer may be able to ask questions on behalf of a family member who is a minor child, or other person "unable to adequately communicate on his or her own behalf with third parties" if there is no other responsible adult available. Even in that unusual circumstance, the committee warned, judicial officers should be cautious and never refer to their judicial status, imply that they are the family member's attorney, suggest special consideration for the family member, or "use any court resources, such as an email dedicated to the court system."

The Indiana opinion stated that a judge could attend an investigative interview or settlement conference with a family member to provide emotional support but added caveats. The judge:

- Must not refer to their judicial status,
- Should try to keep others from referring to them as "judge," "magistrate," "commissioner," "referee," or other judicial title,
- Should not wear any court-related clothing (for example, a judicial robe or casual shirt with the court logo), and
- Should not interact with others in a manner that conveys that they have special influence or are a "court insider."

Further, the committee stated that a judge could, during a break in a settlement conference "answer the family member's questions, assist the family member in evaluating the strengths and weaknesses of certain positions, and provide informal, common sense input."

However, the opinion concluded that a judge must not negotiate on a family member's behalf in a settlement conference to, for example, "resolve an insurance claim after an auto accident or to clear up disputed credit issues," even if their advice is requested before a civil lawsuit is filed, because doing so constitutes the practice of law. *See also* ***Arizona Advisory Opinion 2010-6*** (a judge may not represent their spouse in negotiations with an insurance company); ***Connecticut Advisory Opinion 2009-12*** (a judge may not accompany a family member to meet with the family member's attorney to provide legal advice about potential settlements but may do so to provide emotional or moral support or personal advice based on common sense

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and good judgment); *Connecticut Emergency Staff Opinion 2015-9* (a judicial official, in their personal capacity, may not attempt to settle a case with a hospital on behalf of their adult child but may help the child hire an attorney and review any contractual documents related to the hiring); *New Hampshire Advisory Opinion 2022-1* (a judge may not advocate with insurance companies on behalf of a family member and should be cautious when undertaking even basic communications that may not constitute advocacy because any discussion could evolve in a way that implicates the prohibition on practicing law); *New York Advisory Opinion 2011-55* (a judge may provide informal, uncompensated legal advice and assistance to their spouse in the selection of, and consultation with, counsel to represent the spouse in a proposed class action or other proceeding against the spouse's employer); *New York Advisory Opinion 2018-120* (a judge may provide informal, uncompensated legal advice to adult relatives involved in civil or criminal proceedings but may not participate in discussions or attend meetings with their retained counsel); *Utah Informal Advisory Opinion 2011-2* (if they have a close relationship, a judge may privately provide legal advice to their siblings about a claim against their stepmother's estate but may not negotiate on behalf of the siblings or the estate; the judge may hire an attorney on behalf of their siblings or recommend a particular attorney).

The California committee advised judges to exercise caution when asked for law-related advice by a family member even outside the context of litigation. *California Formal Opinion 2021-17*.

> For example, if a family member asks for help drafting a demand letter, a judge could agree to assist with clerical tasks such as proofreading the letter or acting as a scrivener to fill in the blanks of an incomplete draft with information that the family member provides or that is generally known. But if asked to advise on what to include in the letter or how to write it, a judge must consider the likelihood that providing such guidance would put the judge in the role of an advocate, either on behalf of the family member or of a legal position that advances the interests of the family member, and for that reason would be impermissible.

In another example, the opinion stated that a judge may assist a family member who asks for "help with an employment offer by discussing standard business terms included in the offer, such as the amount of compensation, location of the position, or hours required," and may even provide "generalized, abstract information about provisions usually included in a standard employment offer." However, the committee stated that "before discussing any of the law-related terms actually included in an offer or advising the family member on terms that may be missing from it, a judge should evaluate whether such advice would cross the line into advocacy or negotiation and therefore constitute the practice of law."

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An article on the related issue "A judge accompanying a family member to court" was published in the fall 2023 issue of *Judicial Conduct Reporter*.

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Judicial candidate questionnaires

In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the U.S. Supreme Court held that a prohibition on judicial candidates announcing their views on disputed legal and political issues violated the First Amendment, concluding: "We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election."

After *White*, constitutional challenges were filed against the prohibitions on judicial candidates making inappropriate pledges, promises, and commitments. The version of that prohibition in the 1990 American Bar Association *Model Code of Judicial Conduct* stated:

> A judge or a candidate for election or appointment to judicial office shall not . . . make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office [or] make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.

In the 2007 model code, Rule 4.1(A)(13) provides:

> [A] judge or a judicial candidate shall not . . . in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

Comment 15 notes that that rule does not specifically address how judicial candidates should respond to questionnaires from "issue advocacy or other community organizations that seek to learn their views on disputed or controversial legal or political issues." It explains:

> Depending upon the wording and format of such questionnaires, candidates' responses might be viewed as pledges, promises, or commitments to perform the adjudicative duties of office other than in an impartial way. To avoid violating paragraph (A)(13), therefore, candidates who respond to media and other inquiries should also give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected. Candidates who do not respond may state their reasons for not responding, such as the danger that answering might be perceived by a reasonable person as undermining a successful candidate's independence or impartiality, or that it might lead to frequent disqualification. *See* Rule 2.11.

Federal courts have held that the pledges, promises, and commitments clause does not violate the First Amendment if narrowly construed to allow judicial candidates to answer some but not necessarily all questions on some but not necessarily all questionnaires.

Several judicial ethics committees have issued advisory opinions applying the clause to questionnaires directed to judicial candidates.

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In *Pennsylvania Family Institute v. Celluci*, 521 F. Supp. 2d 351 (Eastern District of Pennsylvania 2007), the court concluded that, "it is hard to imagine a restriction more narrowly tailored to Pennsylvania's compelling interest in protecting the due process rights of future litigants" than the pledges, promises, and commitments clause. The clause was construed to prohibit a candidate from making only pledges, promises, or commitments to decide an issue or a case in a particular way and to allow a candidate to answer the questionnaires at issue sent out by the Pennsylvania Family Institute.

In *Duwe v. Alexander*, 490 F. Supp. 2d 968 (Western District of Wisconsin 2007), the court held that the pledges, promises, and commitments clause did not prohibit judicial candidates from responding to a questionnaire from Wisconsin Right to Life and was not unconstitutional on its face. The court stated that, "whether a statement is a pledge, promise or commitment is objectively discernable," and "people are practiced in recognizing the difference between an opinion and a commitment."

In *Bauer v. Shepard*, 620 F.3d 704 (7th Circuit 2010), the U.S. Court of Appeals for the 7th Circuit stated:

> It is not clear to us that any speech covered by the commits clauses is constitutionally protected, as *White I* understands the first amendment. How could it be permissible to "make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office"?

The 7th Circuit acknowledged that "neither the commits clauses nor the Code's definitions pin . . . down" what promises are inconsistent with the impartial performance of the adjudicative duties of judicial office, noting that "the principle is clear only in these extremes." However, the court concluded that advisory opinions are a more appropriate method for clarifying the provision than "summary condemnation by a federal court," stating that the constitution allows details to be fleshed out in an administrative system.

Advisory opinions

Several judicial ethics committees have issued advisory opinions applying the clause to questionnaires directed to judicial candidates.

The Illinois committee concluded that the First Amendment right of judicial candidates to announce their views on "controversial moral, legal, and political issues" allows them to answer questionnaires that seek their views on disputed topics as long as their responses do not "contain statements that commit or appear to commit them to decide particular cases, controversies, or issues within cases that are likely to come before the court in a particular way." ***Illinois Advisory Opinion 2021-3***. The opinion added further caveats:

- A candidate must carefully analyze "the likely impact of whether or how to answer the questionnaire."

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- A candidate should consider whether they "have information that would suggest that any answers provided to a particular questionnaire are likely to be misused or misinterpreted," raising a genuine concern that answering might undermine public confidence in the independence and integrity of the judiciary.
- A candidate's response should "include assurances that the candidate will keep an open mind and carry out adjudicative duties faithfully and impartially if elected."

Moreover, the opinion noted that judicial candidates are not required to answer questionnaires. *See also* ***Arizona Advisory Opinion 2006-5*** (although not required to, a judge standing for retention or election may respond to a political interest group questionnaire seeking their views on disputed political and legal issues or judicial philosophy if their responses do not constitute pledges, promises, or commitments that are inconsistent with the impartial performance of their adjudicative duties); ***Pennsylvania General Guidance 2-2023*** (quoting the comment to the code and answering "yes" to the question "May I respond to questionnaires?").

The Kansas advisory committee stated that a judicial candidate may not answer a questionnaire from Kansas Judicial Watch that asked the candidate to state whether in their view a particular decision by the state supreme court had violated the state constitution; whether the state constitution makes the power to tax and spend and to define marriage the prerogative of the legislature only, not the supreme court; their views on same-sex marriage, who should define pornography, and the rights of an unborn child; whether the death penalty should be determined by the state supreme court; and whether any portion of the state constitution is intended to protect a right to assisted suicide. ***Kansas Advisory Opinion JE-139*** (2006). (However, the Kansas Commission on Judicial Qualifications added a disclaimer on the advisory committee website stating that it "respectfully rejects" the committee's conclusion, citing *White,* and noting that it is not bound by advisory opinions.)

The Maryland committee advised that a sitting judge who is a candidate for election may respond to a questionnaire from the League of Women Voters that is published to provide information to voters regarding candidates. ***Maryland Advisory Opinion Request 2024-6***. The opinion noted that the League describes itself as non-partisan and does not endorse candidates.

The questionnaire asked:

1. Qualifications: How does your experience prepare you for the duties of this judgeship?
2. Juvenile Justice: How would you address the problem of large numbers of minority youth being imprisoned?
3. Diversion Programs: What are your views on diversion programs for behavioral problems and substance abuse?
4. Challenges: What are the greatest challenges facing Maryland's Circuit Courts and how should they be addressed?

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The judge who asked the committee about the questionnaire was particularly concerned that responding to question 2 would violate the code.

The opinion noted that the code does not prohibit "a candidate-judge from expressing their opinion on important matters of public concern, notwithstanding the disputed legal and political positions and issues it may generate as long as the statements do not violate the ethical rules." The committee explained that to the extent that an answer to question 2 "may be interpreted as advocating for a particular position, i.e., to reduce the number of minority youth being incarcerated," the answer could constitute a statement "with respect to a case, controversy, or issue that is likely to come before the court" and, depending on the answer, "may be viewed as making a 'pledge[] or promise that is inconsistent with the impartial performance of the adjudicative duties of the office.'" However, the committee noted that there was "an alternative way to approach Question No. 2 that would not raise ethical problems:" a candidate could treat the question as "an attempt to elicit a response to discrimination in society and the right of all to be afforded equal justice under the law" and could take "the opportunity to express their strictest fidelity to justice and equal justice under the law."

Yes or no questions

The Florida committee considered two questionnaires—one from the Florida Family Policy Council and one from the Christian Coalition of Florida—that sought "a combination of personal and political information." ***Florida Advisory Opinion 2006-18***. For example, the Family Policy Council questionnaire asked candidates "which United States and Florida Supreme Court Justices most reflect the candidate's own judicial philosophy, whether the candidate believes that the Florida Constitution recognizes a right to unisex marriage, and whether the candidate agrees with federal or Florida Supreme Court opinions on such subjects as parental consent for abortion, school vouchers, and assisted suicide." The questions gave the candidates five options: "agree," "disagree," "undecided," "decline to respond," and "refuse to respond." According to a footnote, "decline" would "be viewed as willing to answer but for a belief that such action is prohibited by the Florida Code of Judicial Conduct and/or that providing answers might subject a judge to disqualification in a future case." The opinion noted that some of the questions on the Christian Coalition's questionnaire had more options for the answers, but several asked only "for 'yes,' 'no,' or 'refused.'"

The committee stated that the questionnaires did not leave "much room" for candidates to explain their responses, essentially calling "for 'yes or no' answers to their questions on substantive law" and that it was not clear whether candidates were prohibited from elaborating. It noted that in a prior opinion it had advised:

> [M]any responses may not necessarily fit into the "yes" or "no" or "undecided" boxes on the questionnaire. Depending upon the subject matter of the question, some complex legal or political questions may not be able to be ethically answered at all. Other questions may need a thoughtfully

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> drafted explanation or elaboration to appropriately satisfy ethical considerations.

The committee left "to the candidates' professional judgment whether such brevity is sufficient."

The Florida committee declined to definitively permit or prohibit judicial candidates from answering the two questionnaires but did give general guidance about what "sorts of answers or comment are likely to run afoul of the Code of Judicial Conduct." It explained:

> To the extent the questionnaires seek comment on the Florida Constitution or published judicial decisions, we note that the Code of Judicial Conduct does not impose a blanket proscription on expressions of a general judicial philosophy, including "views on constitutional or statutory construction.". . . The scope of such expression, however, should acknowledge the cardinal duty of a judge to follow the law whether the judge agrees with it or not. Apart from this we know of no ethical impediment to analytical, informed, respectful, and dignified comment on past decisions. Judicial opinions on most controversial legal issues will have been the subject of scholarly analysis (e.g., law review articles), from which endeavor judges are not barred. . . . Moreover, the mere expression of an opinion does not necessarily mean the person giving the opinion has researched the issue exhaustively, or that the person would not be amenable to altering the opinion in the face of capable advocacy. That is, expressing an opinion does not automatically indicate closed-mindedness.

The committee cautioned that "the line between 'announcing' and 'promising' can be a thin one" and even if a judicial candidate's pronouncements are constitutionally protected speech that complies with the canons, the dispositive question in a motion for disqualification is "whether the individual 'beholder's' fear of partiality is reasonable, reasonableness being determined by a neutral and objective standard."

The New York committee advised that a judicial candidate may not answer a candidate questionnaire from the Women's Equality Party that asked 20 yes/no questions about the candidate's support for legislation regarding reproductive rights, pay equity, and sexual harassment; their opposition to attempts to limit federal programs; and their support for campaign finance reform, health education in public schools, and other local and federal programs and legislation. ***New York Advisory Opinion 2018-95***. (The questionnaire apparently was designed for candidates for many types of offices, not just judicial candidates.) The opinion noted that many of the questions expressly asked the candidate "to say yes or no to a specific pledge or promise, such as . . . 'Will you pledge to fight any attempts to roll back the reproductive protections afforded women by *Roe v. Wade*?'" Further, candidates were expected to check "yes or no for each question, without comment," although they could provide "additional narrative" on a separate page. The questionnaire did not "acknowledge a judge's obligation to 'decide all cases fairly and impartially and in accordance with governing law'" or "invite candidates to assert any caveats when responding . . . ."

The Maryland committee advised that a sitting judge who is a candidate for election may respond to a questionnaire from the League of Women Voters that is published to provide information to voters regarding candidates.

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The West Virginia committee stated that a judicial candidate may not answer a political party's questionnaire about controversial issues because the questionnaire stated that it was not asking for the candidate's personal opinions and did not give the candidate an opportunity to expound on their answers. *West Virginia Advisory Opinion 2024-3*. The questionnaire asked, for example, "(1) which of two U.S. Supreme Court Justices (Scalia or Breyer) the candidate agrees with in interpreting the U.S. Constitution; and (2) whether the candidate agrees with U.S. Supreme Court decisions overturning *Roe v. Wade*, 410 U.S. 113 (1973), protecting the right of an individual to possess firearms, and that a contraception mandate imposed by the federal government violated the Freedom Restoration Act."

The opinion emphasized that the questionnaire stated that "it 'requests [the candidate's] **opinion on settled legal precedent.** These questions **do NOT ask for your personal opinions on specific issues**.'" (Emphasis added by the opinion.) The questions were "multiple choice—asking the candidate to agree with a specific justice or agree/disagree with the legal reasoning of a decision or the majority/dissent," with no option for the candidate to explain their answers. The opinion noted that the questionnaire did not mention the code of judicial conduct.

The committee concluded:

> The questionnaire by its own admission does not ask for the candidate's personal opinions which would be perfectly acceptable as long as the responder was given the opportunity to explain that he/she could apply and uphold the law without regard to his/her own personal views. Instead, the questionnaire claims that it is seeking "opinions on settled legal precedent." However, abortion rights, contraception and the right to bear arms, as of today, are still not truly settled, and the wording and format of the questionnaire . . . is such that candidate responses without any explanation might be viewed by the public however wrong it may be as a pledge, promise or commitment to perform his/her adjudicative duties of office other than in an impartial way. This is particularly true when there is no mechanism for the candidate to assure the public that he/she will faithfully and impartially carry out his/her duties if elected or for him/her to explain why he/she answered in the way that he/she did.

Recent cases

Abuses of power

Agreeing with the findings and recommendation of the Judicial Standards Commission based on a stipulation, the North Carolina Supreme Court suspended a judge for 120 days without pay for (1) in a call to a county magistrate's office, using her judicial title to ask if her son was in custody without disclosing their relationship, yelling at the magistrate, and demanding a

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bond reduction and (2) demanding that a courtroom be vacated so that she could use it, resulting in over 100 cases being continued. *In re Inquiry Concerning Foster*, 898 S.E.2d 269 (North Carolina 2024).

(1) At 10:48 p.m. one night, the Wake County Magistrates' Office received a phone call from "Foster, Angela" according to the caller identification. When Magistrate Lauren May answered the call, the caller identified herself, said that she was a Guilford County District Court Judge, and asked if a defendant named Alexander Pinnix was in Wake County custody. After looking in the system, Magistrate May confirmed to the judge that Wake County had Pinnix in custody on a $1,000 secured bond. The judge then began speaking loudly and requesting that Magistrate May change Pinnix's bond to a written promise to appear. The request confused Magistrate May because the judge was not a Wake County judge, but May did not want to come across as rude, so she asked to put the judge on a brief hold to look at the case file. May found that Pinnix was being held on charges of resisting a public officer and misdemeanor breaking or entering that had been sworn out before another Wake County magistrate with a bond set by a different Wake County magistrate.

Before returning to the call, Magistrate May asked for the assistance of her three colleagues, who were near her cubicle. The four magistrates concluded, based on their training and experience, that the judge had no reason to be involved with the case and that the situation sounded strange.

When Magistrate May returned to the call, she asked the judge to explain her involvement with Pinnix's case and to provide a basis for changing the bond. Based on the judge's response, Magistrate May explained that she did not feel comfortable altering another magistrate's bond. The judge then requested the telephone numbers of the magistrates who had been involved with the case so that she could call them at home. Magistrate May declined to provide their numbers but suggested that the judge call the Wake County Chief District Court Judge. The judge became extremely angry at this suggestion, indicated that she would never dream of calling a district court judge at that time of night, and again demanded that Magistrate May alter the bond. Magistrate May suggested that the judge could wait until morning to call the chief judge. This suggestion upset the judge even more; Magistrate May's three co-workers could hear the judge yelling at her through the phone receiver. The judge stressed that the bond needed to be changed that evening because Pinnix had to be in court in Guilford County in the morning for a child custody case and that his children would be taken away if he was not present.

Magistrate May then muted the phone and again requested the assistance of the other magistrates. At their suggestion, Magistrate May offered the judge the phone number for the Chief Magistrate. The phone call ended shortly thereafter. The judge did not contact the Chief Magistrate regarding Pinnix's bond that evening.

Due to "the strange nature of the phone call," Magistrate May and her colleagues looked up the judge on the internet and learned that she was Pinnix's mother. During the phone conversation, the judge had not disclosed

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her relationship with Pinnix, instead leading Magistrate May to believe that Pinnix was a litigant in her courtroom. Magistrate May wrote down her recollection of the call and reported the incident to her Chief Magistrate.

Court documents showed that Pinnix did not have a child custody case or any other case pending in Guilford County.

(2) On July 22, 2022, Chief District Court Judge Teresa Vincent issued an administrative order that stated: "In High Point, administrative traffic court and 3B waiver court will be combined into courtroom 3B. The Courtroom 3B shall be open Mondays and Fridays from 8:30 am until 12:30 pm." This order was distributed to all High Point Courthouse employees, including judges.

On November 1, the judge alerted Judge Vincent by text that the courtroom in the High Point Courthouse that she had been assigned for November 7 would not meet the needs of her abuse, neglect, and dependency court session because there was a case scheduled in which two parents were charged with the murder of their child and could not be in the courtroom at the same time, requiring extra security and staff. In response, Judge Vincent suggested that Judge Foster take over courtroom 3B after traffic court concluded. Judge Foster expressed concern that the traffic court would not be run "with the goal of finishing in an efficient manner;" Judge Vincent replied, "I am sure they will finish court as soon as they can in order to handle other tasks." No other contingency plans were discussed.

At approximately 8:30 a.m. on November 7, the judge went to courtroom 3B and informed the assistant district attorney there that she might need the courtroom. The ADA told her how many cases were on his docket and reminded her of the administrative order requiring that traffic court be open in courtroom 3B from 8:30 a.m. to 12:30 p.m. After the judge left, the ADA began traffic court as usual.

After this conversation, Judge Foster returned to her assigned courtroom and informed everyone there that they would be moving to courtroom 4C, a superior court courtroom, without getting approval from Judge Vincent and the senior superior court judge.

While the judge was holding her district court session in the superior court courtroom, the superior court administrator walked past and heard voices. When the administrator realized what the judge was doing, she asked why the judge was there. The judge replied, "Oh they didn't tell you either. . . I needed to use this courtroom." The court administrator told the judge that she was not aware that anyone would be using the courtroom, then went to her office and called her supervisor, who told Judge Vincent.

At 9:37 a.m., Judge Vincent confronted Judge Foster by text about using the superior court courtroom without permission, stating that that was not the plan they had discussed and ordering the judge to vacate the courtroom. In response, the judge claimed that the bailiffs had given her permission to use courtroom 4C; when Judge Vincent asked the sheriff's office, they denied giving that permission.

At approximately 10:00 a.m., the judge left courtroom 4C, returned to courtroom 3B, and informed the assistant district attorney that she needed

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his courtroom. The ADA told the judge that the courtroom was still full, but she told him to vacate it. The ADA and the presiding magistrate closed down the traffic court, finishing any case the ADA had already started to address but informing the remaining citizens that their cases would be continued. As a result, more than 100 cases were not addressed, which frustrated "many members of the public."

The Commission concluded that the judge had abused her power "by misleading and bullying a magistrate in an attempt to have her son released from custody" and abused her power again by forcing more than 100 cases to be continued so that she could use a courtroom, noting the courtroom incident took place after the judge had already been charged by the Commission for the call to the magistrate. The Commission also stressed that the judge had committed these abuses after being publicly censured for abusing her power in the courtroom in 2019. In that case, the judge had berated and threatened 15-year-old twins who refused to visit their father and directed the bailiff to handcuff and escort their mother out of the courtroom even though she had not displayed any contemptuous behavior or been given an opportunity to be heard. *In re Foster*, 832 S.E.2d 684 (North Carolina 2019).

The judicial "high road"

In a recent judicial discipline case, the Ohio Supreme Court acknowledged that the courtroom "is often a place for disagreement and argument, whether between the parties to a case or a party and the judge" but reminded judges to "recognize when they need to control such a situation and take the high road." The Court found that the judge in the case had failed to do so in an exchange with a criminal defendant that "was not cordial, to say the least." ***Disciplinary Counsel v. Gaul*** (Ohio Supreme Court December 29, 2023).

In 2021, Arthur Smiley appeared before the judge by videoconferencing for arraignment on two counts of robbery. When the judge determined that he was going to set a $25,000 surety bond, Smiley said, "Thank you." As the Court explained it:

> From that point, the colloquy devolved into apathetic quips by Smiley that appeared to increasingly irritate [Judge] Gaul. Smiley continued to express indifference regarding the arraignment because he would be held in jail for other cases anyway. Gaul referred to Smiley, who is black, as "my brother" and told him, "This isn't the drive-through window at Burger King, my friend. You don't get it your way."

As a result of the exchange, the judge announced that he was raising Smiley's bond to $100,000. Smiley told the judge that he was making himself "look stupid * * * as a judge" by raising the bond because Smiley was being held on other cases and could not be released anyway. In response, the judge found Smiley in contempt and sentenced him to 30 days in jail for contempt. Toward the end of the arraignment, the judge retracted his decision to increase Smiley's bond and reset the bond at $25,000.

"Ohioans expect patience from their judges."

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The Court stated:

> Judges—especially trial-court judges—deal with people of varying tempers on a near-daily basis, and a judge's encountering a difficult person does not excuse the judge's duty to exercise fair and impartial judgment and to treat that person with patience, courtesy, and dignity. Gaul's interaction with Smiley did little to promote the public's confidence in the integrity and impartiality of the judiciary, because Gaul continued to engage with Smiley even though the main purpose of the hearing—the setting of bond—had been fulfilled. Gaul could have stopped interacting with Smiley after he set bond, but he chose not to. The evidence shows that as the arraignment continued, Gaul became increasingly irritated by Smiley's cavalier attitude.
>
> Conduct such as that exhibited by Smiley during the arraignment might inflame the passions of an ordinary person so as to cause the person to respond with equal vigor, but judges are not ordinary. Rather, they are held to the highest standards of professional behavior. . . . Ohioans expect patience from their judges. By stepping up (or down) to Smiley's level and engaging with Smiley when he did not need to do so, Gaul prolonged a bad situation and made it worse. Gaul's continued interaction with Smiley ultimately led to his finding Smiley in contempt. That unnecessary interaction demonstrated that Gaul's role as an impartial arbiter in the matter had ended, resulting in prejudice to Smiley. In other words, but for Gaul's continued engagement with Smiley, the contempt finding, although later reversed, would never have happened.

The Court also found that the judge committed additional misconduct by coercing no-contest pleas in two other cases, aggressively questioning a criminal defendant in another matter, demeaning litigants and spectators in two additional matters, and providing assistance to a litigant in a federal case who had been acquitted on related matters before the judge. The Court suspended the judge for one year without pay.

Internet search

The Tennessee Board of Judicial Conduct publicly reprimanded a judge for using the internet to research the value of property at issue in a case; the judge accepted the reprimand. ***Gilley*, Public reprimand** (Tennessee Board of Judicial Conduct January 4, 2024).

The judge was trying a case in which the value of the property at issue, specifically a tree that had been wrongfully cut, was the primary point of contention. The judge found an online valuation calculator and then used that information to question an expert witness about the differences between his methodology for valuing the tree and that of the online source.

Detesting the law

The Tennessee Board of Judicial Conduct publicly reprimanded a judge for (1) expressing his animosity toward the bail system at a county commission meeting and (2) raising his voice at a police sergeant and being sarcastic about a warrant he had prepared. The judge accepted the reprimand. ***Anderson*, Public reprimand** (Tennessee Board of Judicial Conduct February 6, 2024).

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(1) During a public county commission meeting, the judge stated that "bail bond companies don't do anything except collect money from poor people." He added, "I detest the bail bond system in Shelby County. I detest it across the State."

In response to the Board, the judge explained that he followed the law regardless of his personal views.

The Board stated:

> It is one thing for a judge to appear publicly and explain specific problems in an area of the law in which the judge has expertise; it is quite another for a judge to publicly declare that he or she "detests" the law that the judge is charged with applying. Statements of the type in the latter category can undermine public perception and confidence that the judge will approach his or her cases fairly and impartially, as well as undermine public confidence in the judiciary. . . . In addition, extrajudicial comments like those at issue can raise questions about a judge's willingness to follow the law. . . . Such comments can also lead to disqualification issues for the judge.

(2) On March 16, 2023, at the judge's request, Police Sergeant Benjamin O'Brien appeared in court for a bond hearing. During the hearing, the judge raised his voice at Sergeant O'Brien and became sarcastic about a warrant he had prepared. The sergeant left the courtroom feeling embarrassed and harassed.

In response to the complaint, the judge said that, although he did not recall his interaction with the sergeant, court records showed that the case had been dismissed and he had likely explained to the sergeant that the case was being dismissed because the affidavit of complaint was insufficient.

The Board stated:

> Yelling or making injudicious comments in court is neither dignified nor courteous and sets a poor example for everyone present. In addition, a party who is the subject of overly harsh or intemperate words may reasonably perceive that the judge is biased. Nor do such comments inspire confidence in the integrity and impartiality of the judiciary.

Failure to respond to judicial discipline complaints

A judge's failure to file an answer to a formal complaint or charges in judicial disciplinary proceedings has different consequences in different jurisdictions.

For example, in New York, "Failure to answer the formal written complaint shall be deemed an admission of its allegations." §7000.6, New York State Commission on Judicial Conduct, Operating Procedures and Rules. Thus, if the judge fails

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to file an answer, counsel for the Commission files a motion for a summary determination. If the Commission grants the summary determination, it finds that the factual allegations of the complaint were sustained and that respondent's misconduct was established. It then provides a "reasonable opportunity for the submission of briefs and oral argument with respect to possible sanctions." *See, e.g.,* ***In the Matter of Hall*, Determination** (New York State Commission on Judicial Conduct October 17, 2023) (granting a motion for summary determination based on the judge's failure to file an answer to a formal complaint, removal of judge for (1) during a dispute with another customer at a service station, repeatedly asserting his judicial office to the police; (2) making inappropriate sexually charged comments to his co-judge and court staff; (3) making sexual and otherwise inappropriate comments on his public Facebook page; (4) while on the record, publicly inquiring about employment with the police department; and (5) making comments that gave at least the impression that he had prejudged the guilt of three criminal defendants).

Other states have similar rules. There are several examples below.

- "Failure to answer the Formal Statement of Charges shall constitute an admission that the facts alleged in the formal complaint are true and establish grounds for discipline . . . ." **Rule 17, Procedural Rules of the Nevada Commission on Judicial Discipline**.
- "Failure to answer the formal charges shall constitute an admission of the allegations. On motion of disciplinary counsel, the administrative chair may issue a default order setting a hearing to determine the appropriate sanction to recommend to the Supreme Court. The Commission shall notify the parties of the date and time of the hearing and shall permit them to submit evidence regarding aggravation and mitigation of sanction. A respondent held in default shall not be permitted to offer evidence to challenge the allegations contained in the formal charges deemed admitted by this rule." **Rule 24, South Carolina Rules for Judicial Disciplinary Enforcement**.
- "Failure to answer the formal charges shall constitute an admission of the factual allegations. In the event respondent fails to answer within the prescribed time, the statement of charges shall be deemed admitted. The commission [on judicial conduct] shall proceed to determine the appropriate discipline. If respondent fails to appear when ordered to do so by the commission, respondent shall be deemed to have admitted the factual allegations which were to be the subject of such appearance and to have conceded the merits of any motion or recommendations to be considered at such appearance. Absent good cause, the commission shall not continue or delay proceedings because of respondent's failure to appear." **Rule 21, Washington Commission on Judicial Conduct Rules of Procedure**.

Cf., **Rule 8A, Rules of the Mississippi Commission on Judicial Performance** ("The failure of the judge to answer or appear [for the formal hearing] may be taken as evidence of the facts alleged in the formal complaint").

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In contrast, other states have a contrary rule—a judge's failure to file an answer does not constitute an admission, although it may be considered as evidence. There are several examples below.

- "The failure of the judge to answer the charges or to appear at the hearing shall not, standing alone, be taken as evidence of the truth of the facts alleged to constitute grounds for censure, removal, retirement, public or private admonishment, or an advisory letter. In accordance with California Evidence Code section 413, in reviewing the evidence and facts in the case against the judge, the commission [on judicial performance] and the masters may consider the judge's failure to explain or deny evidence or facts in the case or any willful suppression of evidence if that is the case, unless the failure or suppression is due to the judge's exercise of any legally recognized privilege. A lack of cooperation by the judge may be considered by the commission under rule 104." Rule 123(b), Rules if the California Commission on Judicial Performance.
- "The failure of the judicial officer to answer or to appear at the hearing, standing alone, shall not be taken as evidence of the facts alleged or constitute grounds for discipline, retirement, or removal, however the failure to cooperate in the prompt resolution of a complaint by the refusal to respond to Commission [on Judicial Qualifications] requests or by the use of dilatory practices, frivolous or unfounded arguments, or other obdurate behavior may be considered as aggravating factors affecting sanctions or may be the basis for the filing of separate counts of judicial misconduct." Rule 25, VIIIK(2), Indiana Rules for Admission to the Bar and the Discipline of Attorneys.
- "The committee [on judicial conduct] may proceed with the hearing at the time and place fixed, whether or not the judge has filed an answer or appears for the hearing. The committee may draw an unfavorable inference from the failure of the judge to answer or appear; but no such failure, standing alone, shall be sufficient to meet the standard of proof." Rule 40(11)(b), Procedural Rules of New Hampshire Committee on Judicial Conduct.
- "Disciplinary counsel has the burden of proving, by clear and convincing evidence, the facts justifying discipline in conformity with the formal statement of allegations made against the judge. Disciplinary counsel shall present the case in support of the allegations made against the judge set forth in the notice of formal proceedings together with such supplementation of allegations made against the judge as have been made and noticed prior to the date of the hearing. The failure of the judge to answer or to appear at the hearing shall not, standing alone, be taken as evidence of the truth of the facts alleged to constitute grounds for suspension, censure, removal, or retirement. The failure of the judge to testify or to submit to an examination ordered by a panel may be considered,

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unless it appears that such failure was due to circumstances beyond the judge's control." Rule 10(c), Wyoming Commission on Judicial Conduct and Ethics.

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Recent cases (April)

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Recent cases (June)

A sampling of recent judicial ethics advisory opinions (March)

A sampling of recent judicial ethics advisory opinions (May)

Attempting "to put a thumb on the scale of justice"

"Ill-advised, improper, and damaging"

"Rising above the chaos"

"What his plain language conveyed"

Timely justice

"Exceptionally poor judgment"