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Comments during sentencing by Cynthia Gray

A judge's careless comments during sentencing, particularly in cases involving sexual offenses or domestic violence, often produce public outrage and sometimes result in judicial discipline.

For example, the Kentucky Judicial Conduct Commission publicly reprimanded a judge for his statements during a sentencing hearing that suggested the under-age victims were complicit in the defendant's sexual offenses. *In re Fletcher*, Agreed order of public reprimand (Kentucky Judicial Conduct Commission October 7, 2013) (http://courts.ky.gov/commissionscommittees/JCC/Documents/Public_Information/PublicReprimandFletcher.pdf). The judge agreed to the reprimand.

A male teacher had pled guilty to multiple counts of sexual abuse, rape, sodomy, use of electronic means to procure a minor for a sexual offense, and distributing obscene materials to a minor. The five victims were his students and were 13- or 14-year-old girls.

During the sentencing hearing, the judge commented that the defendant "was not blind and only human" and that some of the victims did not look their age. He also discussed the lack of enforcement of the school dress code and said he did not think students should go to school wearing low-cut blouses and short skirts. Responding to a statement by the defendant's attorney, the judge said, "this is a statutory offense, but is it your understanding that all of the acts that occurred were consensual?" The judge sentenced the defendant to seven years in prison as agreed by the prosecution and the defendant.

Eight months later, the judge granted shock probation,

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Recent disqualification decisions by Cynthia Gray

There are several sources for interpretation of the requirement that a judge disqualify from a case when the judge's impartiality might reasonably be questioned. For example, many judicial ethics advisory opinions each year apply the general disqualification standards to specific circumstances. *See, e.g., Arkansas Advisory Opinion 2013-3* (attorney is judge's cousin); *Connecticut Informal Advisory Opinion 2013-19* (attorney to whom new judge referred matters when leaving her law practice); *Georgia Advisory Opinion 238* (2013) (spouse is chief assistant district attorney); *Maryland Advisory Opinion 2012-15* (hospice where judge is volunteer); *Minnesota Advisory Opinion 2013–2* (professional but non-financial relationship with a lawyer or law firm); *New York Advisory Opinion 13-64* (campaign treasurer's law firm); *New York Advisory Opinion 12-37* (former judge); *West Virginia Advisory Opinion* (January 28, 2013) (law firms of daughter and her fiancé); *U.S. Opinion 110* (2013) (ownership of a separately managed investment account).

In a petition for review of an advisory opinion, the New Jersey Supreme Court held that a municipal court judge may not hear cases involving police officers who serve in the same police department as his son. *In the Matter of Advisory Letter No. 7-11*, 61 A.3d 136 (New Jersey 2013). (By rule, in New Jersey, a judge aggrieved by the advisory committee's response to an inquiry or by a formal opinion may seek review "by filing a notice of petition for review with the Clerk of the Supreme Court.")

The judge was a part-time municipal court judge in the City of Perth Amboy. In 2011, his son became an officer

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Recent advisory opinions

• If she has determined that a contract public defender does not provide effective representation, a judge is not required to appoint that contract public defender to represent a defendant. *Washington Opinion 13-5.*

• A judge in a juvenile matter may not sua sponte review public or sealed records in an on-line database unless such review is authorized by statute, court rule, or case-law. *Washington Opinion 13-7.*

• If he has determined that an unrepresented criminal defendant understands and waives the right to counsel, a judge may continue a show cause hearing for a probation violation to give the defendant an opportunity to comply with the judgment and sentence; may permit the defendant to accept a penalty recommended by a probation officer at the first show cause hearing; and may grant the defendant's request to confer with the prosecuting attorney to determine if the case can be resolved. A judge may conduct an initial show cause hearing in the absence of the prosecuting attorney if he reads the pleadings and asks questions in a neutral manner and not as an advocate for the prosecution. *Washington Opinion 13-4.*

• Even in cases that are uncontested or likely to be handled by magistrates, a judge who is facing re-election must disclose on the record to the parties when a member of her campaign committee is counsel and may not rely on campaign literature to provide that notice. *Florida Opinion 2013-19.*

• A judge may not contribute a hand-crafted mask to an on-line fund-raising auction for a hospice if he will be identified as a judge. *Colorado Opinion 2013-4.*

• A judge who is assigned to a domestic violence division may not participate in or attend a walk-a-thon to raise funds for a non-profit organization that provides support for domestic violence victims. *Florida Opinion 2013-18.*

• A judge who is a board member for a non-profit organization may permit her photo and a short biography to appear on the organization's web-site even if the site has a PayPal link for donations. *New Mexico Opinion 13-3.*

• A judge may permit a charity to acknowledge his donation on a sign with his name and title during a fund-raising golf outing. *New York Opinion 13-18.*

• A judge may not sign a primary petition if a statute provides that signing indicates support for the candidate. *Connecticut Informal Opinion 2013-36.*

• A judge may not be a member of a political action committee. *Florida Opinion 2013-20.*

• A judge may attend a ceremony to unveil a portrait honoring a former governor. *Connecticut Informal Opinion 2013-37.*

• A judge may speak to a law school class about the legislative and state budget process. *Connecticut Informal Opinion 2013-39.*

• A judge may solicit members of her church to serve on a committee overseeing a Habitat for Humanity house construction project. *North Carolina Opinion 2013-1.*

• A judge may chair a bar association committee that nominates association members for professional and community awards. *New York Opinion 13-20***.**

• A judge may not participate as a judge in a school district's "truancy court" program but may act as an advisor to the program and speak to groups about school attendance laws. *New Mexico Opinion 13-5.*

• A judge may participate in a focus group of community leaders convened by a consultant preparing a report on truancy for the school district. *New York Opinion 13-13.*

• A judge who learned in an interview that a prospective tenant has an open bench warrant is not required to report the individual to the police. *New York Opinion 13-35.*

• A judge may give a statement to an assistant district attorney for use in responding to a motion alleging ineffective assistance of counsel filed by a defendant the judge represented 20 years ago in criminal proceedings. *New York Opinion 13-53.*

• A judge may privately discuss with his state legislator pending legislation to up-grade certain courts. *New York Opinion 13-63.*

• A judge may accompany her ailing, elderly parent to an eviction proceeding in the courthouse where she presides. *New York Opinion 13-68.*

• A judge may own shares in a closely held consulting business owned by his non-attorney spouse and be included in a family photograph posted on the web-site or used in other advertisements if there is no reference to his judicial title or position and he does not appear in a judicial robe or setting. *New York Opinion 13-84.*

• A judge may not serve as a tie-breaking vote between executors for a family friend. *South Carolina Opinion 7-2013.*

• A judge may not be the keynote speaker, honoree, or awards recipient at a for-profit awards banquet sponsored by a commercial legal publisher but may attend the event as the publisher's guest if its interests have not come and are unlikely to come before her. *New York Opinion 12-187.*

• At a Jamaican Jerk Festival, a judge may compete in a cook-off that is not a fund-raiser even if the winner will receive a cash award and trophy. *Florida Opinion 2013-17*.

• A judge may camp, hunt, or fish and stay in a cabin on land owned by family or friends without compensating the owner. *Oklahoma Opinion 2013-1*. ★

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

Recent cases

Trial schedule

Based on a stipulation, the Nevada Commission on Judicial Discipline publicly reprimanded a judge who, during the retrial of a defendant charged with murder, (1) recessed court in the early afternoon on six days so that she could attend her daughter's soccer games and (2) to accommodate her personal schedule and for other reasons, required the jury, the attorneys, and staff to conduct proceedings continuously from 1:12 p.m. until the jury returned a verdict at 6:47 a.m. the next day. *In the Matter of Vega*, Findings of fact, conclusions of law, and order (Nevada Commission on Judicial Discipline August 29, 2013) (http://judicial.state.nv.us/Findings%20of%20Fact%20-%20Vega%200813.pdf).

Kissing clerk

Accepting an agreement in an attorney discipline proceeding, the South Carolina Supreme Court publicly reprimanded a former magistrate for, at the conclusion of a bond court session, kissing the forehead of the clerk who had been working with him. *In the Matter of Hatcher*, 748 S.E.2d 220 (South Carolina 2013). The magistrate had resigned after the clerk complained to the chief magistrate. The magistrate contended that the kiss was a gesture of appreciation for the clerk's hard work and that he did not intend it to be an amorous gesture. However, he recognized that the clerk was offended and that the kiss was inappropriate.

Treatment of pro se litigant

The Kentucky Commission on Judicial Conduct publicly reprimanded a former senior status special judge for his treatment of a pro se defendant in a civil case and his statements to defense counsel and the defendant in a criminal case. *In re McDonald*, Findings of fact, conclusions of law, and final order (Kentucky Commission on Judicial Conduct August 12, 2013) (http://courts.ky.gov/commissions committees/JCC/Pages/publicinformation.aspx).

The judge had refused to allow a pro se defendant in a civil case to present any argument because he was not a lawyer, summarily entered an injunction against the defendant, and awarded the plaintiff attorney's fees of $11,579.20. The Commission found that the judge had "completely disregarded his responsibility to provide access to the Court for all litigants in the Commonwealth of Kentucky, and his actions in this matter were so improper as to be reprehensible."

During a hearing in a criminal case, the judge stated to the defendant's attorney, for example, "If you ever call me on my cell phone again, I'll strangle you," adding he would try to get the attorney's law license "yanked" if he did it again. When the attorney attempted to explain that he had had the consent of opposing counsel to make the call, the judge stated, "negative" and "be quiet."

Disqualification

Based on an agreed statement of facts, the Mississippi Supreme Court reprimanded a judge and fined him $500 for failing to disclose in an asbestos case the history of asbestosis claims by his parents or to disqualify from the case. *Commission on Judicial Performance v. Bowen* (Mississippi Supreme Court October 3, 2013) (http://courts.ms.gov/Images/Opinions/CO88599.pdf).

The judge presided over a jury trial in a matter in which a plaintiff sued Union Carbide Corp. and others for his alleged exposure to asbestos. During jury selection, the judge struck for cause all prospective jurors with family members who had been screened for an asbestos-related disease or had made a claim for injuries related to asbestos exposure. After two weeks of trial, the judge mentioned to the attorneys in chambers that his father might have been tested for asbestosis, but he did not make a disclosure on the record. When the defendants requested his father's name, the judge refused to provide it.

The defendants' investigation determined that the judge's father had filed two asbestosis lawsuits and that his parents had settled asbestosis claims with Union Carbide and other defendants. The defendants also found that the judge's father had submitted a claim to the bankruptcy trustee for Union Carbide's asbestos supplier.

After the trial, Union Carbide filed a motion requesting that the judge recuse himself. The judge did not rule on the motion within the 30 days as required by court rules. Union Carbide appealed, and the Court removed Judge Bowen from the case. The new judge assigned to the case vacated the judgment, the jury verdict in favor of the plaintiff, and all rulings and orders issued by Judge Bowen.

Woman judge was dating

The Texas State Commission on Judicial Conduct publicly reprimanded a judge for setting bond for a woman with whom he had a romantic relationship. *Public Reprimand of Nicholds* (Texas State Commission on Judicial Conduct September 17, 2013) (http://www.scjc.state.tx.us/pdf/actions/FY2014-PUBSANC.pdf).

On or about February 5, 2013, L.D., a woman the judge was dating, was arrested for driving while intoxicated. Judge Nicholds approached another justice of the peace who was preparing to magistrate her and, in the presence of court staff, asked if he could conduct the proceeding instead. Judge Nicholds set a personal recognizance

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which was within his discretion. The Commission then received a complaint about his comments at the initial sentencing.

The judge explained to the Commission that he was exploring the circumstances surrounding the offenses as required. However, the Commission stated:

> Because the victims were underage, they could not consent; nor was their manner of dress or not looking their age a defense to the sexual offenses committed by their adult teacher. Judge Fletcher's comments were offensive to the victims and their families in that they suggested that the young girls were in some way at fault or complicit in the defendant's offenses.

The Commission noted that the judge "made comments that could be viewed as sympathetic to the defendant." The Commission also found that the judge's comments "manifested bias or prejudice in favor of the male defendant and against the female victims and created the impression for some that his disposition of the case was motivated by bias or prejudice."

Opinion rather than evidence

The California Commission on Judicial Performance publicly admonished a judge for "outdated, biased and insensitive" remarks he made while sentencing a defendant convicted of rape and other sexual assault offenses. *In the Matter Concerning Johnson*, Decision and order (California Commission on Judicial Performance December 13, 2012) (http://cjp.ca.gov/res/docs/public_admon/Johnson_DO_Pub_Adm_12-13-2012.pdf).

The defendant and the victim had dated and lived together, but, after the defendant threatened her with a knife and threatened to slash her throat with a broken compact disk, the victim reported him to the police, and he moved out at her request. They continued to date on and off and had consensual sex in October 2007. After they stopped dating, the victim continued communicating with the defendant but became increasingly concerned he would hurt her. In daily phone conversations the week before November 10, 2007, the defendant threatened to get the victim fired or to blow up her car and claimed he had access to her apartment.

On the night of November 10, the defendant showed up at a restaurant where the victim was on a date. The defendant referred to her date by name and threatened the victim while making a slicing motion across his throat. When the victim went to her car, she found that one of the tires had been slashed. After she got home, the defendant called and threatened to blow up her car and cause her to lose her job if she did not arrive at his apartment within 20 minutes. She went to his apartment.

The defendant bruised her breast with a metal baton, shattered her cell phone, and threatened to maim her face and vagina with a heated screwdriver, to burn her face and hair with a cigarette lighter, and to shoot and kill her. He ordered her to perform fellatio, raped her, and ejaculated in her mouth.

A jury convicted the defendant of rape, forcible oral copulation, domestic battery with corporal injury, stalking, criminal threats, and criminal threats using a deadly weapon. At sentencing, the prosecution asked for a 16-year prison term. The judge stated that he intended to impose six years in prison. The judge explained:

> And that is, I spent my last year and a half in the D.A.'s office in the sexual assault unit. I know something about sexual assault. I've seen sexual assault. I've seen women who have been ravaged and savaged whose vagina was shredded by rape. I'm not a gynecologist, but I can tell you something. If someone doesn't want to have sexual intercourse, the body shuts down. The body will not permit that to happen unless a lot of damage is inflicted, and we heard nothing about that in this case. That tells me that the victim in this case, although she wasn't necessarily willing, she didn't put up a fight. And to treat this case like the rape cases that we all hear about is an insult to victims of rape. I think it's an insult. I think it trivializes a rape.

In response to the prosecution's argument that there were aggravating circumstances, the judge stated, "I just found the threats to be technical threats. I found this whole case to be a technical case. The rape is technical. The forced oral copulation is technical. It's more a crim law test than a real live criminal case. I don't know what more to say."

The Commission found that the judge improperly relied on his own "expert opinion" based on his experience in the district attorney's office, rather than on evidence before him. The Commission also found that the judge's comments indicated he "was not impartial towards sexual assault victims who do not 'put up a fight,' by suggesting that they are not victims of a 'real crime.'"

> The judge's statement that the lack of physical damage showed that the victim "didn't put up a fight" along with his comment immediately thereafter that treating the case before him like other rape cases was "an insult to victims of rape" and "trivializes rape," reflected his own view that a victim must resist in order for there to be a "real" sexual assault – a view that is inconsistent with California law, which since 1980 has contained no requirement of proof that the victim of rape either resisted or was prevented from resisting because of threats. . . . Judge Johnson's references to the rape and forced oral copulation as "technical," and his statement that the case was "more of a crim law test than a real live criminal case," similarly signaled his own view that there must be resistance by the victim and associated infliction of serious bodily injury in order for there to be a "real" case involving more than a "technical" sexual assault.

The Commission also found that the judge's remarks "reflected outdated, biased and insensitive views about sexual assault victims who do not 'put up a fight.' Such comments cannot help but diminish public confidence and trust in the impartiality of the judiciary."

Inconsistent with the law

The New Jersey Supreme Court publicly reprimanded a judge for making statements that created the perception of a lack of impartiality when he sentenced a female teacher who had pled guilty to sexual assault arising from her relationship with a male student. *Gaeta*, Order (New Jersey Supreme Court May 7, 2003). (Unfortunately, the Court's order does not describe the conduct, but it accepted the presentment of the Advisory Committee on Judicial Conduct, which is at www.judiciary.state.nj.us/pressrel/gaeta.pdf.) The judge had consented to the reprimand.

The defendant had been charged with committing a sexual assault upon a minor, a former student who had been 13 years old at the time. Pursuant to a plea agreement, the defendant had agreed to be sentenced to three years incarceration. The judge sentenced her to probation. During sentencing, the judge stated:

> It's just something between these two people that clicked beyond the teacher/student relationship, beyond the friendship and the help that she extended to this young man, that evidently the help was lacking in his own family. Maybe it was a way of him to, once this did happen, to satisfy his sexual needs. At 13, if you think back, people mature at different ages. We hear of - newspapers and t.v. reports over the last several months of nine-year-old admitting having sex. So I really don't see the harm that was done here . . . . I don't see anything here that shows that this young man has been psychologically damaged by her actions. And don't forget, this was mutual consent. Now certainly under the law, he is too young to legally consent, but that's what the law says. Some of the legislators should remember when they were that age. Maybe these ages have to be changed a little bit.

The statements attracted nation-wide media attention. The appellate division reversed the sentence because the judge's emphasis on the victim's harm was an incorrect basis for a non-curatorial sentence.

In the disciplinary case, the Committee found that the judge had expressed views about the sexual nature of young boys that were "stereotypical," "problematic," "suspect," and "fundamentally inconsistent with the meaning and policy of the law that criminalizes the sexual activities between an adult and a minor, boy or girl." The Committee concluded that the remarks "denote more than an honest mistake or inadvertent legal error" about the law of sexual assault involving a minor boy and that the "reasonable interpretation, public perception and common understanding" of the judge's remarks would indicate "a bias and lack of impartiality."

The Committee found that the judge's remarks did not reflect an actual underlying bias but his struggle to find a basis for "what he felt to be a just and humane sentence," stating that a judge "may comment on the law and even express disapproval of the law, as long as his or her fairness and impartiality are not compromised." The Committee noted, however, that "a judge who makes such remarks, even out of inadvertence or by speaking carelessly or loosely, creates in the context in which they were spoken the perception that he or she is biased and harbors prejudices that will lead to prejudgment, lack of objectivity and unfairness."

"Inept expressions of opinion"

Commissions and courts sometimes have refrained from subjecting judges to discipline for statements made during sentencing to avoid discouraging judges from articulating the reasons for their sentencing decisions. For example, the Michigan Supreme Court rejected the recommendation of the Commission on Judicial Tenure that a judge be sanctioned for remarks he made when sentencing an attorney who had been convicted of criminal sexual conduct toward a woman he was representing in divorce proceedings. *In re Hocking*, 546 N.W.2d 234 (Michigan 1996).

Between 1:00 and 2:00 a.m. one morning, the defendant had called his client and arranged to meet at her apartment. After he arrived, they twice engaged in fellatio, and the defendant penetrated his client digitally. The defendant claimed the sex was consensual. His client, however, filed charges claiming that the contact was involuntary. The jury accepted the client's version, convicting the defendant of three counts of criminal sexual conduct. During sentencing, the judge stated, "had I tried this case without a jury, I would have acquitted the Defendant."

The judge imposed concurrent sentences of 18 months to 10 years for each of the three counts; sentencing guidelines required him to impose a prison term of 10 to 25 years or provide adequate justification for deviating downward. Among the 12 reasons the judge gave to justify his downward deviation were the "evidence that the Defendant helped the victim up off the floor after the occurrence" and the victim's statement to a spouse-abuse agency that the defendant had not forced the sex but had worn down her resistance by his persistent requests. Further, addressing what he felt was the defendant's lack of culpability, compared to other offenses and offenders, the judge had stated:

> The fact that the victim agreed to the Defendant's 2:00 a.m., Sunday morning visit is a mitigating circumstance, again with regard to the presence of an evil state of mind on behalf of the Defendant. This is not a perfect world, but as common sense tells me that when a man calls a woman at 2:00 a.m. and says he wants to come over and talk and

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> he's — that's accepted, a reasonable person, whether you want to shake your head or not, Ms. Maas [the prosecuting attorney], I haven't been living in a shell. A reasonable person understands that means certain things. They may be wrong.

The Court noted that these statements became the focus of national media attention and had been interpreted to mean that a lesser sentence was appropriate because the victim had asked for it.

Affirming its commitment to eradicating sexual stereotypes, the Court stated that a judge is not immune from discipline for the manner in which a decision is explained and that "a judge's mode of articulating a basis for decision may exhibit such a degree of antagonism or other offensive conduct that a single incident would indicate that impartial judgment is not reasonably possible." However, the Court emphasized, "the cost of censoring inept expressions of opinion" and concluded that not "every graceless, distasteful, or bungled attempt to communicate the reason for a judge's decision" could serve as the basis for judicial discipline. Noting that "the rationale for a severe sentence would inevitably have a negative effect on those who disagree with the verdict, and 'sympathetic' remarks would have a negative effect on those who believed the verdict was correct," the Court stated that "honest explanation of the rationale for tailoring sentences to the offender and the offense" would be discouraged if misconduct were defined from "the perspective of the person most sensitive to such remarks."

Thus, the Court held, when a judge's comment during sentencing was based on knowledge acquired during a proceeding, the comment is misconduct only if, from an objective perspective, it "displays an unfavorable predisposition indicating an inability to impartially determine the facts or when in combination with other conduct . . . it is clearly prejudicial to the fair administration of justice."

Using that objective standard, the Court found that, in the case before it, the judge's attempt to explain his view of the defendant's lack of malevolent purpose did not constitute misconduct. The Court emphasized that the judge had not injected extraneous matters into the proceedings, had not made explicitly demeaning remarks, and had not used abusive language or an abusive manner. The Court also noted that a judge's "disagreement with a jury verdict is not improper, and sympathy for a defendant a judge believes to have been wrongfully convicted is not inappropriate." The Court concluded that, although "tasteless and undoubtedly offensive to the sensibilities of many citizens," the judge's comments did "not display a mindset unable to render fair judgment."

Context

Similarly, in *In re Lichtenstein*, 685 P.2d 204 (Colorado 1984), the Colorado Supreme Court rejected the recommendation of the Commission on Judicial Discipline that a judge be publicly reprimanded for comments he made when explaining why he was giving a suspended sentence to a man who had pled guilty to second degree murder for killing his wife. The judge imposed a suspended sentence of four years in prison plus one year parole; the presumptive sentence was eight to 12 years in prison. During the sentencing, the judge had stated:

> The Court finds that his mental state, his mental and emotional condition, combined with the sudden heat of passion caused by a series of highly provoking acts on the part of the victim of leaving him without any warning; in fact, based on the testimony that the Court has heard, in a sense deceiving him as to her intentions by being extremely loving and caring up to and through the morning that she left the family home with the full intention of obtaining a divorce and proceeding with a separation from him without even giving him any knowledge of her whereabouts or that of their son, the Court finds that this affected the Defendant sufficiently so that it excited an irresistible passion as it would in any reasonable person under the circumstances and, consequently, would warrant a sentence under the extraordinary mitigating terms of the statute.

The judge's comments and the sentence generated extensive publicity. On appeal, the Colorado Supreme Court overturned the sentence as an illegal mix of incarceration and probation.

In the disciplinary proceedings, however, the Court held that the judge's comments did not constitute misconduct. The Court noted that, as required by statute, the judge had been making findings about the circumstances justifying a sentence outside the presumptive range. The Court concluded:

> The judge was attempting to describe how the victim's conduct, as perceived and interpreted by the defendant, brought about an emotional state in the defendant similar to the "irresistible passion" required for voluntary manslaughter. Although the sentencing comments contain some phraseology which, when read in isolation, might have offended the sensibilities of others, the full context of the sentencing hearing indicates that the choice of words was no more than an awkwardly executed effort to place on record the confused and highly emotional state of the defendant at the time of the killing, which, in the judge's opinion, constituted a mitigating circumstance justifying a sentence below the presumptive range. The judge's comments were not intended to be disrespectful of the law, the victim, or anyone else; nor do they reasonably lend themselves to such a connotation in the full context of the hearing.

Extemporaneous remarks

Noting it is a judge's job to explain his reasons for a sentence, the Maryland Commission on Judicial Disabilities found that nothing a judge had said while sentencing a husband for the murder of his wife rose to the level of sanctionable conduct and dismissed all charges against him, following a public hearing. *Inquiry Concerning Cahill*, Majority decision dismissing charges (Maryland Commission on Judicial Disabilities 1996).

The defendant in the underlying case had found his wife in bed with another man. After several hours of arguing and drinking with her, the defendant killed his wife with a hunting rifle and called the police to report what he had done. Pursuant to a plea agreement, he pled guilty to manslaughter. The judge sentenced the defendant to prison for three years, suspending all but 18 months, followed by supervised probation.

The Commission noted that it had received hundreds of letters from individuals and organizations complaining about the sentence and about several of the judge's remarks. (Some of the criticism involved the plea agreement, but, the Commission stated, it was clear that the judge was not involved in the agreement.) The Commission explained that the essence of the complaints was that the judge's comments appeared to excuse violent male behavior against a female, manifesting gender bias.

For example, in one of the comments that received the most complaints, the judge had stated:

> But whether or not the sentence in this case will deter, I can't really say. I would hope that it does. But I cannot think of a circumstance whereby personal rage is uncontrollable greater than this for someone who is happily married. And that is not mere lip service, it is fact. To be betrayed in your personal life when you were out working to support the spouse under the heightened circumstances of this case are almost unmanageable, I would think, even if a person did not have alcohol as a contributing factor.

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The Commission found that the comment simply recognized the legally mitigating fact under Maryland law that discovering a spouse in the act of sexual intercourse with another, although not an excuse for murder, may cause a reasonable person to act in accordance with passion rather than clear reasoning. The Commission stated that it was proper for the judge to explain in detail the importance of the personal rage factor in his considerations of the sentence. The Commission noted the judge had stated in other comments that "manslaughter is a serious offense" and that the husband should have walked away. The Commission also found that the comment was gender neutral, referring to "someone who is happily married and has been betrayed."

The Commission stated that, standing alone, the following statement by the judge would have been inappropriate:

> I seriously wonder how many married men, married five years or four years would have the strength to walk away, but without inflicting some corporal punishment, whatever that punishment might be. I shudder to think what I would do. I'm not known for having the quietest disposition. Had you done that, you probably would have seen this court in different fashion, in a marital case. And that is extremely unfortunate for you. But I sense by your actions that you will handle this.

However, the Commission concluded that the context of the statement indicated that the judge did not condone violence or corporal punishment by men or anyone else in situations similar to those in the case.

The Commission also acknowledged that, read by itself, the judge's statement that "the most difficult thing that I have found is sentencing noncriminals as criminals" could give rise to complaints that the judge was referring to a man who had shot his wife as a non-criminal. But the Commission noted that, immediately following that comment, the judge had explained that he uses "noncriminal" to describe "first offenders." The Commission also stated that, a page or two later in the transcript, it became even clearer that the judge did not consider the husband's actions to be "noncriminal" and recognized the gravity of the offense when he stated, "manslaughter is a serious offense, as the guidelines indicate. Three to eight years for a first offender is a heavy sentence. And for those who have never had the misfortune of spending a day behind bars, they can't understand how heavy that is, because I say we're dealing here with an individual who by his background is a noncriminal. He now is a criminal, unfortunately."

Stating it "did not belittle the outcry" about the judge's comments, the Commission acknowledged the judge's phraseology had "shortcomings" and that his extemporaneous remarks might not have been perfect. However, the Commission concluded that a careful and full reading of the entire proceeding and all of the judge's comments did not demonstrate any violation of the code of judicial conduct. ★

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bond for L.D.'s release. The judge explained that he did so because he knew that she would not run.

The Commission concluded that, although the judge had the authority to magistrate a defendant charged with DWI and the discretion to release that defendant on a PR bond, "his intervention in this particular case, which involved his girlfriend, created the appearance and the reality that he was allowing his relationship with her to influence his judicial conduct and judgment, that he was giving her favorable treatment, and that she was in a special position to influence the judge."

Reference letter

The Arizona Commission on Judicial Conduct informally reprimanded a judge for submitting a character reference letter on behalf of an attorney seeking reinstatement to the practice of law in a proceeding before the presiding disciplinary judge. *Barth*, Order (Arizona Commission on Judicial Conduct September 7, 2012) (http://www.azcourts.gov/azcjc/PublicDecisions/2012.aspx). The Commission stated, "whether the judge's letter was the equivalent of testimony as a character witness in the attorney's reinstatement proceeding or served to vouch for the character of the attorney in a legal proceeding, the judge was not duly summoned by the attorney to provide character witness testimony or otherwise vouch for his character in a legal proceeding."

Acting as attorney for rape victim

Based on an agreed statement of facts and joint recommendation, the New York State Commission on Judicial Conduct admonished a part-time judge for acting as an attorney for an alleged rape victim and her family notwithstanding that he had presided over proceedings in the underlying criminal case. *In the Matter of Fleming*, Determination (New York State Commission on Judicial Conduct September 30, 2013) (http://www.cjc.ny.gov/Determinations/F/Fleming.Andrew.P.2013.09.30.DET.pdf).

On June 9, 2009, the judge issued an arrest warrant for Clarence Justice on charges of rape and endangering the welfare of a child. On June 11, he arraigned Justice, recalled the arrest warrant, issued an order of protection on behalf of the victim, who was then 15, and set bail of $2,500 cash or $10,000 bond. He set the case for August 5. Subsequently, the judge approved the request by Justice's employer for a copy of the records in his case with the victim's name redacted. On August 5, Justice's attorney failed to appear, and the judge adjourned the case to August 12. On August 14, the judge's court was divested of jurisdiction over Justice's case.

The judge has been acquainted with the family of Justice's victim since the late 1990s. In March 2010, the victim's father telephoned the judge for information about legal aspects of Justice's criminal case, which was then pending in another court. Between March 2010 and late July 2010, in several additional telephone calls with the victim's father, the judge provided information about the criminal justice system and legal procedures in the case.

The father told the judge that members of Justice's family and other supporters were harassing the victim. In July 2010, while Justice was on trial, the judge spoke with the prosecuting assistant district attorney about allegedly harassing conduct at the courthouse by Justice's family and supporters toward the victim.

On July 16, Justice was convicted of rape and criminal sexual act. After the conclusion of the trial but prior to sentencing, Judge Flemming telephoned and spoke with the judge presiding over the case about the conduct of the defendant's family and their supporters during the trial.

In late July 2010, the judge met with the victim and her family at his law office and discussed legal action that could be initiated in response to the harassing conduct. The judge sent a letter on his law office stationery to the home of a Justice family member and a friend of the family member who taught at the victim's school. The letter stated that the firm had been retained by the victim's family to pursue a civil suit against Justice and demanded that the harassment of the victim cease. Neither the judge nor anyone in his firm received any fee for any services concerning the matter.

The Commission stated:

> Even if respondent was motivated by a sincere desire to help the young victim of a crime whose family he knew, the ethical rules precluded him from acting as her advocate. By undertaking representation of the victim in the circumstances presented, he conveyed the appearance of using his judicial position and information gleaned in his official capacity to benefit his practice of law. . . . As respondent has acknowledged, such an appearance is inconsistent with the ethical mandates notwithstanding that he did not seek or receive any compensation for his legal services.

Court policy

The Arizona Commission on Judicial Conduct reprimanded a judge for a standing court policy that failed to comply with the statutory requirements for waiver of personal service of a citation. *Mapp*, Disposition of complaint (Arizona Commission on Judicial Conduct October 22, 2013) (http://www.azcourts.gov/portals/137/reports/2013/13-203.pdf). The complainant received a traffic citation through the mail but was not personally served as required by law. When he called the court clerk's office to inquire about his case, the court treated the call as a waiver of the personal service requirement although there was no evidence that the complainant desired or intended to waive that requirement and his call did not meet any of the statutory requirements for such a waiver such as an appearance in court. The judge confirmed that his court's standing policy is not to abide by the statutory requirements for waiver. ★

Recent disqualification decisions continued from page 1

in the city's police department. In response to an inquiry, the advisory committee stated the judge "may neither sit as the Chief Municipal Court Judge nor as Municipal Court Judge in Perth Amboy where his son also serves as a police officer." The judge petitioned the Court for review.

The Court explained that the common courthouse feature of a figure of justice blindfolded holding a scale equally balanced "carries a simple message—all stand before the law as equals, and justice will be administered fairly and impartially."

> If the public is to keep faith in the ideals represented by that symbol, then it must have complete confidence in the integrity of the judges who administer our system of justice. That confidence will come only when judges are above reproach and suspicion in the eyes of those who appear in their courtrooms. Appearances matter when justice is dispensed, and therefore public perception that a judge might be partial to one party over another—whether true or not—cannot be reconciled with the ideal of blind justice.

Noting that, for most members of the public, municipal court judges are the face of the judiciary, the Court emphasized that "the mere appearance of bias in a judge—however difficult, if not impossible, to quantify—is sufficient to erode respect for the judiciary" and concluded "'ensuring both conflict-free, fair hearings and the appearance of impartiality in municipal court is vital to maintaining public confidence in our system of justice."

The Court held that, in cases that pit a litigant's credibility against that of a Perth Amboy police officer, litigants could reasonably believe that they will not "receive a fair shake" and "the scales of justice [would be] tilted against" them "given the judge's filial ties to the police department."

> In his capacity as a municipal court judge trying routine cases involving police witnesses, Judge Boyd must render final judgment on the credibility of his son's colleagues, some of whom may be his supervisors, others of whom may be his partners on patrol, and many of whom may be his friends. In some instances, Judge Boyd might have to issue adverse rulings against the police department that would be extremely displeasing to Officer Boyd's fellow officers. It would not be unnatural for any father to ponder the consequences of his decisions on the life and career of his son—even if he were to do his best to disregard such extraneous considerations in deciding a case. It is the appearance of the conflict between public duty and filial ties that will strain public confidence in the integrity of the judicial process.

The Court emphasized that the issue was not whether the judge "can faithfully maintain impartiality in cases involving Perth Amboy police officers who serve with his son," but that, because "the workings of his mind cannot be put on display," "public perception matters." The Court concluded, "ultimately, a litigant should not be left to wonder about the judge's objectivity or impartiality."

Advisory opinions in other states, however, do not require disqualification when a judge is related to a law enforcement officer in the same jurisdiction if the family member is not directly involved in the case although some opinions require disqualification if the family member is the supervisor of the officers who are directly involved or is the head of the law enforcement department, for example, the police chief or sheriff. *See, e.g., California Advisory Opinion 51* (2001) (a judge whose family member is a police officer may sit in criminal cases unless the family member is actually involved in the proceeding or likely to be a material witness); *Delaware Advisory Opinion 2009-2* (a justice of the peace whose brother-in-law is a police officer may hear cases involving police officers from that department as long as his brother-in-law is not a witness); *Florida Advisory Opinion 07-11* (a judge whose spouse is a detective or whose son is a deputy with the sheriff's department is not disqualified from cases involving the department unless the family member is actively involved in the case); *Florida Advisory Opinion 93-18* (a traffic magistrate whose spouse is an officer in the local sheriff's office is not disqualified from hearing traffic tickets written by the office if her spouse does not have supervisory duties); *Kansas Advisory Opinion JE-113* (2003) (a judge whose brother is the local chief of police is disqualified from any case in which one of the officers under his supervision is the complaining witness); *New York Advisory Opinion 98-27* (a city court judge whose spouse is a city deputy chief of police may preside over criminal matters in which the spouse had no personal involvement only if the parties are represented by counsel, disclosure is made, and both sides consent); *New York Advisory Opinion 93-104* (a judge whose child is an officer of the sheriff's department may preside in criminal cases investigated by the department in which his child did not personally participate); *South Carolina Advisory Opinion 1-2009* (a municipal court judge may not preside over criminal cases when the judge's uncle is the chief of police); *South Carolina Advisory Opinion 9-1994* (a magistrate may be married to a sheriff's deputy as long as he discloses the relationship in every case in which any person involved with the sheriff's department appears and recuses upon request); *South Carolina Advisory Opinion 1-1991* (a judge whose son is the sheriff may preside over cases prosecuted by the sheriff's department unless a party seeks the judge's disqualification); *West Virginia Advisory Opinion* (December 17, 2012) (a magistrate whose father is sheriff must disqualify herself from any case in which her father was involved and disclose the relationship in all cases that involve the agency); *West Virginia Advisory Opinion* (July 19, 2010) (a judge whose son is chief of police must disclose that relationship in all cases

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involving the police department and must disqualify from any case in which his son had any involvement).

Appellate case-law

Another source for interpretation of the judicial disqualification rules is appellate case-law resulting when a question about a trial judge's impartiality is raised as an issue on appeal or in a petition for a writ of prohibition. *See, e.g.*, *People v. Flockhart,* 304 P.3d 227 (Colorado 2013) (trial judge who had as a deputy district attorney seven years earlier brought charges against a defendant was not disqualified from similar charges when he had no knowledge of or involvement with the investigation or presentation of the subsequent case); *State v. Pratt*, 813 N.W.2d 868 (Minnesota 2012) (reversal of defendant's theft-by-swindle convictions because the retired judge who had presided over the trial had at the time been retained as an expert by the county attorney's office in an unrelated case); *Young v. Govier & Milone*, 835 N.W.2d 684 (Nebraska 2013) (that the defendants in an attorney malpractice case had appeared before the trial judge as attorneys; that, before becoming a judge, he had advocated for causes to which the plaintiff and a group she headed were opposed; and that, according to the plaintiff, he had shown hostility toward her in several rulings did not create a basis for the judge's disqualification).

No noticeable up-tick in cases raising disqualification issues appears to have followed the United States Supreme Court's 2009 decision that the Due Process Clause of the United States Constitution required disqualification when a "sufficiently substantial" risk of actual bias was created. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). That risk was created in *Caperton*, the Court held, by approximately $3 million in contributions from the principal of one of the parties that "significant[ly] and disproportionate[ly] influence[d]" the election of one of the justices of the West Virginia Supreme Court of Appeals while the case was clearly headed to that court. The contributions "eclipsed" the total spent by the challenger's campaign committee and "exceeded" by $1 million the total spent by the campaign committees of both candidates combined. The decision emphasized that not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but found "this is an exceptional case."

In one of the few cases to apply *Caperton*, the Nevada Supreme Court held that donations constituting 14% of cash donations to a judge's campaign and 25% of in-kind donations by the husband and others connected to a divorce case and made less than six months after the divorce decree was entered did not require the judge's disqualification from post-decree proceedings under either the due process clause or the code of judicial conduct. *Ivey v. 8th Judicial District Court*, 299 P.3d 354 (Nevada 2013).

"Concrete rubric"

In a concurring opinion in *Ivey*, one justice voiced her concern that the Nevada code of judicial conduct did not have a "bright-line test to apply to judicial contributions" or "any other iteration of the rules," noting other states had adopted such guidelines following *Caperton*. The concurrence argued that "this lack of definition fails to provide a concrete rubric against which to analyze such contributions." In 2009, the Court had rejected a recommendation by its code revision committee for an amendment that would require a judge to disqualify if the "judge has received financial or electoral campaign support within the previous 6 years from a party, or a party's affiliated entities or constituents, or a party's lawyer or the law firm of a party's lawyer in an aggregate amount that exceeds $50,000" or if "the judge has received aggregate campaign support exceeding 5% of the judge's total financial or electoral backing within the previous 6 years from a party, or a party's affiliated entities or constituents, or a party's lawyer or the law firm of a party's lawyer."

Only four states have a bright-line rule. The Arizona code of judicial conduct provides that a judge shall disqualify if "a party, a party's lawyer, or the law firm of a party's lawyer has within the previous four years made aggregate contributions to the judge's campaign in an amount that is greater than the amounts permitted" by statute. The California legislature passed a statute that provides a judge is disqualified if the judge received a contribution over $1500 from a party or lawyer in the proceeding "in support of the judge's last election, if the last election was within the last six years" or "in anticipation of an upcoming election." The Utah code of judicial conduct provides that a judge shall disqualify if "a party, a party's lawyer, or the law firm of a party's lawyer has within the previous three years made aggregate contributions to the judge's retention in an amount that is greater than $50." The New York State Unified Court System adopted an assignment rule that provides "no matter shall be assigned to a judge" if an attorney in a case, that attorney's law firm, or a party has individually contributed $2,500 or more to the judge's campaign.

Seven state supreme courts have adopted disqualification rules for campaign contributions that do not have specific amounts, but that expressly or impliedly incorporate

On December 29, 2009, Judge Gonzalez had entered a divorce decree based on a marital settlement agreement in which Phillip Ivey was to pay Luciaetta Ivey $180,000 a month as alimony from the income that he received from his interest in an Internet poker company. In early 2010, Phillip donated $5,000 to Judge Gonzalez's re-election campaign, his attorney donated $1,000, his attorney's wife contributed $2,500, his attorney's law partner donated $1,000, and the law firm that Phillip had hired to represent Luciaetta contributed $500. Phillip's attorney also made an in-kind contribution of $3,543.54 by holding a fund-raiser for the campaign.

The cash contributions totaled $10,000 and were approximately 14% of the cash contributions to the judge's campaign. Phillip's $5,000 donation was 7% of the cash contributions and the largest contribution by any individual (although two political action committees also donated $5,000). The in-kind donation from Phillip's attorney was 25% of the total in-kind contributions.

In May 2011, a dispute arose over the monthly alimony payments. Luciaetta filed a motion to re-open discovery. In a disqualification motion, Luciaetta argued that the contributions by Phillip and others required the judge's disqualification under the due process clause and the code of judicial conduct. When the motion was denied, Luciaetta filed a petition for a writ of prohibition with the Nevada Supreme Court.

The Court concluded that the donations by the ex-husband and those connected to him did not rise to the "exceptional" level required by *Caperton*. The Court acknowledged that the donations were "greater than the contributions of other individuals to Judge Gonzalez's campaign," but considered more significant that the amounts did "not reach the extraordinary level" of the $3 million at issue in *Caperton*.

The Court also decided that the timing of the contributions was "less suspicious than the timing of the *Caperton* donations," because they took place only after the conclusion of the divorce. The Court acknowledged that post-decree motions are not uncommon in divorce proceedings and that the contributions occurred prior to the expiration of the six-month limit for filing motions for relief from judgment. Nevertheless, the Court concluded that the particular facts of the case did not demonstrate "such a high risk of bias that due process required Judge Gonzalez's recusal."

For the same reasons, the Court concluded that the contributions were not significant enough to raise a reasonable question as to the judge's impartiality under the code of judicial conduct.

Cf., State v. Sawyer, 305 P.3d 608 (Kansas 2013) (due process required judge's disqualification from a criminal trial when he had recused from the defendant's assault and battery trial 20 months earlier and two months after that had engaged in intemperate demeanor in the defendant's trial for lewd and lascivious behavior, which drew an admonition from Court of Appeals). ★

the decision in *Caperton*. For example, the Georgia code requires a judge to disqualify when:

> [T]he judge has received or benefited from an aggregate amount of campaign contributions or support so as to create a reasonable question as to the judge's impartiality. When determining impartiality with respect to campaign contributions or support, the following may be considered: (i) amount of the contribution or support; (ii) timing of the contribution or support; (iii) relationship of contributor or supporter to the parties; (iv) impact of contribution or support; (v) nature of contributor's prior political activities or support and prior relationship with the judge; (vi) nature of case pending and its importance to the parties or counsel; (vii) contributions made independently in support of the judge over and above the maximum allowable contribution which may be contributed to the candidate; and (viii) any factor relevant to the issue of campaign contributions or support that causes the judge's impartiality to be questioned.

The Iowa code provides that a judge is disqualified when:

> The judge knows or learns by means of disclosure mandated by law or a timely motion that the judge's participation in a matter or proceeding would violate due process of law as a result of: (a) Campaign contributions made by donors associated or affiliated with a party or counsel appearing before the court; or (b) Independent campaign expenditures by a person other than a judge's campaign committee, whose donors to the independent campaign are associated or affiliated with a party or counsel appearing before the court.

A comment to the Missouri code states:

> A candidate for judicial office should consider whether his or her conduct may create grounds for recusal for actual bias or a probability of bias pursuant to *Caperton v. A.T. Massey Coal Co.*, ___ U.S. ___ (2009), or whether the conduct otherwise may create grounds for recusal under this Rule 2 if the candidate is elected to or retained in judicial office.

For additional examples and more information, go to https://www.ajs.org/index.php/judicial-ethics/learn-more-about-judicial-ethics-and-discipline.

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