JUDICIAL CONDUCT REPORTER

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Treatment of domestic violence complainants

In three cases, including two recent cases, judges have been disciplined for ordering complaining witnesses in domestic violence cases jailed for failing to carry through with the prosecution of their complaints.

Approving a revised consent judgement, the Florida Supreme Court reprimanded a judge for finding the victim in a domestic violence case in contempt when she failed to respond to the prosecution's subpoena, being discourteous and impatient toward the victim, and creating the appearance of partiality toward the state. *Inquiry Concerning Collins*, 196 So. 3d 1129 (Florida 2016). The Court also ordered the judge to complete anger management and domestic violence courses.

In the criminal domestic violence case over which the judge presided, the victim failed to respond to the state attorney's subpoena to testify in the trial against her abuser. As a result, the state was unable to proceed with the trial and dismissed a charge of dangerous exhibition of a weapon; the defendant pled guilty to a reduced charge of simple battery.

The judge issued an order to show cause why the victim should not be held in contempt of court. When the victim appeared, the judge instituted direct criminal contempt proceedings against her even though she was not

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False or misleading campaign statements

Rule 4.1(A)(11) of the 2007 American Bar Association *Model Code of Judicial Conduct* provides: "A judge or judicial candidate shall not . . . knowingly, or with reckless disregard for the truth, make any false or misleading statement." The clause prohibiting false statements has withstood several constitutional challenges. In contrast, several federal courts and state supreme courts have held that a prohibition on misleading statements in judicial election campaigns violates the First Amendment.

False statements

The Ohio Supreme Court and the U.S. Court of Appeals for the 6th Circuit have upheld the prohibition on false statements in judicial election campaigns.

A judicial candidate challenged the prohibition on false statements in the Ohio code of judicial conduct after she was reprimanded for identifying herself as an incumbent judge when she was not. *In re Judicial Campaign Complaint Against O'Toole*, 24 N.E.3d 1114 (Ohio 2014). The Ohio code of judicial conduct provided that:

> [A judicial candidate] shall not knowingly or with reckless disregard . . . [p]ost, publish, broadcast, transmit, circulate, or distribute information concerning the judicial candidate or an opponent, either knowing the information to be false or with a reckless disregard of whether or not it was false or, if true, that would be deceiving or misleading to a reasonable person.

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NCSC NATIONAL CENTER FOR STATE COURTS Center for Judicial Ethics

Recent advisory opinions

Judicial duties

• While conducting settlement negotiations, a judge must not be coercive, give the appearance of coercion, or engage in other improper tactics but may express her opinion about the merits of the case, order individuals with authority to attend a settlement conference in person, and privately ask counsel if they are willing to consider a fee reduction to help reach a settlement. A judge should ensure that a self-represented party understands that there is no obligation to settle a case but may describe the risks of going to trial. *California Judges Association Opinion 71* (2016).

• A judge may not appoint as a special master or hire as a judicial assistant the spouse of another judge in the same district. A judge should not appoint his child to serve as defense counsel under the Criminal Justice Act, but colleagues may do so as long as the appointment does not constitute de facto full-time service or create the appearance that the court is favoring the child of one of its own judges. A court employee may continue to be employed after becoming a relative of a judge of the court, but the judge/relative should not supervise the employee, and the employee's promotions should not be dependent on the judge/relative's actions. A judge should not hire a person with whom he is in a serious romantic relationship. Nepotism prohibitions apply to the appointment and hiring of volunteer employees, such as unpaid externs. *U.S. Advisory Opinion 115* (2016).

• A judge who denied an application for a civil protection order may not bring the reasons for that decision to the attention of the prosecuting attorney when the same incident becomes the subject of a criminal case. *Connecticut Emergency Staff Opinion 2016-8.*

• For sentencing, a judge may review a defendant's criminal history in the court's computerized records as long as she follows the procedural safeguards for taking judicial notice. *Illinois Opinion 2016-2.*

• A housing court judge who repeatedly receives attempted ex parte communications from elected officials on behalf of their tenant-constituents should, if possible, set up a screening procedure so that staff members can return communications to the sender without exposing the judge to the substance. If the judge does not review the communication, disclosure is not required, and the judge has no further obligation. *New York Opinion 2015-178.*

• Absent a legal requirement, a judge may not comply with guidelines that require judges to consider defendants' financial eligibility for assigned counsel ex parte and under seal. *New York Opinion 2016-68.*

• A judge may not send a form letter to defendants who plead guilty by mail advising them sua sponte that they may change their plea to "not guilty" and conference the matter with the prosecutor or negotiate a reduced plea. *New York Opinion 2016-9.*

• A judge should not approve a plea agreement that requires participation in a traffic diversion program run by the district attorney that the judge believes is illegal. *New York Opinion 2016-92.*

• A judge may place promotional materials for a bar association's educational programs on a table in the back of the courtroom. *New York Opinion 2016-93.*

• After reporting substantial and troubling irregularities by the court clerk to the appropriate supervising judge, a judge has no further ethical obligation. *New York Opinion 2016-103.*

• A judge who actively participated in a prosecution that led to a conviction is disqualified from any proceeding in which that conviction is alleged as a prior in sentencing. *California Oral Advice Summary 2016-17.*

• A judge whose spouse is an attorney in a prosecutor's office is disqualified from a trial if his spouse participated at the arraignment, in juvenile court hearings before the matter was transferred, or in plea negotiations even if she did not file the charges. *Nebraska Opinion 2016-4.*

• A judge has no duty to disclose or disqualify herself from cases involving the attorney general's office based only on media efforts to link the judge and her spouse with a person whom the attorney general is investigating. *New York Opinion 2016-26.*

• A judge who ordered a child protective investigation is not disqualified from other proceedings involving the same family. *New York Opinion 2015-195.*

• A judge who handles criminal matters in a small district may not provide a letter of recommendation directly to the chief public defender for an attorney who has applied to be supervisory public defender when the attorney would continue to appear before the judge if chosen for the position. *Connecticut Emergency Staff Opinion 2016-3.*

• A judge may provide a letter of recommendation for a court clerk regardless whether the clerk is applying for a job within the court system or in the private sector, may use court letterhead, and may sign with the title "Judge." *Nebraska Opinion 2016-3.*

• A judge may suggest that a court employee send a résumé to his friend, a partner in an out-of-state law firm, who is hiring staff for the firm's Connecticut office. *Connecticut Informal Opinion 2016-11.*

• A judge may respond to an inquiry from the ABA concerning a potential candidate's qualifications for appointment to the bench. *U.S. Advisory Opinion 115* (2016). ★

The Center for Judicial Ethics has links to judicial ethics advisory committees at www.ncsc.org/cje.

Recent advisory opinions
Off-bench activities

• A judge may provide a family member involved in an out-of-state lawsuit with an affidavit limited to factual matters but should request that the family member not volunteer that the affiant is a judge. *Connecticut Informal Opinion 2016-7.*

• A judge may not complete a questionnaire on behalf of a family member for use in a Catholic Church annulment proceeding. *South Carolina Opinion 12-2016*

• A judge may complete a social services department form verifying the names of all adults and children in a home that must be filled out by a professional who knows the applicant and her family and requires the signer to state his profession. *New York Opinion 2016-106.*

• A judge may be photographed as part of the bar foundation's oral history project on the state's women lawyers and may send a letter soliciting other judges to participate. *Connecticut Informal Opinion 2016-9.*

• A judge who was instrumental in creating an ethnic bar association may authorize the association to rename its annual awards dinner for him if the dinner is not a fundraiser. *Connecticut Informal Opinion 2016-10.*

• A judge who agreed to emcee a program celebrating Latino culture and heritage must withdraw if marketing for the event states that the proceeds will be donated to an educational organization that is not related to the law, the legal system, or the administration of justice, includes a link to the organization's web-site that has a "Donate Now" feature, and asks others to actively market the event through Facebook. *Washington Opinion 2016-5.*

• A judge may not serve on an advisory council created by statute for a public elementary school. *Florida Opinion 2016-11.*

• A judge may be a member of the board of trustees for a local museum and cultural center. *South Carolina Opinion 13-2016.*

• A judge may not serve as a member of the judicial advisory council for the National Juvenile Defender Center. *Utah Informal Opinion 2016-3.*

• A judge may not participate in the "Las Vegas Oscars" in which judges would nominate or vote for the "best" attorney in categories such as best lead counsel, best criminal trial, or best closing argument. *Nevada Opinion 2016-2.*

• A judge who maintains a leadership role in a religious organization may not promote fund-raising activities or otherwise personally participate in soliciting funds or goods but may promote a non-fund-raising weekend retreat. *New York Opinion 2016-17.*

• A judge may read passages from scripture at a religious service. *New York Opinion 2016-22.*

• A judge may not participate in a prison ministry program if inmates he sentenced may be at the program's group sessions. *New York Opinion 2016-22.*

• A judge who is a former rodeo queen may allow herself to be featured in an article in an equestrian magazine about how participation in such contests benefits young women. *New Mexico Opinion 2015-3.*

• A judge may be an unpaid guest on a non-commercial podcast about New York legal issues or discuss legal issues that arise in fictional works on a non-commercial podcast about science fiction and comic book characters if her participation is not used to market the podcasts. *New York Opinion 2016-5.*

• A judge may not participate in a continuing legal education program that is advertised in a way that clearly implies attorneys attending will be in a special position to influence the judge and offers an honorarium designed to maximize the number of paying attendees. *New York Opinion 2015-202.*

• A judge may work during non-court hours as a softball umpire and be reasonably compensated. *Washington Opinion 2016-1.*

• A judge may not earn supplemental income by assisting a for-profit company secure investors from his network of family and friends. *Florida Opinion 2016-12.*

• A judge may not engage anonymously in otherwise prohibited political activity, such as publishing partisan political literature. *New York Opinion 2016-85.*

• A judge may take a public position on whether a constitutional convention should be convened. *New York Opinion 2016-94.*

• Regardless whether her title is used, a judge may not hold an office in an organization if the statements and policies of the organization would undermine public confidence in the independence and impartiality of the judiciary. A judge should not make any public statements commending or criticizing a political candidate on the bench, as a private citizen, or as an officer of an organization. A judge may speak on issues and legislation if she is personally affected but only if the personal interest is significant and the affect is direct. *Utah Informal Opinion 2016-2.*

• A judge may not join an informal discussion group with politically connected people to develop proposals for redistricting, election, and voting reforms, legislative restructuring, school funding, and other controversial or political matters unrelated to the law, the legal system, and the administration of justice. *New York Opinion 2016-60.*

• A judge's spouse may make political contributions but not from a joint account. *Maryland Opinion Request 2016-23.*

• A judicial candidate may not sign a political organization's pledge to endorse all other candidates endorsed by the organization and to consult with it on appointments when in office. *New York Opinion 2016-7.* ★

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Disqualification: Recent cases

Served as lawyer

Vacating a decision of the Pennsylvania Supreme Court that denied post-conviction relief to a prisoner sentenced to death, the U.S. Supreme Court held that (1) the participation of a justice who had as the district attorney approved seeking the death penalty in the prisoner's case violated the Due Process Clause of the Fourteenth Amendment and (2) the justice's failure to recuse was not a harmless error even though his vote was not decisive in the state court's 6-0 decision. *Williams v. Pennsylvania*, 195 L. Ed. 2d 132 (2016).

In 1986, Terrance Williams was convicted of first-degree murder and sentenced to death for the murder of Amos Norwood. At the time, Ronald Castille was the district attorney of Philadelphia. When the prosecutor had requested permission to seek the death penalty for Williams, Castille wrote at the bottom of the document: "Approved to proceed on the death penalty."

> "Bias is easy to attribute to others and difficult to discern in oneself."

Williams's conviction and sentence were upheld on direct appeal, state post-conviction review, and federal habeas review. In 2012, Williams filed a petition pursuant to Pennsylvania's Post Conviction Relief Act based on new information from a witness who had previously refused to speak with Williams's attorneys. The witness now disclosed that before trial he had informed the prosecutors that the motive for the murder was Norwood's sexual relationship with Williams but that the prosecutors had instructed him to falsely testify that the motive was robbery. The witness also admitted that the trial prosecutor had promised in exchange for his testimony to write a letter to the state parole board on his behalf, which was not disclosed at trial.

The post-conviction relief court found that the trial prosecutor had suppressed material, exculpatory evidence and engaged in "prosecutorial gamesmanship." That court stayed Williams's execution and ordered a new sentencing hearing.

Ronald Castille was now Chief Justice of the Pennsylvania Supreme Court, and he joined a majority of the Court in reinstating the death sentence for Williams.

Granting review, the U.S. Supreme Court held that "under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case."

> Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, "the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" . . .
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> When a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome. There is, furthermore, a risk that the judge "would be so psychologically wedded" to his or her previous position as a prosecutor that the judge "would consciously or unconsciously avoid the appearance of having erred or changed position." . . . In addition, the judge's "own personal knowledge and impression" of the case, acquired through his or her role in the prosecution, may carry far more weight with the judge than the parties' arguments to the court. . . .

Rejecting the state's characterization of Chief Justice Castille's prior involvement as a brief administrative act limited to "the time it takes to read a one-and-a-half-page memo," the Court stated that it would "not assume that then-District Attorney Castille treated so major a decision as a perfunctory task requiring little time, judgment, or reflection on his part." The Court also noted Chief Justice Castille's own statement during his campaign for the Pennsylvania Supreme Court that he had "'sent 45 people to death rows' as district attorney," concluding his "willingness to take personal responsibility for the death sentences obtained during his tenure as district attorney indicate that, in his own view, he played a meaningful role in those sentencing decisions and considered his involvement to be an important duty of his office." The Court emphasized:

> It is important to note that due process "demarks only the outer boundaries of judicial disqualifications." Most questions of recusal are addressed by more stringent and detailed ethical rules, which in many jurisdictions already require disqualification under the circumstances of this case.

The Pennsylvania code of judicial conduct does provide that a judge shall disqualify himself if he "served as a lawyer in the matter in controversy" and if he "served in governmental employment, and in such capacity participated

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Recent judicial discipline cases

Church observations

Based on the findings of fact and recommendation of the Judiciary Commission, which the judge did not contest, the Louisiana Supreme Court suspended a judge for 15 days for investigating a probationer's background through ex parte communications, adjudicating the matter without the prosecuting agency, and making observations from the bench based on his acquaintance with the probationer through their involvement in the same church. *In re Best*, 195 So. 3d 460 (Louisiana 2016).

In June 2009, Antonio Garcia pled guilty to indecent behavior with a juvenile and was sentenced to five years of active supervised probation. Garcia's prosecution was handled by the Attorney General's office because the District Attorney's office recused itself.

At some point after Garcia was sentenced, he and the judge became personally acquainted through their mutual involvement with the church they both attend; the judge was also the director of the church choir in which Garcia was a member.

On May 17, 2011, Garcia, without the assistance of an attorney, filed a motion to terminate his probation. The Attorney General's office did not receive a copy of the motion. Outside of court and through their social connection, the judge told Garcia that he had received the motion and that Garcia should seek legal advice, giving him the names of several attorneys, including David Marquette, with whom the judge had a close social relationship. The judge also asked the probation officer ex parte to contact the victim's family to find out their position regarding the proposed early termination of Garcia's probation. When the probation officer told the judge that the victim's father was opposed, the judge asked the probation officer to locate the victim, who was now an adult. The judge also discussed Garcia's motion with the District Attorney and the chief of police.

On the motion of Marquette as Garcia's counsel, the judge set a hearing. The judge also ordered the clerk of court to subpoena the probation officer to appear. At the hearing, the District Attorney's office informed the judge that it had recused itself and that the Attorney General's office had not been served with the motions or notified of the hearing. Nevertheless, the judge proceeded with the hearing, announcing that the assistant district attorney would remain in court and "be a Court-watcher for the A.G.'s Office." The assistant district attorney agreed to be a "Court-watcher," but stated, "I'm going to remain silent."

During the hearing, the judge questioned the probation officer regarding others' opinions concerning the early termination of Garcia's probation and stated that the victim's father was "indifferent," even though the probation officer's unrebutted testimony was that the victim's father was opposed. The judge also described his personal observations of Garcia's character through his interactions with Garcia at church, indicating that those observations supported terminating Garcia's probation early. At the conclusion of the hearing, the judge issued an order terminating Garcia's probation.

Two weeks later, a media outlet published an article about the early termination of Garcia's probation. The same day, the judge reinstated Garcia to supervised probation, granting the Attorney General's motion.

Appearance of favoritism

Based on a stipulation and agreement, the Washington State Commission on Judicial Conduct censured a court commissioner for meeting privately with a former judge before a hearing in a case in which the former judge's daughter was a litigant; failing to disclose that contact; allowing the former judge to argue a motion; and voiding a valid court order. *In re Anderson*, Stipulation, agreement, and order (Washington State Commission on Judicial Conduct July 15, 2016) (https://www.cjc.state.wa.us/materials/activity/public_actions/2016/7985FinalStip.pdf).

On January 2, 2016, the court commissioner had on his docket a hearing in a paternity/custody case to determine whether to maintain a temporary restraining order prohibiting Kristen Jorgensen from removing the child in the case from the state. Shortly before the hearing, Kristen Jorgensen's father, Kenneth Jorgensen, came to the courthouse and asked to speak to the court commissioner. Mr. Jorgensen had retired as a superior court judge in 2009. He and the court commissioner have known each other for several years, mostly professionally; the court commissioner appeared as a lawyer before Mr. Jorgensen many times and served as an appointed pro tem judicial officer when Mr. Jorgensen was a judge. The court commissioner agreed to meet with Mr. Jorgensen, and they spoke privately for approximately five minutes in the commissioner's office. In response to the Commission's inquiry, the court commissioner stated that, when he agreed to speak with Jorgensen he "did not associate him with the name Jorgensen on the docket for that afternoon" and that they "did not discuss the case at all," other than to note that it was on the docket.

Although Kristen Jorgensen was required to be present at the hearing, she was not; former judge Jorgensen was present. Even though Mr. Jorgensen was neither a currently licensed attorney nor a party, the court commissioner allowed him to make a motion, offer unsworn testimony, and argue at length from counsel table that the restraining order should be deemed "void" due to an asserted

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represented by counsel or advised of her right to present evidence or testimony.

The victim was distraught and apologized for failing to appear, citing anxiety, depression, and a desire to move on from contact with her abuser. The judge was discourteous and impatient, raising her voice, using sarcasm, speaking harshly, and interrupting the victim. After pressing the victim about the veracity of her statements to police, the judge rebuked her, declaring, "You disobeyed a court order knowing that this was not going to turn out well for the State." When the victim stated that she was "not in a good place," the judge responded, "and violating a court order did not do anything for you." The judge found the victim in contempt and sentenced her to three days in jail even though the victim pleaded that she needed to take care of her one-year-old child.

The Commission explained, "[t]hat is not the role of the Judiciary. That is the role of the duly elected prosecutorial authorities . . . ."

In the discipline proceedings, the judge explained her good faith belief that she was exercising appropriate legal authority, but acknowledged that she should have been more patient and used less inflammatory and sarcastic language and a less aggressive tone. The judge accepted full responsibility and expressed remorse that her intemperate conduct brought unnecessary criticism upon her court and the entire judiciary and could impair the public's perception of the fairness and impartiality of Florida's justice system.

Recanted testimony

Following a hearing, the Kentucky Judicial Conduct Commission reprimanded a judge for ordering a domestic violence complainant jailed after she recanted her testimony. *In re Collins*, Findings of fact, conclusions of law, and final order (Kentucky Judicial Conduct Commission April 22, 2016) (http://courts.ky.gov/commissionscommittees/JCC/Documents/Public_Information/FindingsFactsCollins.pdf).

The judge presided over a bond reduction hearing in a case in which the defendant was charged with domestic violence for allegedly assaulting Jasmine Stone. During the hearing, Stone recanted her allegations. Over the objection of the prosecution, the judge immediately ordered a deputy sheriff to take Stone into custody, directed the prosecutor to charge Stone with making false statements, and set a $10,000 cash bond.

About an hour later, the prosecutor formally asked the judge to release Stone based on information that the defendant had pressured her to recant; the prosecutor also indicated that the prosecution did not intend to proceed against Stone for making false statements. However, the judge refused to lower the bond or release Stone from custody. A writ of habeas corpus was filed on Stone's behalf; the circuit court denied the writ but vacated the bond. Stone was released from custody later that afternoon.

The Commission found that the judge had failed to afford Stone rudimentary due process. The Commission also stated that the judge should not have set bond because she was the complaining witness, noting "bond is to be set by a detached Magistrate, not one who orchestrated the filing of the criminal charge in the first place."

The judge admitted that she had made a mistake but argued she had not acted in bad faith because she "could have placed this lady in jail for contempt of Court." However, the Commission found that "nothing that this witness stated could in any way be considered direct criminal contempt of Court." The Commission explained:

> By the Respondent's own testimony and as seen from the video tape of this encounter, the Respondent acknowledged she did not know what was true and a hearing needed to be conducted with the presence of a police officer who was on the scene in order for the truth to be determined. If the Respondent needed a hearing in order to determine the truth then in no way could the witness who was questioned by the Court without being advised of her right against self-incrimination and without being afforded counsel be considered to be in direct criminal contempt of the Court or any Order it entered. The witness may well have committed false swearing, but that does not provide a Court with the ability to punish such a person for direct criminal contempt.

Noting that the judge should not "have directed the Sheriff to take this witness into custody and to charge the witness with a crime, the Commission explained, "[t]hat is not the role of the Judiciary. That is the role of the duly elected prosecutorial authorities . . . ."

Significant injury

In 2011, pursuant to a stipulation and agreement, the Washington State Commission on Judicial Conduct reprimanded a judge for summarily holding a domestic violence complainant in contempt after she recanted a statement she had given to the police. *In re Shelton*, Stipulation, agreement, and order of reprimand (Washington State Commission on Judicial Conduct July 8, 2011) (https://www.cjc.state.

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Treatment of domestic violence complainants (continued from page 6)

wa.us/materials/activity/public_actions/2011/6284%20Shelton%20Stip%20Final.pdf). The judge also agreed to attend training on domestic violence.

Very early one morning, the police arrested a defendant after C.A. complained that he had threatened to hit her with a belt. Later that day, at approximately 11:00 a.m., C.A. went to the police department and, in a new statement in a supplemental police report, indicated that she had lied to the police at the scene because she was afraid of being arrested.

At approximately 1:00 p.m., the judge presided over the defendant's arraignment. After preliminary advisements, the defendant indicated his intention to plead guilty. As the prosecutor submitted the signed agreement and police reports to the judge, the prosecutor directed the judge's attention to the supplemental police report. After considering the situation and reviewing the records, the judge found probable cause but declined to accept the defendant's stipulated plea and waiver of trial and counsel. Instead, the judge announced he would set the matter over to a pretrial conference so the parties could consider the supplemental police report.

After hearing this announcement, C.A. asked the judge if she could make a comment. The judge stated, "No ma'am, you can have a moment in a minute, trust me." After a brief pause, the judge directed C.A. to stand and summoned the court bailiff to handcuff her. The judge explained:

> Okay, I'm going to go ahead and give [the defendant] an opportunity to maintain all of his rights, that's why I've not accepted his plea. I'm going to, at this point in time, find you [C.A.] in contempt of court because you have written a second statement stated, ah, stating you "called the police, they came and I lied and said [the defendant] had threatened me, which is untrue. I want to recant my statement, I was frightened and afraid I would be arrested." I'm gonna find you in contempt of court. I'm gonna impose a day in jail. So you'll be released in the morning. This gives the City an opportunity to further review the case and if [the defendant] is still in custody on Monday, then I'll certainly be reviewing his case at pre-trial. If he's able to post bail, then he will still be scheduled to come to court on Monday afternoon. It's the order of the court. Thank you, gentleman.

C.A. was taken from the courthouse and booked into the jail; she spent the night in jail and was released from custody the following morning.

In answering the Commission charges, the judge explained that he had reasoned that, given the serious nature of domestic violence and his concerns for preserving the integrity of domestic violence laws, it was necessary to take C.A. into custody to "preserve the order, authority and dignity of the court," because ignoring her admission that she had lied might imply that the court was not able or willing to take action when false statements impact judicial proceedings. The judge also explained that he had not provided C.A. an opportunity to speak in mitigation because he was concerned that she might incriminate herself and based on his interpretation of the compelling circumstances exception in the contempt statute.

The agreement stated that C.A.'s conduct did not occur within the courtroom and was not directed at the court or judge and, therefore, did not fall within the definition of contemptuous behavior and that the judge's decision to jail C.A. overnight was not necessary to preserve order in the court or to protect the authority and dignity of the court. The agreement also noted that the judge had failed to comply with the statutory procedural requirements by failing to issue a written order and to provide C.A. an opportunity to speak. The judge agreed that his reasoning was erroneous and that his prior experience as a prosecutor and judge involved with domestic violence issues caused him to over-analyze the situation.

The agreement noted that the judge's demeanor was calm and his language was not insulting or offensive. However, the agreement concluded that his conduct caused a significant injury because jailing C.A. overnight violated her liberty interest and right to due process. The agreement stated:

> Although C.A. may have been implicated in the crimes of domestic violence assault and providing a false statement to a public servant, those potential criminal charges were not properly before the court, nor is it within the court's authority to file criminal charges. C.A. entered respondent's courtroom as a purported victim of domestic violence, and was therefore owed a heightened degree of respect and protection by those who administer the criminal justice system, as is codified in Washington Crime Victim's Bill or Rights. ★

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

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

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False or misleading campaign statements (continued from page 1)

Applying strict scrutiny, the Ohio Supreme Court held that the state has a compelling government interest in ensuring truthful judicial candidates, noting "the public interest is served not only by ensuring that Ohio's judges are trustworthy, but also by promoting a collective public awareness of that trustworthiness" and "there is every reason to expect and insist that candidates will be truthful in their campaign speech when they are seeking a judicial position." The Court concluded that the code's limit on "a judicial candidate's false speech made during a specific time period (the campaign), conveyed by specific means (ads, sample ballots, etc.), disseminated with a specific mental state (knowingly or with reckless disregard) and with a specific mental state as to the information's accuracy (with knowledge of its falsity or with reckless disregard as to its truth or falsity) is constitutional."

The Court held that the candidate's repeated, intentional misrepresentations that she was an incumbent judge were not protected under the First Amendment and "undermined public confidence in the judiciary as a whole. Such misconduct injures both the public and the judiciary from the moment the lie is uttered, and that injury cannot be undone with corrective speech."

In a challenge to the Kentucky code of judicial conduct, the U.S. Court of Appeals for the 6th Circuit held that the clause prohibiting false statements made knowingly or with reckless disregard for the truth "is constitutional on its face." *Winter v. Wolnitzek*, 2016 U.S. App. LEXIS 15544 (6th Circuit 2016).

> The narrowest way to keep judges honest during their campaigns is to prohibit them from consciously making false statements about matters material to the campaign. This canon does that, and does it clearly. In the words of the district court: "Don't want to violate the Canon? Don't tell a lie on purpose or recklessly." . . . Given the mens rea requirement, a judicial candidate will necessarily be conscious of violating this canon.

The Court noted that it had recently invalidated a ban on false statements that covered non-judicial candidates for political office in Ohio, but stated that the Ohio law was broader than the Kentucky rule and emphasized that Kentucky's interest in preserving public confidence in the honesty and integrity of its judiciary is narrower and "more compelling than Ohio's purported interest in protecting voters in other elected races from misinformation."

> However much or however little truth-bending the public has come to expect from candidates for political jobs, "[j]udges are not politicians," and a "State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office." . . . Kentucky has a "vital state interest" in safeguarding the public's confidence in the honesty of its judiciary, . . . and the State's ban on materially false statements by judicial candidates survives strict scrutiny—at least facially.

However, the Kentucky Supreme Court had ruled that the term "re-elect" was a "materially false statement . . . calculated to mislead and deceive the voters" when it was used by a judge who had been appointed to the bench. The 6th Circuit stated that the false statements prohibition was unconstitutional as applied to that statement.

> Yes, "re-elect" could mean what the court thought it meant: elect someone to the same position to which she was previously elected. . . . But the term fairly could also mean "to elect for another term in office," precisely what [the plaintiff] was seeking. *Webster's Third New International Dictionary 1907*. Applied to a statement such as "re-elect," . . . the ban outstrips the Commonwealth's interest in ensuring candidates don't tell knowing lies and thus fails to give candidates the "breathing space" necessary to free debate.

Misleading statements

Two federal appellate courts (in cases from Kentucky and Georgia), a federal district court in Ohio, and the state supreme courts in Alabama, Michigan, and Ohio have held that a prohibition on misleading statements in judicial election campaigns cannot withstand a First Amendment challenge.

Reviewing a recommendation that a judge be sanctioned for misleading campaign ads, the Michigan Supreme Court considered a rule then in its code providing that a judicial candidate "should not use or participate in the use of any form of public communication that the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading, or which is likely to create an unjustified expectation about results the candidate can achieve." *In re Chmura*, 608 N.W.2d 31 (Michigan 2000).

The Court acknowledged that the canon serves the compelling state interests of preventing fraud and libel, preserving the integrity of the election process from distortions caused by false statements, and preserving the integrity of and public confidence in the judiciary. However, it concluded that, to avoid the risk of discipline, a judicial candidate would merely state academic credentials, professional experience, and endorsements received, and the Court found that the canon precludes meaningful debate concerning the overall direction of the courts and the role of individual judges in contributing to that direction, impeding the public's ability to influence the direction of the courts through the electoral process. The Court narrowed the canon to provide that a judicial candidate "should not knowingly, or with reckless disregard, use or participate in

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False or misleading campaign statements (continued from page 8)

the use of any form of public communication that is false," which, it stated, was an objective standard.

The Alabama Supreme Court noted that the state has a compelling interest in protecting the integrity of the judiciary but concluded that language then in its code prohibiting the dissemination of "true information about a judicial candidate or an opponent that would be deceiving or misleading to a reasonable person" was "unconstitutionally overbroad because it has the plain effect of chilling legitimate First Amendment rights." *Butler v. Alabama Judicial Inquiry Commission*, 802 So. 2d 207 (Alabama 2001). The Court narrowed the canon to provide that a candidate shall not disseminate demonstrably false information with actual malice, that is, that the candidate realized that his statement was false or that he subjectively entertained serious doubt as to its truth.

> "However much or however little truth-bending the public has come to expect from candidates for political jobs, '[j]udges are not politicians.'"

The U.S. Court of Appeals for the 11th Circuit held unconstitutional a Georgia canon prohibiting a judicial candidate from using or participating "in the use of any form of public communication which the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading or which is likely to create an unjustified expectation about results the candidate can achieve." *Weaver v. Bonner*, 309 F.3d 1312 (11th Circuit 2002). The Court concluded that "absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns." The Court held that "to be narrowly tailored, restrictions on candidate speech during political campaigns must be limited to false statements that are made with knowledge of falsity or with reckless disregard as to whether the statement is false—i.e, an actual malice standard."

Although it had upheld the ban on false statements, the 6th Circuit held that the "ban on misleading statements fails across the board." *Winter v. Wolnitzek*, 2016 U.S. App. LEXIS 15544 (6th Circuit 2016).

> If "misleading" adds anything to "false," it is to include statements that, while technically true or ambiguous, create false implications or give rise to false inferences. But only a ban on conscious falsehoods satisfies strict scrutiny. . . . Unknowing lies do not undermine the integrity of the judiciary in the same way that knowing lies do, and the ability of an opponent to correct a misstatement "more than offsets the danger of a misinformed electorate." This clause adds little to the permissible ban on false statements, and what it adds cannot be squared with the First Amendment.

Similarly, the Ohio Supreme Court held that a clause "prohibiting the dissemination of information that 'if true,' 'would be deceiving or misleading to a reasonable person' is unconstitutional because it chills the exercise of legitimate First Amendment rights." *In re Judicial Campaign Complaint Against O'Toole*, 24 N.E.3d 1114 (Ohio 2014). The Court explained:

> This portion of the rule does not leave room for innocent misstatements or for honest, truthful statements made in good faith but that could deceive some listeners. The language requires candidates to "attempt to determine whether a reasonable person would view their speech as somehow misleading or deceptive." . . . As a result, candidates will often choose to avoid adverse action by remaining silent even when they have good reason to believe that what they want to say is truthful.

The Court narrowed the rule to prohibit a judicial candidate from distributing information "either knowing the information to be false or with a reckless disregard of whether or not it was false." In the case before it, the Court concluded that claims that a judicial candidate had "carefully crafted her campaign website so that a reasonable reader would be misled into believing that she was an incumbent judge seeking reelection" did not allege a violation of the narrower rule.

That candidate won her campaign for the Court of Appeals and then wanted to use the term "Judge" in her subsequent campaign for the Ohio Supreme Court. She therefore filed a new challenge in federal court to a comment to the Ohio code that stated a sitting judge who is a candidate for a judicial office other than the court on which she currently serves violates the code if she uses the title "judge" without identifying the court on which she currently serves. A federal district court conceded that voters could be misled by some of the phrases she proposed using (for example, "Elect Judge O'Toole to the Ohio Supreme Court"), but concluded that the examples did not represent false speech or even obviously misleading speech and held that prohibiting true but misleading speech restricts more than is necessary to achieve the government's aims. *O'Toole v. O'Connor*, 2016 U.S. Dist. LEXIS 109923 (U.S. District Court for the Southern District of Ohio 2016). ★

personally and substantially as a lawyer . . . concerning the proceeding . . . ." Williams had filed a motion for Chief Justice Castille to recuse himself or to refer the recusal motion to the full court. As the U.S. Supreme Court noted, however, Chief Justice Castille denied the motion "without explanation."

Rule of necessity

Granting the application of the Judicial Qualifications Commission, the Iowa Supreme Court admonished a judge for signing an ex parte order presented by an attorney who had recently represented her in a personal matter without charge. *In the Matter of Howes,* 880 N.W.2d 184 (Iowa 2016).

Maria Pauly represented Judge Howes in her dissolution of marriage action, which was settled in May 2012. In April 2013, the judge's ex-husband asked her to reimburse him for $3192 the IRS had deducted from his 2012 income tax return because she had not claimed income she had received from liquidating an individual retirement account on a previous joint return. Pauly and the ex-husband's attorney became involved in the post-dissolution tax issue. Pauly provided her legal services to the judge free of charge.

> "It is important to note that due process 'demarks only the outer boundaries of judicial disqualifications.'"

On July 24, during a two-month lull in the correspondence concerning the dispute, Pauly, representing a father, filed an application for a temporary injunction seeking to restrain a mother from removing their child to Pakistan. By the time Pauly arrived at the courthouse on July 25 to present the application, the judge assigned to hear unscheduled matters was busy hearing scheduled motions. Because the court has an open-door policy, Pauly looked for a different judge. She discovered that every judge had a full schedule, except for Judge Howes who had become available when the case she was to hear had fallen off her schedule. Pauly told Judge Howes her client had an emergency and asked if she would consider the application for a temporary injunction. After reviewing the application, the judge signed an order temporarily enjoining both parents from removing the child from the area and temporarily enjoining the mother from removing the child from the father.

The Court held that, "[w]hen an attorney who contemporaneously represents or recently represented a judge in a personal matter appears before the judge in another case and the judge does not disclose that fact to the parties, the judge's impartiality might reasonably be questioned." The Court also held that, "[o]nce a judge has accepted free legal services from an attorney or firm, the judge must either disqualify himself or herself from any matter in which the attorney or firm who provided the services appears or disclose his or her acceptance of free legal services and obtain a waiver of the disqualification requirement from the parties." Because the judge signed the order ex parte, the Court noted, she was unable to disclose her representation by Pauly to the opposing counsel and was, therefore, obligated to recuse herself—unless the rule of necessity excused her.

The Court agreed with the judge that an application for a temporary injunction is the sort of matter that may require immediate judicial attention and, therefore, to which the rule of necessity might apply. However, the Court held that "a judge has an affirmative obligation to assure deciding a matter is in fact necessary before relying on the rule of necessity to excuse a duty of disqualification based on the unavailability of another judge." The Court concluded that the judge had not demonstrated that she made reasonable efforts to transfer the matter to another judge or that she was the only judge available. The Court noted that the judge had not investigated the degree of urgency of the application or checked with the court administrator or other judges' clerks before considering the application herself. The Court stated it was "confident any judge who had been informed by Judge Howes or a court administrator that he or she was the only judge without a conflict available to consider an emergency application for a temporary injunction would have agreed to take five minutes to consider it."

Personal friend

Based on a stipulation for discipline by consent, the California Commission on Judicial Performance censured a judge for failing to disqualify himself or disclose when a close personal friend appeared as an attorney in addition to other misconduct. *Inquiry Concerning Trice* (California Commission on Judicial Performance February 4, 2016) (http://cjp.ca.gov/res/docs/censures/Trice_DO_02-04-16.pdf).

The judge and criminal defense attorney David Hurst have been close personal friends since they were both employed by the district attorney's office in the 1980's. Hurst considers the judge one of his four "best friends:" they socialize together outside of work approximately once a month, Hurst has been to the judge's house at least 20 times, they watch sports events together, and Hurst typically goes to the judge's house on Thanksgiving.

Since the judge took the bench in 2003, Hurst has

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frequently represented criminal defendants in his court. The judge did not disqualify himself from those cases or disclose on the record the fact or nature of his relationship with Hurst. The judge argued that he is not disqualified from cases in which Hurst represents a defendant and that he was not required to disclose their relationship because the opposing representatives in all of his criminal cases are 20-year veterans of the DA's office who are aware of the relationship and who have never raised any concern of personal bias or prejudice or the appearance of impropriety.

The Commission found that the judge's close friendship with Hurst would arguably appear to be a disqualifying circumstance and that, even if their friendship did not require his disqualification, the judge had an obligation to disclose the relationship on the record.

Own divorce

The Texas State Commission on Judicial Conduct reprimanded a judge for failing to take immediate steps to disqualify himself and/or transfer his own divorce case out of his court, in addition to other misconduct. *Public Reprimand of Herrera and Order of Additional Education* (Texas State Commission on Judicial Conduct February 24, 2016) (http://www.scjc.texas.gov/media/42368/herrera-public-sanction-doc.pdf).

On June 6, 2012, the judge filed a petition for divorce. The case was assigned to his court. The judge allowed his divorce case to remain pending in his court for several months.

In his testimony before the Commission, the judge explained that he let the case remain in his court because he was "trying to save the marriage and [he] did not want to do anything on the case," adding that he saw his role in the divorce proceeding as that of a husband, not as an attorney or judge. In addition, the judge stated, "I did not care to place my family in the same position as other litigants find themselves, in conflicts and court hearings, which, for the most part only benefit the attorneys financially. It is really sad and embarrassing to see the reputation of some of the litigants being dragged in the mud in these court proceedings." The judge also testified that "there is a lot of unnecessary litigation in family court" and he "simply was not going to allow [his] family to be placed in that situation."

On July 16, after retaining attorney Angelica Carreon-Beltran, the judge's wife filed a counter-petition for divorce that was also assigned to the judge's court because the original petition was pending there. Unhappy with this development, the judge asked his wife, "Why are you involved with Carreon, anyway? You know she doesn't like me," and she "is going to cause nothing but problems." According to the judge's testimony, he refused to recognize the "legitimacy" of Carreon's representation of his wife because, in his opinion, Carreon had improperly solicited her as a client, had campaigned against him in an election, and was "dishonest and unethical and unreasonable."

On September 7, the judge filed a notice of non-suit of his divorce petition, leaving his wife's counter-petition pending in his court. On September 11, Carreon served discovery requests on the judge. In response, the judge filed a motion to extend the answer date for the discovery and a motion for a protective order. During his testimony before the Commission, the judge acknowledged that, technically, he had petitioned himself for relief when he filed the motions, but he believed he had done nothing inappropriate because he never ruled on the motions. The judge explained that it was only when he realized he would be unable to avoid divorce that he had the case transferred.

In brief:

• Pursuant to the judge's agreement, the Tennessee Board of Judicial Conduct reprimanded a judge for disposing of numerous cases in which criminal and juvenile defendants were represented by his wife. The judge had believed he was not disqualified from cases involving his wife if there was a negotiated plea or if he did not have to make findings on contested facts. *Re Grimes* (Tennessee Board of Judicial Conduct January 11, 2016) (http://www.tsc.state.tn.us/sites/default/files/docs/grimes_-_public_reprimand_and_agreed_cease__desist_order1-11-16.pdf).

• Pursuant to an agreement, an investigative panel of the Tennessee Board of Judicial Conduct reprimanded a former judicial commissioner for failing to disqualify himself from a case in which one of the attorneys had recommended him for a part-time prosecutor position a month earlier or to disclose the relationship. *Re Cross* (Tennessee Board of Judicial Conduct May 18, 2016) (http://www.tsc.state.tn.us/sites/default/files/docs/michael_cross_-_public_reprimand_2016may23.pdf).

• The Illinois Courts Commission suspended a judge for four months without pay for presiding over cases, including a trial, in which the husband of the judge with whom he was having an affair represented a party without disclosing the relationship, in addition to other misconduct. *In re Drazewski*, Order (Illinois Courts Commission March 11, 2016) (http://www.illinois.gov/jib/Documents/Orders%20from%20Courts%20Commission/JudgesDrazewskiFoley.Order.pdf).

• Based on an agreement, the Alabama Court of the Judiciary ordered a judge to retire immediately and never serve in judicial office again for failing to disqualify herself from a case involving the probate of her father's estate in which she and her siblings were heirs, in addition to related misconduct. *In the Matter of Isaac*, Final judgment (Alabama Court

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Disqualification: Recent cases (continued from page 11)

of the Judiciary August 8, 2016) (http://judicial.alabama.gov/judiciary/COJ48_FINAL_JUDGMENT_08082016.pdf).

• The Arizona Commission on Judicial Conduct reprimanded a judge for presiding over a criminal damage trial even though he was a leasing agent for the company that managed the property that had been damaged and had spoken with a resident about the damage. *Wilson*, Order (Arizona Commission on Judicial Conduct February 6, 2015) (http://www.azcourts.gov/portals/137/reports/2014/14-331.pdf).

• Based on a stipulated resolution, the Arizona Supreme Court censured a judge for failing to disclose that he jointly owned property with a litigant in two protective order proceedings. *Bravo*, Order (Arizona Supreme Court June 26, 2015) (http://www.azcourts.gov/portals/137/reports/2014/14-373.pdf).

• Based on an agreement, the Kentucky Judicial Conduct Commission suspended a judge for 180 days without pay for presiding over a case for over three years even though he had an oil and gas lease agreement with one of the defendants and had a dispute with the company, in addition to other misconduct. *In re Combs*, Agreed order of suspension (Kentucky Judicial Conduct Commission October 1, 2015) (http://courts.ky.gov/commissionscommittees/JCC/Documents/Public_Information/AgreedOrderSuspensionCombs.pdf). ★

Recent cases (continued from page 5)

procedural defect. At the conclusion of the hearing, the court commissioner granted Jorgensen's oral motion to void the order even though, as the stipulation stated, "voiding" the restraining order was not a legally recognized remedy under the circumstances. At no time did the court commissioner disclose that he had met with Mr. Jorgensen in chambers.

The Commission found that, at a minimum, the court commissioner created an appearance of impropriety, favoritism, and partiality.

Internet investigations

With the judge's consent, the New Hampshire Judicial Conduct Committee reprimanded a judge for independently investigating facts on the internet and considering those facts in reaching her decision in a divorce case and receiving and considering facts not put into evidence by the parties in a second divorce case. *In the Matter of Albee*, Reprimand and caution (New Hampshire Judicial Conduct Committee May 9, 2016) (http://www.courts.state.nh.us/committees/judconductcomm/docs/PLEDReprimand-Caution-Signed-by-Judge-Albee-and-JCC-Chair.pdf).

In her decision in a divorce case, the judge indicated that, to determine the value of the marital home, she had used Zillow, an on-line service, to up-date information supplied by a party. Finding reversible error on appeal, the New Hampshire Supreme Court had held that "it is axiomatic that a trial court cannot go outside of the record except as to matters judicially noticed" and that taking judicial notice of the Zillow information was not appropriate because it was not "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

In response to the Committee's inquiry, the judge disclosed that in a second divorce case, to evaluate the marital home, she had used information about the local housing market from a flyer she received in the mail from a local realtor.

Religious reasons

Based on a stipulation and agreement, the Washington State Commission on Judicial Conduct admonished a judge for refusing to allow a defendant to testify when he would not, for religious reasons, raise his hand while affirming he would tell the truth. *In re Parise*, Stipulation, agreement, and admonishment (Washington State Commission on Judicial Conduct July 15, 2016) (https://www.cjc.state.wa.us/materials/activity/public_actions/2016/8080FinalStip.pdf).

On November 24, 2015, the judge presided over a contested, non-criminal traffic infraction hearing. After the prosecution presented its case, the defendant indicated he wished to testify and was willing to affirm to tell the truth, but, for religious reasons, he would not raise his right hand when giving his affirmation. The judge explained that he required all witnesses to "raise their hand and just affirm that they understand the seriousness of the testimony that they are offering and that it needs to be true." The defendant insisted that the act of raising his "right hand to heaven" offended his religious beliefs and that forcing him to do so was an abuse of the court's authority. Because the defendant would not raise his hand, the judge instructed him to leave the witness stand and did not allow him to testify. In the absence of the defendant's testimony, the judge found that he had committed the infraction. ★