JUDICIAL CONDUCT REPORTER

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State judicial discipline in 2012

From 1980 through 2011, approximately 387 judges were removed as a result of state disciplinary proceedings. In 2012, 13 judges (or former judges in two cases) were removed from office. In addition, 24 judges resigned or retired in lieu of discipline and agreed not to serve in judicial office again pursuant to public agreements with judicial conduct commissions. (For an additional discussion of these agreements, *see* page 7.) Three former judges were barred from serving in judicial office; one of the cases also censured the former judge.

Further, 97 judges (or former judges in 10 cases) received other public sanctions, approximately half pursuant to the judge's agreement.

• 10 judges were suspended without pay for from five days to one year, two of the suspensions were stayed contitioned on the judge's committing no additional misconduct. One suspension also included a censure, probation, and order of reimbursement; one included a reprimand and $2,000 fine; two included conditions.

• 24 judges were censured. One censure also barred a former judge from serving in judicial office for five years; one also ordered probation, a mentorship, and training.

• 40 judges were reprimanded. One reprimand also included an order of additional education.

• 15 judges were admonished.

• Two judge received public warnings.

• Three judges were privately reprimanded, but the reprimand was made public with the judge's consent.

• Three judges were ordered to pay civil penalties for failing to timely file financial disclosure reports.

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Top judicial ethics stories of 2012 by Cynthia Gray

Ticket-fixing – a two-track system of justice

Ticket-fixing is the dismissal of charges or other preferential treatment by a judge in a traffic case without a hearing or the consent of prosecuting authorities, usually following an ex parte communication with the defendant or a third party. The number of judicial discipline cases in 2012 and the extensive underlying patterns of ticket-fixing demonstrate the strength of the temptation to act "kinda Robin Hoodish," as one of the disciplined judges explained.

That judge had personally accepted traffic citations from members of her church, acquaintances, and her students at the Wake Forest University Law School and requested the assistant district attorney for help with the tickets or instructed that the citations be placed on her docket so that she could continue the prayer for judgment (which avoids a final judgment) and strike costs. In addition, as the judge was aware, county or court employees took traffic citations issued to their friends, family members, or acquaintances to court employees, and those court employees would arrange for the cases to be placed on the judge's docket. Then, on her traffic court dates, the judge would instruct court personnel to enter pleas of "guilty" or "responsible" on behalf of the recipients, who were not present, and continued judgment and imposed a nominal fine with no costs or costs only with no fine. There was no evidence that the judge sought or received any gift or other personal gain. *In re Hartsfield*, 722 S.E.2d 496 (North Carolina 2012) (75-day suspension without pay for this and other misconduct).

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Domestic violence

Adopting the findings of the Commission on Judicial Conduct and affirming the recommended sanction, the Arizona Supreme Court removed a judge who had asked a court manager to move the judge's vehicle to avoid a process server attempting to serve him with an order of protection; continued to hear cases involving domestic violence orders after the order was entered against him; invoked his position repeatedly with law enforcement authorities in visitation disputes with his wife; and sent threatening texts to his wife. *In the Matter of Woolbright*, Order (Arizona Supreme Court July 23, 2012) (http://tinyurl.com/cs52cfp). The Court's order does not describe the misconduct; this summary is based on the Commission's findings.

Ticket-fixing

The California Commission on Judicial Performance removed a judge for diverting to his own court and acting on seven traffic tickets issued to his son-in-law, friends, and the pastor of his church, waiving or suspending all or practically all fines and fees in six of the cases and granting a continuance in the seventh. *Inquiry Concerning Stanford*, Decision (California Commission on Judicial Performance January 11, 2012) (http://tinyurl.com/75aadl2), *petition for review denied* (http://tinyurl.com/ac5gocc).

The Commission found that the judge had known that providing preferential treatment to friends and relatives was wrong. However, it emphasized that his "state of mind is not the determining factor on the issue of discipline because a failure to recognize the impropriety of such obviously unethical conduct 'necessarily raises the correlated concern that he may continue to 'miss' other such issues in the future.'" The Commission emphasized that "the public deserves protection from judges who commit serious misconduct regardless of whether the conduct is the result of malice or ignorance." The Commission acknowledged that the judge had made "exceptional contributions" to his court and community and had not received any prior discipline (except one advisory letter) during a long tenure on the bench. However, it concluded these factors "are eclipsed by a pattern of misconduct in which Judge Stanford repeatedly abused the power of his judicial office by providing benefits to the favored few not available to other citizens."

* * *

Adopting the findings and recommendation of the Judicial Tenure Commission, the Michigan Supreme Court removed a judge for (1) fixing traffic citations issued to himself, his wife, and his staff and disposing of other cases without a hearing or notice to the prosecuting attorney; (2) preventing the transmission of or altering information that was required to be transmitted to the Secretary of State; (3) ex parte communications; (4) dismissing or reducing charges without the prosecutor's authorization after a plea agreement; (5) failing to promptly dispose of cases; (6) interfering with a case assigned to another judge; and (7) making false statements under oath during the discipline proceedings. *In re Justin*, 809 N.W.2d 126 (Michigan 2012). The Court concluded:

> Respondent's multitudinous acts of proved misconduct sketch a common theme: respondent failed to follow the law, apparently believing that it simply did not apply to him. . . .
>
> The duration, scope, and sheer number of respondent's substantiated acts of misconduct are without precedent in Michigan judicial disciplinary cases. Respondent's long-term pattern of judicial misconduct constitutes a negation of the proper exercise of judicial authority that more than justifies the sanction imposed.

* * *

Based on the judge's resignation and withdrawal of her request for review, the New York Court of Appeals removed a judge in accordance with the findings of the State Commission on Judicial Conduct that she had (1) improperly intervened in the disposition of a speeding ticket issued to another judge's wife and (2) accepted special consideration for a speeding ticket that had been issued to herself. *In the Matter of Schilling*, Order (New York Court of Appeals June 19, 2012) (http://tinyurl.com/d7bwr8r), *accepting*, Determination (New York State Commission on Judicial Conduct May 8, 2012) (http://tinyurl.com/7rn2ush). The Court's order does not describe the judge's conduct; this summary is based on the Commission determination.

At 5:40 a.m. one Saturday, a police officer issued a speeding ticket to Judge Toomey's wife that was returnable in Judge Schilling's court. Following normal procedures, the officer placed the court's copies of the ticket in a bin at the police station.

At 8:17 a.m., Judge Schilling sent an e-mail to Judge Toomey with the subject line "I know," and the message, "No sgt due in until tomorrow then it should be corrected." The two judges also had at least two private conversations about the ticket.

The ticket was never prosecuted because, the Commission concluded, Judge Shilling's "scheme to circumvent the normal judicial process . . . resulted in the disappearance of the ticket from the system." After receiving an advisory opinion stating he was required to report her, Judge Toomey filed a complaint about Judge Schilling with the Commission.

In 2005, a state trooper had issued Judge Schilling a speeding ticket while she was driving her car, which had an "SMA" license plate. When he learned that "SMA" stands for State Magistrates Association and that he had given a ticket to a judge before whom troopers appear, the trooper asked that she return the ticket because he intended to void it. The judge gave him the ticket, and it was voided.

Emphasizing the significant body of case law in New York

concerning the impropriety of ticket-fixing, the Commission concluded that despite "respondent's public service, her previously unblemished record and her admission of wrongdoing, the nature and gravity of the proven impropriety . . . cannot be overlooked. . . ."

For an additional discussion of ticket-fixing, *see* "Top judicial ethics stories of 2012," at page 1.

Personal and emotional attachments

The Delaware Court on the Judiciary removed a judge for giving advice to a young female attorney about a case pending before him and hearing her cases after developing romantic feelings for her. *In re Henriksen* (Delaware Court on the Judiciary May 3, 2012) (http://tinyurl.com/c9w4kzu). The Court made the removal effective November 2, 2012, which, it noted, was one day after the judge's pension entitlement vested and his term expired. The Court also ordered that the judge pay $10,000 in therapy bills incurred by the attorney, who had filed a complaint, 75% of her counsel fees, and 75% of the counsel fees of the chief family court judge, who had also filed a complaint. The Court found that the "sanctions are measured and balanced with sensitive regard for the impact on Complainants, Respondent and his family," noting the judge's distinguished career as a lawyer and family court judge.

The Court stated:

> Mere social contacts with Members of the Bar, including those who appear before judges, alone do not constitute a violation of the Delaware Judges' Code of Judicial Conduct. But, where those contacts rise to the level of personal and emotional attachments, no matter how unrealistic, one-sided, and unreciprocated, judges must take steps to preserve public confidence in their integrity and impartiality. Here, Respondent, despite clearly rebuffed overtures, continued to pursue a relationship and preside over cases in which [the attorney] appeared. Only after the Chief Judge of his Court intervened did he no longer preside over cases involving [the attorney] or her firm.

The Court noted that there was no clear and convincing evidence that the judge's "perceived relationship" with the attorney affected his decisions.

Pattern of misconduct

Affirming the Judicial Conduct Commission, the Kentucky Supreme Court removed a judge for (1) advocating at a county meeting that $500,000 donated by defendants under a plea agreement be used to fund a water park and making misstatements about the funds in an order; (2) establishing a special grand jury to discredit a county official and viewing videotapes regarding the sheriff's investigation of the official; (3) presiding over two criminal cases that he had urged law enforcement to pursue; (4) personally raising funds for playground equipment for his children's school; and (5) removing an assistant public defender as counsel in all pending cases without giving her an opportunity to be heard. *Alred v. Judicial Conduct Commission* (Kentucky Supreme Court July 23, 2012) (http://tinyurl.com/d5ju7l2). The Court concluded that the judge engaged in a pattern of misconduct, displayed disregard for the law and the code of judicial conduct, and refused to accept responsibility or acknowledge his wrongdoing.

"Publicly funded private foundation"

Affirming the recommendation of the Judicial Tenure Commission, the Michigan Supreme Court removed a judge for (1) inappropriate financial transactions and practices; (2) failing to ensure that her business-attire policy was properly enforced; (3) knowingly re-hiring an unqualified magistrate, misrepresenting that he was qualified, and requiring him to sign bench warrants, contrary to statute; (4) hiring her niece; and (5) making misrepresentations during the discipline proceedings, including lying under oath. *In re James*, 821 N.W.2d 144 (Michigan 2012).

The judge's "most significant misconduct," the Court stated, was her misappropriation and abuse of community service program funds, which "she treated . . . as her own 'publicly funded private foundation.'" A statute required that 50% of the fees paid by non-violent defendants to participate in an alternative sentencing program be applied to victim restitution and the balance to payment of fines, costs, supervision fees, and other assessments. The judicial information system was programmed to automatically apply payments in accordance with the statute, but the judge ordered her clerks to override the system to permit payments not authorized in the statute. For example, the judge directed that more than $14,000 be distributed to local charitable organizations; that $13,000 be spent on travel expenses for the judge and court employees to attend drug court conferences in California and Massachusetts; and that $48,000 be given to court employees for acting as co-directors of the program even though they were salaried. The Court subsequently ordered the judge to pay $16,500 to the Commission, which included the amount she misappropriated that should have been allotted to victim restitution, in addition to costs. *In re James*, 823 N.W.2d 97 (Michigan 2012).

Suborning perjury

Granting a petition for removal, which the judge had accepted, the New Mexico Supreme Court removed a judge for, in a probate case filed by his neighbor, accepting a copy of a will in lieu of the original required by the probate code, issuing an order containing false information about the will, requesting court staff to shred the case documents, and suborning perjury in the Judicial Standards Commission investigation by asking a court employee to sign an affidavit stating that her prior statements about the judge's

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misconduct were untrue. *In the Matter of Dillon*, Order (New Mexico Supreme Court November 9, 2012) (www.nmjsc.org/docs/Dillon_order.pdf). The Court's order does not describe the misconduct; this summary is based on the Commission's findings of fact.

Disregard of fundamental legal principles

The New York State Commission on Judicial Conduct removed a non-lawyer judge for (1) accepting a plea from an unrepresented defendant whose ability to understand the proceedings was impaired by alcohol and (2) holding four defendants in summary contempt without complying with the procedures required by law. *In the Matter of Feeder*, Determination (New York State Commission on Judicial Conduct January 31, 2012) (http://tinyurl.com/al4kjyg). The Commission concluded that the judge's "handling of these matters showed a disregard of fundamental legal principles" and the "record amply demonstrates that respondent lacks fitness for judicial office . . . ." Noting that, at the time of his misconduct, other disciplinary charges had been pending against the judge, the Commission stated, "while the misconduct in the earlier proceeding is different from the conduct here, respondent's argument that he has learned from his past mistakes and desisted from particular acts of misconduct when they were brought to his attention is hardly reassuring."

Paramour's relatives

Accepting the determination of the State Commission on Judicial Conduct, the New York Court of Appeals removed a judge for presiding over eight matters in which his paramour's relatives were the defendants or the complainants; engaging in ex parte communications with his paramour and her relatives; and making dispositions that conveyed an appearance of favoritism. *In the Matter of Young*, 974 N.E.2d 658 (New York 2012).

For example, Merton Petri, the nephew of Robyne Petrie-Platt with whom the judge was living, violated the terms of a conditional discharge. During a family gathering, the judge discussed the case with members of the Petrie family, who advised him to send Merton to jail. He had other ex parte communications concerning the matter with Merton

What they said that got them in trouble

"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." Judge explaining sentence in rape case. *In the Matter Concerning Johnson* (California Commission 2012) (http://tinyurl.com/d573t7t).

"Sir, this is not the Soviet Union, this is the United States of America. We use the best and latest technologies to determine parentage of children. . . . I suggest you watch some CSI TV shows." Judge to man who insisted he was not the father of a child. *In re Wulle* (Washington Commission 2012) (http://tinyurl.com/c8dskd5).

I wish I could "pull a trap door" and send you "straight to hell right now." Judge to defendants charged with robbing a man and beating him to death. *Re Houston* (Tennessee Court of the Judiciary 2012) (http://tinyurl.com/cmhvkrs).

"You have a bad case of D.H. Dickheaditis." Judge to probationer in court. *Disciplinary Counsel v. Elum*, 979 N.E.2d 289 (Ohio 2012).

"Bird head, get your ass up here." Judge to defendant in court. *In re Adams*, Decision (Texas Court of Review 2012) (http://tinyurl.com/6oj7rpl),*reviewing* (http://tinyurl.com/ahgeaqu).

"If they were to gang up on you, you would be the first one yelling mama as you're running home." Judge to juvenile charged with harassment. *In the Matter of McLeod* (New York Commission 2012) (http://tinyurl.com/b4v4ejw).

"I don't know of anybody that's made [sic] a mistake—and except for perhaps one, and for that we murdered him. . . . That's not politically correct but I happen to believe in God.... Christ is the intercessor." Judge after he, without notice to the parties, obtained a National Crime Information Center report on a witness. *Inquiry Concerning Singbush*, 93 So. 3d 188 (Florida 2012).

"Rover has a bone." Judge, repeatedly, during trial whenever the pro se defendant made an objection. *In re Merlo* (Pennsylvania Court of Judicial Discipline 2011) (http://tinyurl.com/cdx48ox), *aff'd,* 58 A.3d 1 (Pennsylvania 2012).

"[I will] not grant custody of a child to an illegal." Judge in adoption proceeding about birth father. *In the Matter of Poyfair* (Washington Commission 2012) (http://tinyurl.com/7cq6lcz).

and Petrie-Platt's mother and sister before re-sentencing Merton to 45 days in jail and three years' probation.

Sexual quid pro quo

The Pennsylvania Court of Judicial Discipline removed a former judge and barred him from serving in judicial office for taking sexual liberties with two women appearing in his courtroom; the judge had admitted the facts in his answer and when he pled guilty to criminal charges. *In re Cioppa*, Opinion (June 5, 2012), Order (Pennsylvania Court of Judicial Discipline July 24, 2012) (www.cjdpa.org/decisions/jd12-04.html). The Court stated:

> It is not open to question that Respondent's conduct was intended to affect a specific outcome – he *promised* that it would. He promised that, for a consideration, he would take off his robe of impartiality and decide in favor of the female-litigants whose cases were before him. The two episodes, from their incipience in the mind of the Respondent to his eventual rulings, establish that there is no doubt that Respondent intended that his actions – that his promise – would have a deleterious effect on the administration of justice and that it would prejudice the right of the opposing parties, in this case the victims' landlords, to have the case tried on its merits.

Work habits, handling of cases, demeanor

The Pennsylvania Supreme Court affirmed the decision of the Court of Judicial Discipline removing a judge for her work habits, her handling of truancy and landlord/tenant cases, and her demeanor in six cases; she was also barred from judicial office. *In re Merlo*, 58 A.3d 1 (Pennsylvania 2012).

For example, between September 12, 2007 and December 15, 2009, the judge "called off" 116 days and took 49 vacation days, which meant she did not work 30% of workdays. When the judge called off, she did not do so until 10, 10:30, or 11 a.m. Her excessive absenteeism caused a backlog of paperwork that prevented the timely closing of cases and interfered with her staff's ability to handle the regular business of the court as they "often spent most of

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"I'll beat your ass if you call me a liar." Judge to defendant who questioned bond. *In the Matter of Martin*, 734 S.E.2d 165 (South Carolina 2012).

"She's told [the supervising judge] she's afraid of me, which I think is hysterical, this pudgy little judicial officer she's afraid of . . . . Tell her I have been defanged, and I no longer have rabies." Judge about child's grandmother in custody proceeding. *In the Matter of Friedenthal* (California Commission 2012) (http://tinyurl.com/7tq5lvj).

"Work all day today, work all night." Judge to attorney who asked for extension of time to prepare for hearing. *Public Admonishment of Jacobson* (California Commission 2012) (http://tinyurl.com/88fkhuv).

"I am going to nail his ass to the wall." Judge on learning his former bailiff was the subject of a domestic violence complaint. *In the Matter of Melville* (Nevada Commission 2012) (http://tinyurl.com/88djmtn).

"Tell all your family how you feel about me because I'm running this year for Common Pleas Court." Judge to defendant who had thanked her for accepting a plea agreement. *In re Michael* (Ohio Board 2012) (http://tinyurl.com/a89ocgc).

"I'm going to try to get that man's job. . . . He's just picking on people . . . . Damn Bastard." Judge about the judge who had set bond set for the daughter of the woman with whom he was living. *Public Admonition of Nicholds* (Texas Commission 2012) (http://tinyurl.com/cj5xag2).

"No shame in my game." Judge to reporter about picture of himself shirtless that he sent to a bailiff's phone. *In re McCree*, 821 N.W.2d 674 (Michigan 2012).

"For obvious reasons, keep these as your observations and not mine." Judge in e-mail giving advice to attorney in a case before him. *In re Henriksen* (Delaware Court on the Judiciary 2012) (http://tinyurl.com/c9w4kzu).

"Quite frankly the towing people are gouging 'em . . . . If you can make some amendment to the ordinance dealing with that as to the maximum amount, anything else is usurious or ridiculous or unconscionable." Judge at city council meeting. *In the Matter of Lopez*, 274 P.3d 405 (Wyoming 2012).

"You'll have picked the wrong little girl that has friends in high places to mess with." Judge trying to get friend's daughter released. *Public Reprimand of Sharp* (Texas Commission 2012) (http://tinyurl.com/cj5xag2).

"No sgt due in until tomorrow then it should be corrected." Judge in e-mail, with subject line "I know," to another judge about a ticket received by the recipient's wife. *In the Matter of Schilling* (New York Commission 2012) (http://tinyurl.com/7rn2ush), *accepted* (http://tinyurl.com/d7bwr8r).

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the morning making telephone calls to attorneys, litigants, and witnesses to advise them that their hearings were continued, preparing and mailing notices of new hearing dates, and attempting to placate angry litigants and witnesses." Even on the days she did not call off, lawyers and litigants were kept waiting because, although hearings were always scheduled to begin at 9:30 a.m., she customarily did not arrive at court until between 10:00 and 10:30 a.m.

Rejecting the judge's argument that removing her failed to credit the testimony of her character witnesses, the Court explained that character evidence does not undo a judge's offensive behavior and that "'disciplinary sanctions focus beyond the one who is charged, to the message sent to the public and the effect on the expectation of standards of behavior.'" Noting the judge's argument that the sanctions were unlawful because they were greater than those imposed on other judges, the Court emphasized that the constitution limits its review to whether the sanction imposed is lawful and stated that "similarity of misconduct does not require identicality of sanction, for there are other factors that bear on that decision, including mitigating and aggravating considerations and how a particular jurist's misconduct undermines public confidence in the judiciary."

Criminal conduct

Based on stipulations of fact in lieu of trial, the Pennsylvania Court of Judicial Discipline removed a former judge based on his guilty plea to one federal count of racketeering conspiracy; the order also declared him ineligible to serve in judicial office in Pennsylvania. *In re Conahan*, Opinion (March 14, 2012), Order (Pennsylvania Court of Judicial Discipline April 23, 2012) (www.cjdpa.org/decisions/jd11-08.html).

Top judicial ethics stories of 2012 continued from page 1

Another judge explained that he had handled tickets for friends and family "in an effort to help people that I knew in situations that, at the time, seemed like an appropriate thing to do...." The judge had diverted to his own court and acted on traffic tickets for his son-in-law, a former neighbor who attended the same church, the pastor of his church, his clerk, a driver for a construction company owned by a friend of the judge, a good friend, a man with whom he had done volunteer work for more than 15 years, and a juror who received a speeding ticket on the way to his courtroom.

Emphasizing that, "in the public's eye, ticket fixing is the quintessential bad act of a judge," the California Commission on Judicial Performance concluded that the judge's pattern of misconduct "created both the appearance and the reality of a two-track system of justice—one for his friends and family and another for all others." That the judge did not dismiss the tickets but waived fines and fees did not mean there was no misconduct, the Commission stated, noting that the judge "provided substantial financial breaks to the favored few" who "were given virtually a free ride because of their close relationship" to him. The Commission explained:

> Judge Stanford's conduct was wrong on many levels. Not only did he favor those he knew with procedural shortcuts and extraordinarily lenient dispositions, he repeatedly engaged in ex parte communications, entered dispositions based on hearsay information from his wife, failed to recuse when there were obvious conflicts of interest, handled matters not assigned to his court, and waived fees and fines without considering the facts of the offense, the driver's record, or public safety. . . .

Inquiry Concerning Stanford, Decision (California Commission on Judicial Performance January 11, 2012) (http://tinyurl.com/75aadl2), *petition for review denied* (http://tinyurl.com/ac5gocc) (removal).

A third judge explained that he had dismissed charges after discussions in the courthouse hallway without the prosecuting attorney to provide "optimum, convenient service." Rejecting that justification, the Michigan Supreme Court stated:

> Respondent provides no authority for this provision of "optimum, convenient service" because, quite obviously, none exists. . . . [T]he core of "judicial power" involves the power to hear and determine controversies between adverse parties. Respondent's method of dismissing cases after having a discussion with only one side of a controversy is not a valid exercise of the judicial power; rather, it is a perversion of judicial power. Apparently, respondent believed that providing what he considered "optimum, convenient service" trumped the law and the canons of judicial ethics and gave him license to do away with the truth-finding process entirely.

The Court also noted that, "while some citizens received the 'optimum, convenient service' of having their tickets and charges summarily dismissed, other citizens were forced to endure the inconvenience and burden of countless adjournments and delays, requiring frequent court appearances. It is unclear how this latter group fit into respondent's theory of providing 'optimum, convenient service.'"

The Court also explained:

> [R]espondent's belief that expediency could trump the rule of law had repercussions for the entire 12th District Court. When citizens who had received "optimum,

convenient service" in respondent's courtroom later found themselves in another judge's courtroom, where the rule of law, not "optimum, convenient service," was the guiding principle, these citizens sometimes became confused and angry. As the chief judge of the court explained:

> These people were indignant with us when we imposed a sentence, because [respondent] didn't do this. Why are you doing this to me? Why are you sentencing me? . . . It was a different kind of justice in [respondent's] courtroom than the justice that was received by or administrated by the other three judges. And, yes, there were repercussions; there were people that were extremely angry, people who questioned our authority for doing what we were doing.

In re Justin, 809 N.W.2d 126 (Michigan 2012) (removal for this and other misconduct).

See also In the Matter of Durward, Reprimand and Censure (Alabama Court of the Judiciary November 21, 2012) (http://tinyurl.com/b5hze2q) (reprimand and censure for judge who failed to recuse himself from and dismissed a traffic violation case in which his son was the defendant); *In the Matter of Schilling*, Order (New York Court of Appeals June 19, 2010) (http://tinyurl.com/d7bwr8r), *accepting*, Determination (New York State Commission on Judicial Conduct May 8, 2012) (http://tinyurl.com/7rn2ush) (removal for improperly intervening in the disposition of a speeding ticket issued to another judge's wife and accepting special consideration for a speeding ticket that had been issued to herself).

In lieu of discipline

In 2012, 24 judges—more judges than any previous year—resigned or retired and agreed not to serve in judicial office in the future, pursuant to public agreements in which the conduct commissions agreed to dismiss pending complaints against them. Those agreements included eight in Georgia, five in New York, four in New Mexico, and three in Texas. As the Texas agreements note, the agreements are entered into because both the commission and the judge "are desirous of resolving these matters without the time and expense of further proceedings."

The contents of the agreements and the procedures vary from state to state. For example, the agreements in Texas include clauses that state:

- "No Findings of Fact or Conclusions of Law have been made by the Commission in connection" with the allegations.
- "The parties agree that the allegations of judicial misconduct, if found to be true, could result in further disciplinary action" against the judge.
- The judge "by his execution of this voluntary agreement, does not admit guilt, fault or liability."
- "Any violation of this Agreement by [the judge] would constitute willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice."
- "The Commission may enforce this Agreement through any legal process necessary, including injunctive relief."

Although in some states, the agreements do not indicate the underlying allegations, in most states, some description is given. For example, in *In re Cochran*, Consent Order (Georgia Judicial Qualifications Commission August 15, 2012) (www.gajqc.com/news.cfm), the accompanying report explained that the Georgia Judicial Qualifications Commission had been investigating whether the judge used the prestige of his office to advance his private interests and whether he had pre-signed blank arrest warrants for completion by law enforcement officers when he was absent from office.

In New York, the agreements are entered into after the filing of the formal complaint, and the complaint, which would otherwise still be confidential, is part of the public stipulation pursuant to the judge's waiver. For example, in *In the Matter of Knott*, Decision and Order (New York State Commission on Judicial Conduct August 7, 2012) (http://tinyurl.com/cw8hwhd), accepting a stipulation, the New York State Commission on Judicial Conduct discontinued a proceeding against a judge based on her resignation and affirmation that she would not seek or accept judicial office in the future. The formal complaint alleged that the judge failed to report a property damage accident, invoked her judicial status with police, gave testimony to the Commission that was false and/or lacking in candor as to why she had failed to report the accident, and, notwithstanding that she had represented to the Commission in 1999 proceedings that she would refrain from using alcohol, presided over court and appeared in family court representing a child while under the influence of alcohol. The stipulation stated that the judge "understands that, should she abrogate the terms of this Stipulation and hold any judicial position at any time, the present proceedings before the Commission will be revived and the matter will proceed to a hearing before a referee."

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Tennessee disqualification reform

The Tennessee Supreme Court adopted a new procedural rule for disqualification motions, effective July 1, 2012 (www.tsc.state.tn.us/courts/supreme-court/rules/supreme-court-rules). Amended Rule 10.B states that a trial judge who is the subject of a motion to disqualify "shall act promptly by written order" and, if he or she denies the motion, "shall state in writing the grounds upon which he or she denies the motion." The new rule provides for an interlocutory appeal as of right if a judge denies a motion to disqualify.

The amended rule also establishes a procedure for seeking disqualification or recusal of an appellate judge or justice. If an appellate judge denies a motion to disqualify, the movant "may file a motion for court review to be determined promptly by the other judges in that section of the court upon a de novo standard of review" and, if that motion is denied, the movant has an accelerated appeal as of right to the Tennessee Supreme Court. If a motion is filed seeking disqualification of a supreme court justice, the justice is required to act promptly and, if the justice denies the motion, "the movant, within fifteen days of entry of the order, may file a motion for court review, which shall be determined promptly by the remaining justices upon a de novo standard of review."

California discipline statistics

The Commission on Judicial Performance issued a report on the incidence of public and private discipline of California trial court judges from 1990 to 2009 (http://tinyurl.com/7jktb62). In 2002, the Commission had released a summary for 1990 to 1999, "which was unprecedented nationally," and the new report is also "without precedent." The report was prepared by students in the Stanford University Public Policy Program with information provided by the Commission and the Administrative Office of the Courts. The statistics revealed several "trends and relationships."

• The number of complaints per judge decreased slightly after 1999, while the number of sanctions imposed per judge decreased substantially. This decrease was only in advisory letters; the frequency of all other sanctions

Quotable quotes

Decorum and dignity: *In the Matter of McLeod*, Determination (New York Commission 2012) (http://tinyurl.com/b4v4ejw)

Even in the face of provocative, disrespectful comments by a litigant, a judge is required to be an exemplar of decorum and dignity in the courtroom and not allow the proceedings to devolve into an undignified exchange of taunts, insults and obscenities. . . . . Indeed, the more offensive a litigant's behavior, the more important a judge's obligation to act with dignity and restraint.

A judge's job: *In re Wulle* (Washington Commission 2012) (http://tinyurl.com/c8dskd5)

The job of a superior court judge is high-stress and high-volume. Crowded criminal dockets, juveniles who appear on repeated violations, and domestic relations matters with pro se litigants are all part of a judge's workload. With pro se litigants, judges face people who do not always understand the legal process and who do not always behave with the decorum shown by counsel. Judges encounter some litigants who show an outright disrespect for the process and the judges themselves. It is a significant part of the superior court judge's job to manage this process and to control the courtroom, while treating the litigants and counsel with dignity and respect.

Small communities: *In the Matter of Rael* (New Mexico Supreme Court 2012) (http://tinyurl.com/apmembl)

The fact that a judge located in a small community likely knows many of the people in that community is all the more reason for the judge to avoid ex parte communications. . . . Word that a judge is willing to meet in private with one party at a time will only invite members of the community who find themselves embroiled in litigation to approach the judge for an ex parte communication. In addition, community members may also learn from community gossip about ex parte communications and arrive at the conclusion that the judge decided the merits of the case out of fear or favor, and not only the merits.

* * *

Respondent stated that he felt that he had to "bend the law to keep peace with [the] families [because] [t]his is a very small town and sometimes I must go out of the box to keep peace." While a judge retains considerable discretion in fashioning equitable remedies, the judge must not only be impartial but must *be regarded* as impartial to still act within the bounds of the Code of Judicial Conduct. . . . This obligation is especially true in small communities where a judge will be called upon to settle sensitive disputes between parties the judge knows quite well.

remained relatively constant.

- Judges who were initially elected to the bench were more frequently sanctioned (four sanctions per 100 judges) than judges who were initially appointed (2.39 sanctions per 100 judges).
- Male judges were approximately twice as likely to be sanctioned as female judges.
- Judges on smaller courts received more sanctions than judges on larger courts.
- Judges who had previously been sanctioned by the Commission made up a large share of disciplined judges.
- "Complaints from government attorneys and investigations opened by the Commission on its own initiative (based on news reports, information about a judge received in the course of investigating another judge, or anonymous letters) resulted in discipline more frequently than complaints received from other sources."

The report also included comparisons based on years on the bench, age, and types of misconduct.

Viral videotape

One of the top judicial ethics stories of 2012 began in 2011 when the daughter of Judge Williams Adams posted on-line a video of the judge beating her in 2004, when she was 16. The video was viewed by millions of people. In public statements, Judge Adams acknowledged that he had lost his temper while disciplining his daughter for downloading music illegally from the Internet. In November 2011, the Texas Supreme Court suspended the judge with pay with his consent, and the State Commission on Judicial Conduct announced that it had begun an investigation.

In September 2012, the Commission concluded its investigation by issuing a public warning to Judge Adams. *Public Warning of Adams* (Texas State Commission on Judicial Conduct September 4, 2012) (http:tinyurl.com/bv7gq91). The warning was also for a pattern of incidents in which the judge displayed poor judicial demeanor toward certain attorneys in his courtroom. The Commission issues a public warning without formal charges or a public hearing.

The Commission concluded that the judge's actions, "once publicly released, cast reasonable doubt on his capacity to act impartially as a judge and interfered with the proper performance of his judicial duties . . . ." The Commission acknowledged that the judge "was not aware that he had been secretly videotaped, and that he was not

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Life experiences: *Miles v. Ryan*, 697 F.3d 1090 (9th Circuit 2012)

All of us as judges have had life experiences that could be said to affect our perception of the cases that come before us. Some of us have served as prosecutors and others have not; some have experienced discrimination as women or minorities and others have not; some are intensely religious and others are not, and our religions vary; some have children and other relatives with disabilities and illnesses, physical and mental, while others do not; some have had personal experience, directly or through family members, as crime victims, while others have not; some have relatives who are police officers, civil rights activists, or journalists, and others do not; some served in the armed forces and others did not; some had personal experiences as immigrants and others did not. These life experiences do not disqualify us from serving as judges on cases in which the issues or the facts are in some indirect way related to our personal experiences.

Actual and perceived impartiality*: Wersal v. Sexton*, 674 F.3d 1010 (8th Circuit), *cert. denied*, 133 S. Ct. 209 (2012)

[T]here is a significant relation between actual and perceived impartiality, although the two concepts are unique. For instance, a judge who harbors a bias against a particular group, but shows no outward manifestations of the bias lacks impartiality, even though there is no appearance of bias. At the same time, a judge who uses disrespectful language to one party may be perceived as lacking impartiality, even if that judge in fact harbors no actual bias against the party.

These examples highlight some important differences between the two concepts. First, actual impartiality concerns the mental state of a particular judge, whereas the appearance of impartiality arises from the public's perception of that judge. Second, the appearance of impartiality often stems from the collective awareness of the public, and thus Minnesota's interest in maintaining the appearance of impartiality is in this sense broader and qualitatively different than its interest in fostering actual impartiality. Instead of aiming to protect the due process rights of actual parties to a case, maintaining the appearance of impartiality is systemic in nature, as it is essential to protect the judiciary's reputation for fairness in the eyes of all citizens. This reputational interest is not a fanciful one; rather, public confidence in the judiciary is integral to preserving our justice system.

the person who released the videotape on the Internet" but stated, "because Judge Adams regularly presides over and decides child custody, child abuse, and family violence cases, his private conduct did cast public discredit upon the judiciary and the administration of justice . . . ."

The Commission noted that, during its investigation, it had interviewed approximately 17 witnesses, including 15 attorneys who regularly practiced in the judge's court. "Although surprised and disappointed by the scene captured on tape seven years ago, six of the attorneys interviewed by the Commission remained supportive of Judge Adams' return to the bench," the Commission reported, but "six attorneys believed that Judge Adams could no longer be effective in court because the conduct portrayed in the videotape created the public perception that the judge could not be fair and impartial in cases involving allegations of family violence, child abuse, or assault." Those attorneys noted that criminal defense attorneys were likely to file motions to recuse "on behalf of their clients if and when Judge Adams were to return to the bench." The Commission also noted, "as further evidence of the perception that Judge Adams could no longer be fair and impartial," that the commissioner for the Texas Department of Family and Protective Services had directed the county attorney to take action to prevent the judge from hearing the department's cases because "'the department does not believe that Judge Adams hearing such cases [considering the publicity surrounding the video] can serve the best interests of children and parents and insure the objectivity of the Court in actions regarding the abuse or neglect of children.'"

The judge's suspension was lifted shortly after the warning (http://tinyurl.com/ak5rdo8).

Compare Judicial Discipline and Disability Commission v. Pope (Arkansas Supreme Court October 4, 2012) (http://tinyurl.com/8ldeskt) (agreed 30-day suspension without pay for judge's physical confrontation with his estranged wife and her male companion at Walmart); *In the Matter of Horton*, Determination (New York State Commission on Judicial Conduct December 10, 2012) (http://tinyurl.com/bky5vmp) (agreed admonishment for pushing girlfriend against wall, causing her to fall).

Interim suspensions

Some states have provisions allowing the supreme court or judicial conduct commission to suspend a judge with or without pay pending the outcome of criminal or disciplinary proceedings. In 2012, there were at least six judges suspended on an interim basis, four pending the outcome of criminal proceedings, one pending the outcome of disciplinary proceedings, and one at the request of a chief judge. In three of the cases, the judge was suspended without pay.

For example, based on a report by the Office of Judicial Disciplinary Counsel, the West Virginia Supreme Court of Appeals suspended Magistrate Carol Fouty without pay and remanded the matter to the Judicial Investigation Commission for the filing of formal charges. *In re Fouty*, 728 S.E.2d 140 (West Virginia 2012). The Court stated that, in determining whether to suspend a judicial officer with or without pay, it considered "factors, including, but not limited to, (1) whether the charges of misconduct are directly related to the administration of justice or the public's perception of the administration of justice, (2) whether the circumstances underlying the charges of misconduct are entirely personal in nature or whether they relate to the judicial officer's public persona, (3) whether the charges of misconduct involve violence or a callous disregard for our system of justice, (4) whether the judicial officer has been criminally indicted, and (5) any mitigating or compounding factors which might exist."

Examining "the unique circumstances" of the case, the Court noted that the magistrate had admitted dismissing a ticket without the agreement or knowledge of the prosecuting attorney or the trooper who issued the ticket. The Court acknowledged that "this transgression alone may not warrant suspension without pay" but noted that the report also alleged "a variety of questionable judicial practices and activities, casting serious doubt on the integrity of the judicial system" and that the magistrate had previously been sanctioned four times. The Court stated it was "not unsympathetic to the financial hardship [suspension without pay] would impose on Magistrate Fouty," but emphasized its "primary duty is to defend the integrity of the judicial system. Should the outcome of this disciplinary matter warrant, the magistrate may return to this Court to seek back pay."

Granting the petition filed by the Judicial Conduct Board, the Pennsylvania Court of Judicial Discipline ordered that Supreme Court Justice Joan Orie Melvin be suspended without pay until further order of the Court. *In re Melvin*, Order and Opinion (Pennsylvania Court of Judicial Discipline August 30, 2012) (www.cjdpa.org/decisions/jd12-05.html). Justice Melvin had been suspended with pay after she was indicted on state charges of theft and diversion of services based on allegations that state employees on state time worked on her 2003 and 2009 campaigns for the supreme court.

To determine whether the suspension should be without pay, the Court applied a "totality of the circumstances test" that considered the nature of the crime, its relation to judicial duties, the impact or possible impact on the administration of justice, and the harm or possible harm to public confidence in the judiciary. In addition to the arguments of the Board and the judge, the Court reviewed the criminal information, grand jury testimony, and testimony and exhibits from the preliminary hearing in the criminal

case. Acknowledging that it would "necessarily be expressing [its] view" on the evidence, the Court concluded that the criminal charges "are strong—and that they describe conduct so egregious as to require Respondent's interim suspension without pay."

Judicial elections

There were numerous allegations of ethics violations by judicial candidates during the 2012 election campaign. Many were resolved by judicial campaign committees established by state or local bar associations or other groups to quickly respond to such complaints as well as to educate candidates and the public about appropriate judicial campaign conduct. *See* www.judicialcampaignoversight.org/.

An issue that came up several times was judicial candidates endorsing candidates for non-judicial offices, a violation of the code of judicial conduct in most states. The candidates often defended their actions by arguing their endorsements were protected under the First Amendment, but the restriction has been upheld, mostly recently in a challenge to the Minnesota rule. *Wersal v. Sexton*, 674 F.3d 1010 (8th Circuit), *cert. denied*, 133 S. Ct. 209 (2012).

A second recurring issue was misleading campaign statements, particularly non-incumbent candidates using the term "judge" in ads in ways intended to create the appearance that they already held the office for which they were running. The Ohio code of judicial conduct prohibits the use of the term "judge" when the judicial candidate is not a judge unless "elect," "vote," or "for" are also appropriately placed in prominent lettering in the ad. After the election, the Ohio Supreme Court amended Canon 4 to further clarify the rules for non-incumbents (http://tinyurl.com/b2vecup). The amendments:

- Prohibit a former or retired judge from using "the term 'former' or 'retired' immediately preceding the term 'judge' unless the term 'former' or 'retired' appears each time the term 'judge' is used and the term 'former' or 'retired' appears in prominent lettering."
- Prohibit a judicial candidate from using "the title of a public office or position immediately preceding or following the name of the judicial candidate, when the judicial candidate does not hold that office or position."
- Define "prominent lettering" to mean "not less than the size of the largest type used to display the title of office or the court to which the judicial candidate seeks election."

Also, reflecting the increasing use of electronic communications in judicial campaigns, under a new amendment in Ohio, a candidate may make "a general request for campaign contributions via an electronic communication that is in text format if contributions are directed to be sent to the campaign committee and not to the judicial candidate."

Addiction fallout

In 2011, Judge Richard Baumgartner resigned as part of an agreement in which he pled guilty to one state count of official misconduct for regularly buying prescription pills from a defendant on probation in his court, according to news reports. He received a two-year suspended sentence and was placed on judicial diversion.

Through 2012, the repercussions of his conduct continued, both for the former judge and the Tennessee justice system. Parts of a report by the Tennessee Bureau of Investigation were released that revealed Baumgartner, while still a judge, had allegedly engaged in doctor shopping, used his position to acquire prescription painkillers from a bailiff and court clerk, used a drug court graduate (Deena Castleman) to procure pills, had sex with her in his chambers, and tried to influence judges and prosecutors to go easy on her. The 2011 plea agreement barred additional state charges, but, in May 2012, a federal grand jury indicted Baumgartner on seven counts of misprision of felony. The indictment alleged that Baumgartner, while still a judge, knew that Castleman and others were participating in a conspiracy to distribute painkillers but failed to report that felony as soon as possible and concealed it by making material misrepresentations about Castleman to several judges and other officials.

In November 2012, a jury convicted Baumgartner on five counts of misprision of a felony. He has appealed.

The verdicts in cases over which Baumgartner had presided just before his resignation have also come under review. *See, e.g.; State v. Cobbins*, Opinion (Tennessee Court of Criminal Appeals October 25, 2012) (http://tinyurl.com/as99ukh).

23rd National College on Judicial Conduct and Ethics

The Center for Judicial Ethics will hold its 23rd National College on Judicial Conduct and Ethics on **Wednesday October 23 through Friday October 25, 2013**, at the Embassy Suites Chicago—Downtown Lakefront. Registration information will be in the spring issue of the *Judicial Conduct Reporter* and at www.ajs.org/ethics/college.asp in June.

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