To secure and promote an independent and qualified judiciary and a fair system of justice

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Campaign Supporters and Disqualification

by Cynthia Gray

According to a 2007 survey by the Annenberg Public Policy Center, 69% of the public believe that raising money for elections moderately or greatly affects a judge's rulings, although 64% still favor election of judges (www.appcpenn.org/Downloads/20071017_JudicialSurvey/Judicial_Findings_10-17-2007.pdf). Under the code of judicial conduct, a judge is required to disqualify from "a proceeding in which the judge's impartiality might reasonably be questioned." Judicial ethics advisory opinions, however, consistently state that a judge is not required to disqualify himself or herself from presiding over a case merely because an attorney or party has contributed to the judge's election campaign. *Alabama Advisory Opinion 99-725; California Advisory Opinion 48* (1999); *Illinois Advisory Opinion 93-11; Nevada Advisory Opinion JE 02-1*; *Oklahoma Advisory Opinion 07-3*. Those opinions are consistent with case law. *See, e.g., Roe v. Mobile County Appointment Board*, 676 So. 2d 1206 (Alabama 1995) (campaign contributions by attorneys for plaintiff-class to justices' campaigns do not constitute grounds for disqualification); *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332 (Florida 1990) (legal campaign contribution by litigant or counsel to judge's political campaign is not sufficient ground for disqualification); *City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial District Court*, 5 P.3d 1059 (Nevada 2000)

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Judicial Accountability System in Bosnia and Herzegovina *by Mersudin Pružan*

The judiciary occupies a unique position in a democratic society, and it should uphold the law for all, safeguarding the rights of all individuals and all minority groups against the excesses of the majority. One of most important sources of legitimacy and authority for judges is their independence. Meaningful independence — and public perception of that independence — is essential to the judiciary's legitimacy as a guarantor of rights and freedoms. If the judiciary is not independent of the executive and legislature, it cannot properly restrain those branches.

Bosnia and Herzegovina was one of six republics in former Yugoslavia and gained its independence in 1992. The pre-1992 civil law system and judiciary had been subordinated to the executive and through it to the supra-political authority of the Communist Party. In the socialist period, the judiciary's position was defined by its political subordination, and a weak commitment to the rule of law. The system was based on the unity of power, in which the subordination of judges to the Communist Party and of law to politics was *sine qua non* for preservation of the socialist regime. Judges were generally viewed as functionaries, and there was no expectation that a judge might issue a decision fundamentally at odds with the official political line.

The continuing effects of this history on public and political ideas about the judiciary and on judges' views of their role continue to affect perceptions of the Bosnian judiciary. Many politicians and citizens still assume

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Recent Advisory Opinions – Teaching

A judge may speak without compensation at a CLE program open to all members of the bar and sponsored by a for-profit corporation provided the judge does not comment on any pending or impending proceeding and the sponsor is not a party in a contested proceeding pending before the judge. *New York Opinion 05-12*.

A judge may participate in a panel discussion at a CLE seminar sponsored by a private organization, non-profit or for-profit, as long as the judge does not endorse products or materials offered by the organization. The judge may receive reimbursement for expenses and an honorarium. The judge's photo and biographical information may be included in advertisements that are dignified and do not imply that the judge endorses any products or services. *Florida Opinion 07-9*.

A judge should not make a presentation on effective motions to suppress in a seminar about defense of DUI cases sponsored by an association of criminal defense attorneys. *Nebraska Opinion 06-4*.

Judges may host "brown bag luncheons" to discuss issues of law and practice with members of the bar and may include attorneys employed by organizations with cases regularly before the court as long as any attorney directly and actively involved in a case that has been scheduled for appellate argument or is currently in the midst of a trial or evidentiary hearing before the judges does not attend. *New York Opinion 07-15*.

A judge may permit law firm associates to observe court proceedings, speak to them on court premises about court procedures, and accept the firm's offer to pay for a modest lunch immediately following the program. *New York Opinion 07-125*.

A probate judge may teach a course on adult protective services at a training program for employees of county departments of job and family services provided the teaching does not interfere with judicial duties, but should not accept compensation. *Ohio Opinion 06-3*.

A judge may teach a fire police training course on the organization, duties, and responsibilities of fire police squads, safety, and laws pertaining to the position as long as the judge does not advise the officers how to obtain convictions, discuss any pending or impending cases, or give any impression of partiality or of a predisposition to decide matters in a particular way. *New York Opinion 06-15*.

A juvenile court judge may participate on a panel designed to train foster parents as long as the panel consists of representation from all of the entities involved in juvenile court cases. *Utah Informal Opinion 06-4*.

In deciding whether to speak at private law-related training programs offered by entities seeking to train their own employees, clients, or associates, a judge should consider the sponsor of the program; the subject; whether there is a commercial motivation for the program; the attendees, including whether members of different constituencies are invited; the location; advertising or promotion of the event; and other factors. A judge should not participate in training programs offered by law firms, business legal departments, or government agencies for their attorneys and held in their offices but may do so at neutral settings. A judge should not teach at for-profit programs about "the ins-and-outs" of practice before that judge's court. A judge should not participate in a conference intended to attract litigators and sponsored by a group that provides witnesses for court proceedings or at a program on discovery issues hosted by a for-profit company offering discovery services. A judge may lecture at a seminar sponsored by a for-profit entity on a law-related subject of interest to attorneys and lay persons or at a for-profit program for corporate and government attorneys on topics unrelated to the operations of the judge's court. A judge has a continuing obligation to monitor promotional activities to ensure that the organizers of training programs do not exploit judicial participation by overemphasizing the judge's participation. A judge may participate in a law-related forum sponsored by a bar association or not-for-profit civic organization and open to the public even if admission is charged to defray costs but should not participate in training offered by an issue-specific advocacy group. *U.S. Opinion 105* (2006).

** The Center for Judicial Ethics web-site has links to judicial ethics advisory committees at www.ajs.org/ethics/eth_advis_comm_links.asp.*

Developments Following *Republican Party of Minnesota v. White*

This article up-dates information on developments following the U.S. Supreme Court decision that the prohibition on judicial candidates announcing their views on disputed legal or political issues was unconstitutional in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). A cumulative description is at www.ajs.org/ethics/pdfs/eth_judicial-campaign.asp, which is up-dated frequently.

Pledges, promises, commitments

Several organizations have filed suits in federal court challenging the pledges, promises, and commits canons of the code of judicial conduct after judicial candidates refused to answer questions in questionnaires distributed by the organizations. For example, the Pennsylvania Family Institute questionnaire asked candidates to indicate whether they believed "that the Pennsylvania Constitution recognizes a right to same-sex marriage?" The challenged canons prohibit judicial candidates from "mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" and "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."

Vacating a preliminary injunction, the United States District Court for the Eastern District of Pennsylvania held that the pledges, promises, and commits canons, narrowly construed, were not unconstitutional. *Pennsylvania Family Institute v. Celluci*, Memorandum and Order (October 16, 2007). The narrow construction adopted by the court eliminates "appear to commit" from the canon and prohibits judicial candidates from pledging, promising, or committing to decide an issue or a case in a particular way once elected but permits any speech short of a pledge, promise, or commitment to adjudicate a particular result. The court held that "Pennsylvania has compelling interests in preserving an openminded judiciary and in protecting the due process rights

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Assessing Complaints About Judicial Conduct

To evaluate the federal judiciary's handling of complaints under the Judicial Conduct and Disability Act, a study committee appointed by then-Chief Justice William Rehnquist (called "the Breyer Committee," for its chair, Justice Stephen Breyer) applied several standards it developed based on the language of the Act. (For a copy of the Committee report, issued in 2006, see www.supremecourtus.gov/publicinfo/breyercommitteereport.pdf.)

Complaints against federal judges are filed with the chief judge of the court of appeals in the circuit in which the judge sits. The chief judge either dismisses the complaint, concludes the proceeding if corrective action has been taken, or appoints a special committee to investigate.

The Act provides that the chief judge should dismiss a complaint if the complaint is **"**directly related to the merits of a decision or procedural ruling.**"** The Committee explained that the rule reflects the "core policy" that the complaint procedure cannot be used to collaterally attack the substance of a ruling to protect the independence of the judge in deciding cases and controversies. However, the Committee stressed that whether an allegation is merits-related has nothing to do with whether the complainant has an adequate appellate remedy.

A complaint alleging incorrect rulings is merits related even though the complainant—a non-party—has no judicial recourse. By the same token, an allegation that is otherwise cognizable under the Act should not be dismissed merely because an appellate remedy appears to exist (e.g., vacating a ruling that resulted from an improper ex parte communication).

Any allegation that goes beyond a mere attack on the correctness of the ruling itself is not dismissed as merits-related (although it may be dismissed for other reasons).

An allegation—however unsupported—that a judge conspired with a prosecutor in order to reach a particular ruling is not merits related, even though it "relates" to a ruling in a colloquial sense. What that allegation attacks is the propriety of conspiring with the prosecutor. . . . Similarly, an allegation—however unsupported—that a judge ruled against the complainant because the complainant was Asian, or because the judge doesn't like the complainant personally, is not merits related. What the allegation attacks is the propriety of arriving at rulings with an illicit or improper motive.

"Because of the special need to protect judges' independence in deciding what to say in an opinion or ruling,"

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(campaign contributions to trial judge, which ranged from $150 to $2,000, do not require disqualification); *In re Disqualification of Celebrezze*, 657 N.E.2d 1341 (Ohio 1991) (disqualification is not mandated because a party or counsel made campaign contributions to or against the judge).

The rationale for these opinions is that "the exigencies dictated by the need to run periodically for elective office against active challengers makes invocation of the rule of disqualification, unrealistic and unreasonable." *California Advisory Opinion 48* (1999).

No judicial campaign can be run without reliance on campaign funds. Inherent in fundraising is the concern that it might negatively impact at least the perception of judicial impartiality. Nevertheless, ensuring a fair and meaningful election process requires that judicial candidates be presented to an informed voting public.

If a judge were required to disqualify because of contributions, the California advisory committee explained, a judge's ability to raise funds for an election campaign "might be seriously impaired, and could perhaps interfere with the right of a judge to defend himself or herself from an election challenge." The committee added that limiting the ability of judicial candidates to raise funds may "diminish the pool of candidates who do not have the personal means to finance a campaign," or at least "disadvantage them in a campaign against wealthy candidates who could personally absorb the cost of the election." Thus, the committee concluded, "a judge who engages in permissible forms of campaign fundraising will not be seen by a reasonable person to be biased or lacking in impartiality."

Concern has also been expressed that a disqualification requirement would allow attorneys to "'shop' for the judges they want simply by cutting a check at election time." *MacKenzie v. Super Kids Bargain Store*, 565 So. 2d 1332 (Florida 1990) (Kogan, J., concurring). Finally, an automatic disqualification rule could "create an administrative nightmare," choking the court with motions for disqualification. *Id*.

Although a "mere" contribution to a judicial campaign does not trigger automatic disqualification of the judge, a more substantial contribution or a more extensive involvement in a campaign may require a judge to recuse.

In 1997, the ABA revised the 1990 Model Code of Judicial Conduct to provide that a judge is disqualified if "the judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than $[insert amount] for an individual or $[insert amount] for an entity [is reasonable and appropriate for an individual or an entity]." No state has adopted this provision, which was retained in the 2007 revised model code.

Additional circumstances

Although a "mere" contribution to a judicial campaign does not trigger automatic disqualification of the judge, a more substantial contribution or a more extensive involvement in a campaign may require a judge to recuse. In *Pierce v. Pierce*, 39 P.3d 791 (Oklahoma 2001), the wife in divorce proceedings sought to disqualify the trial judge because he had accepted campaign contributions from the husband's lawyer and the lawyer's father while the case was pending. The trial judge declined to disqualify himself.

Reversing the divorce degree in part, the Oklahoma Supreme Court held that a judge's impartiality might reasonably be questioned when, during a pending case, a lawyer makes a campaign contribution to the judge in the maximum amount allowed by statute ($5,000) and assists the judge's campaign by successfully soliciting funds on behalf of the judge and a member of that lawyer's immediate family also makes a comparable contribution. The court also stated, however, that the party represented by the lawyer-contributor could defend against a motion to disqualify by showing that the contributions were a minimal part of the funds raised for the judge's campaign. Moreover, the court emphasized, "the mere fact of a lawyer's contribution to a judge's campaign does not per se require that judge's disqualification when the lawyer comes before him."

Similarly, the California committee suggested that "acceptance of disproportionately large contributions could give rise" to a presumption of bias. *California Advisory Opinion 48* (1999).

Judges should consider contributions in the context of the size of the electorate and the total cost of a campaign. For example, a $1,000.00 contribution in a community where the total cost of a campaign is proportionately high would not be likely to raise a question of the judge's ability to be unbiased should that contributor later appear before the judge. On the other hand, the same contribution in a small county where the total cost of the campaign is expected to be $25,000 very well may raise such a doubt.

See, also, City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial District Court, 5 P.3d 1059 (Nevada 2000) (campaign contributions that are "extraordinary in amount" may raise a reasonable question as to a judge's impartiality requiring that a judge recuse himself or herself).

The New York judicial ethics committee has advised that a judge who is running for re-election may not preside over cases during the campaign in which the judge's campaign manager appears as an attorney even if the matters are routine and uncontested (*New York Advisory Opinion 94-12*) and that disqualification continues for two years following the campaign (*New York Advisory Opinion 06-54*), subject to remittal. After two years, the judge need not disqualify, but must disclose the person's role in the campaign. Further, the New York committee has directed judges to disqualify during the campaign from cases involving attorneys who hold a leadership position or a continuing fund-raising role in the campaign (*New York Advisory Opinion 03-64*), who are planning a fund-raiser or are on a host committee for a fund-raiser (*New York Advisory Opinion 01-7*), or who have provided other active support for the judge's candidacy (*New York Advisory Opinion 03-64*). However, under the New York opinions, a judge need not disqualify, either prior to or after the election, when attorneys appear who are listed as supporters of the judge in the campaign (*New York Advisory Opinion 03-64*), who allowed their names to be used by the committee to elect the judge, who helped gather petitions and distribute flyers for the judge's campaign, or who attended fund-raising events (*New York Advisory Opinion 07-26)*.

Similarly, the Wisconsin judicial ethics committee has advised that, for one year after a contested election, a judge is required to disqualify from contested matters involving the judge's former campaign manager. *Wisconsin Advisory Opinion 03-1*. *See also Illinois Advisory Opinion 96-20* (judge is disqualified during a campaign from any case in which one of the parties is represented by the judge's campaign chair); *South Carolina Advisory Opinion 14-1998* (judge should disqualify from cases involving an attorney who has worked on the judge's campaign finance committee); *Washington Amended Advisory Opinion 88-7* (judge should disqualify from cases involving lawyer who has formed campaign committee for judge's candidacy for another judicial position). After a year, the committee stated, whether the judge should disqualify depends on factors such as the degree of involvement between the judge and campaign manager; the closeness of the financial, professional, personal, or other interests between the campaign manager and the judge; the appearance to the public, other attorneys, judges, and members of the legal system of the failure to disqualify; and the administrative burden of the recusal on the courts.

Other committees, however, have advised that a judge is not disqualified from cases involving attorneys who are members of the judge's campaign committee or have endorsed the judge's candidacy. *See Alabama Advisory Opinion 99-717* (judge is not disqualified from criminal cases by local district attorney's endorsement of judge's candidacy in a political advertisement)*; Alabama Advisory Opinion 91-420* (judge is not disqualified from proceedings in which a party is represented by the judge's re-election campaign treasurer or a member of the judge's re-election advisory committee); *Florida Advisory Opinion 07-17* (judge should not necessarily disqualify when a criminal defense attorney appearing before the judge is currently on the judge's campaign committee); *Florida Advisory Opinion 03-22* (whether judge is disqualified

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from a case in which an attorney who was a member of the judge's re-election committee appears depends on the extent of the attorney's involvement in the judge's campaign and the remoteness of time since the campaign); *Michigan Advisory Opinion JI-79* (1994) (judge is not automatically disqualified from a matter in which a member of the judge's re-election campaign committee appears as an advocate for a party); *Nevada Advisory Opinion JE 02-1* (judge is not disqualified from a case involving an attorney who publicly endorsed the judge or agreed to be listed on the judge's campaign committee); *South Carolina Advisory Opinion 31-1994* (judge is not required to disqualify from proceedings simply because one of the attorneys had endorsed the judge); *West Virginia Advisory Opinion* (December 13, 1995) (judge is not disqualified from cases in which attorneys who are members of the judge's campaign committee appear).

Disclosure

Although disqualification may not be required, most advisory committees direct that a judge should disclose when campaign contributors or supporters are involved in a case. *See, e.g., Michigan Advisory Opinion JI-79* (1994) (judge has affirmative duty to disclose when a member of the judge's re-election campaign committee appears for a party); *Nevada Advisory Opinion JE 02-1* (if an attorney has contributed an extraordinary amount to the judge's campaign or served as the judge's campaign chair, treasurer, or other position, judge must disclose the participation and afford the parties an opportunity to request disqualification); *West Virginia Advisory Opinion* (December 13, 1995) (judge must disclose relationship when attorneys who are members of the judge's campaign committee appear in cases).

The California advisory committee stated disclosure is the best means for "striking a balance between a judge's need to participate fairly in the electoral process with the judge's obligation to maintain the appearance of impartiality." *California Advisory Opinion 48* (1999). The committee established a two-year period after the contribution as the time limit for disclosure and defined the duty to disclose to include the identity of the contributor and the amount or nature of the contribution and to apply to parties, witnesses whose credibility the judge may be called upon to evaluate, and attorneys appearing before the judge and their law firms.

The committee advised that any amount above $100 (the threshold amount set by statute for disclosure in the candidate's public disclosure filings) should be disclosed, adding that contributions less than $100 "simply are too de minimis to rise to the level of relevance." The committee stated that an implied disclosure through the candidate's campaign filing with the county elections office was not sufficient in light of the code of judicial conduct requirement that disclosure be "on the record," adding that "expecting attorneys or litigants to procure these filings recorded in remote locations on their own to determine if opponents contributed to the judge's campaign is neither practical nor realistic."

The California committee also directed judges to disclose non-monetary contributions, including service on a campaign committee, "work[ing] behind the scenes enthusiastically or indefatigably for the candidate," hosting fund-raising "coffees," regularly assisting in precinct walking, provision of accounting services, use of office space and equipment, and donation of materials for campaign signs and literature.

Similarly, the Oklahoma advisory committee stated that a judge has the duty to disclose to adverse counsel a lawyer's contribution of a substantial sum of money to the judge's campaign and to disclose any other activities by the lawyer in support of the judge's candidacy. *Oklahoma Advisory Opinion 07-3*. A de minimis contribution, the committee stated, does not have to be disclosed, but a small contribution coupled with additional factors may require disclosure. The committee explained that it could not "arbitrarily fix a 'bright-line' dollar figure which would distinguish a de minimus contribution from one that is 'substantial,'" noting a "small contribution in the metropolitan areas could be considered 'substantial' in other areas of the State," or "conversely, a contribution may be considered large or 'substantial' in one area of the State, but viewed as de minimus in other areas." The committee decided that any disclosure requirement would extend for a year after the judge's term began.

A comment to Rule 2.11 of the ABA Model Code of Judicial Conduct, as revised in 2007, notes that "in many jurisdictions, the term "recusal" is used interchangeably with the term 'disqualification.'" The reporters' notes state the "the terms 'recusal' and 'disqualification' have been defined in different and sometimes inconsistent ways to apply where judges act on their own initiative or pursuant to a motion by a party. This Comment is intended to render such distinctions irrelevant here."

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that judges are there to implement state policy and not protect rights of individuals. These perceptions contribute to popular distrust of judges.

After dissolution of Yugoslavia in the early 1990s, Bosnia and Herzegovina became a battlefield that caused devastation and the collapse of all social values and almost the entire system of government. Replacing the socialist system in Bosnia, ethnic interests became the supreme criteria for any public function including positions in the judiciary. As a result of ethnic cleansing of governmental institutions, three separate entities were created, each dominated by one of the three major ethnic groups in Bosnia.

Courts continued to function during the war, but some judges were taken to concentration camps, some left the country, while many lost their position due to their ethnic background, and new judges with the "appropriate" ethnic background were appointed in their place. After the war, the nationalistic political parties in power continued to control the appointment process and the judiciary, and, before 2000, only sporadic and weak efforts were made to improve the situation.

Judicial Reform

Since 2002, significant progress has been made in Bosnia and Herzegovina towards the goal of a truly independent judiciary integrated in and accountable to a democratic society. The major judiciary reform was initiated by the international community through its Office of the High Representative, which was charged by the United Nation Security Council with maintaining peace in Bosnia and helping in the development of democratic institutions. All judges and prosecutors went through a re-selection process, and anyone with specified qualifications could apply for any position within the judiciary. About 30% of judges were not re-selected, and new judges and prosecutors have been appointed.

The High Judicial and Prosecutorial Council was created as an agency independent of the executive and legislative branches and vested with administrative powers over the judiciary such as discipline, court management, appointments, and promotions. The Judicial Council is composed primarily of judges, prosecutors, and lawyers, with only two of the 15 members appointed by the executive and legislature. Protecting the public and judicial system from judges and prosecutors who fail to adhere to their professional and ethical responsibilities is one of the Judicial Council's important functions; in particular, the Law on High Judicial and Prosecutorial Council provides clear and transparent criteria for disciplining judges and prosecutors.

The High Judicial and Prosecutorial Council's disciplinary jurisdiction includes judges, court presidents, lay judges and reserve judges and courts at the state, entity, cantonal, district, municipal, and basic levels in Bosnia and Herzegovina. Only Constitutional Courts, three in existence at different levels, and judges of those courts are outside its jurisdiction. The newly-established system prevents the executive and legislature from influencing judges' careers, and those two branches of government can no longer initiate disciplinary proceedings if not satisfied with a ruling of the judge, which is the guarantee to prevent the arbitrary exercise of power and to protect the human rights of citizens.

An Office of the Disciplinary Counsel has been created as an autonomous unit within the Judicial Council to keep judges accountable, as greater independence requires greater responsibility. The Office of the Disciplinary Counsel exercises its jurisdiction through the Judicial Council's disciplinary activities, or more broadly, by protecting the public and judicial system, and it reports directly to the Judicial Council. The Office of the Disciplinary Counsel is charged by law with receiving, investigating, and prosecuting complaints of misconduct against judges and prosecutors. The Office of the Disciplinary Counsel acts upon its own initiative or upon a complaint, which may be made by any person or organization. The Office of Disciplinary Counsel must initiate a disciplinary proceeding before the Judicial Council within five years from the misconduct and within two years from the filing of a complaint.

Bosnia and Herzegovina has a Code of Conduct for Judges, but provisions of the code are not mandatory. The provisions guide judges when confronted with difficult ethical and professional issues and assist members of the executive and the legislature, lawyers, and the public in general to better understand and support the judiciary.

The Law on the Judicial Council contains a comprehensive list of 23 disciplinary offences that could be committed by a judge who acts in a manner that is inconsistent with the standards of professional and ethical behavior. Examples of misconduct that constitutes a disciplinary offence include:

- not acting impartially and without prejudice;
- breach of the obligation to behave properly in relation to the parties in a proceeding, their legal representatives, witnesses, civil servants, or colleagues;
- exploiting the position of judge in order to obtain unjustified advantages

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for himself/herself or for other persons;

- accepting gifts or remuneration for the purpose of improper influencing the decisions or the actions taken by the judge;
- failure to ask for his/her exemption from hearing a case when a conflict of interest exists; or
- engaging in activities that are incompatible with the judicial function.

When a judge acts in such a manner, accountability requires disciplinary action and, upon determination of the judge's disciplinary liability, imposition of appropriate disciplinary measures.

If the Office of Disciplinary Counsel is able to prove that a judge has committed a disciplinary offence, the Judicial Council may impose disciplinary measures ranging in severity from a private written warning for relatively minor misconduct to permanent removal from office when more serious misconduct is found. During disciplinary proceedings, judges have numerous rights, including a right to be represented by a lawyer, to a public hearing, to attend all hearings, to appeal adverse disciplinary rulings, and to initiate a court proceedings before the State Court in case of being removed from the office.

In 2004, 1428 complaints of misconduct were lodged against judges and prosecutors, while that number grew to 1733 complaints in 2006. However, after a thorough and careful review and evaluation of the complaints, the Office of Disciplinary Counsel took disciplinary action in only 14 complaints in 2004, and 35 complaints in 2006, in which it was determined that the complaints were substantiated or founded.

Challenges

Although major reforms have been undertaken and some significant issues have been resolved in regard to independence and accountability of the judiciary, there are still significant challenges before Bosnia's judiciary and its disciplinary system. The Bosnia and Herzegovina Constitution, which dates to 1995 and was agreed to in Dayton, Ohio, was a tool to stop the war in Bosnia. As such, the constitution does not mention separation of powers or an independent judicial branch. Currently, key stakeholders within Bosnia are discussing changes and amendments to the "Dayton Constitution," and the judiciary is trying to get its independence recognized as a constitutional category, which would safeguard an independent judiciary.

Another issue of concern is the inadequate resources for properly handling the large number of complaints filed against judges and prosecutors. The Office of Disciplinary Counsel employs eight employees to handle an average 1700 complaints a year. This shortage in manpower and the two-year limit on taking action means that many complaints clearly are or will not be treated adequately, and only the most serious complaints will get adequate attention.

People sometimes are not satisfied with slowness of the disciplinary process and have heavily criticized the Office of Disciplinary Counsel; criminal charges have even been filed against some of its employees. On the other hand, judges and their associations often criticize the Office of Disciplinary Counsel for requesting information regarding court cases and for initiating disciplinary proceedings. In addition, the legislature and executive often criticize the existing disciplinary system because they no longer have control over the discipline of judges. These powerful actors sometimes are not pleased with judges' rulings and use all means possible, including the media under their control, to attack both the judge and the Judicial Council for rulings. The executive and legislature in some parts of the country decreased court budgets after the control over appointment and discipline of judges was given to the Judicial Council.

A recent attempt to significantly decrease the salaries of Judicial Council employees may result in many if not most leaving in search of better-paying jobs. Those leaving may include employees who, in the past five years, have gained unique experience with the disciplinary system, and their resignations could have significant consequences for the judicial disciplinary system and practice in Bosnia and Herzegovina.

There are also some procedural challenges. For example, the statute of limitations is proving to be too short. Because a decision on a complaint must be made within two years from its filing, the Office of Disciplinary Counsel may have to investigate even while a case is still pending before the judge who is a subject of complaint. The investigation sometimes influences proceedings in a way that a judge renders a decision or treats the case as a priority, which is incompatible with judicial independence.

Transparency of proceedings is another challenge. The Law on Judicial Council provides that all proceedings relating to allegations of misconduct or disability prior to the filing of a formal complaint by the Office of Disciplinary Counsel are confidential and that a complaint or communication alleging judicial or prosecutorial misconduct with the Office or information obtained through an investiga-

tion is privileged, except as to requests from Judicial Council. Respecting these rules and trying to make the disciplinary system more transparent, the Judicial Council has published on its internet site press releases about initiation of disciplinary proceedings in all cases as well as all decisions rendered in disciplinary proceedings to educate both the public and judges about particular disciplinary offences.

It is unclear if disciplinary proceedings are civil or criminal in nature. The issue is very important with regard to the rights of parties to the proceeding. Although the Judicial Council applies civil procedure provisions to disciplinary proceedings, a recent decision of the Constitutional Court of Bosnia and Herzegovina declared disciplinary proceedings as criminal in nature.

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of future litigants." The court concluded that the narrowly construed canons promote those interests, regulate no speech beyond their "plainly legitimate sweep," and "are clear enough that 'men of common intelligence' need not 'guess at its meaning.'"

The court stated that none of the questions in the questionnaire asked candidates to make a pledge, promise, or commitment prohibited by the code of judicial conduct under its narrow construction. Although holding that candidates could answer the questions, the court stated it "wholeheartedly" agreed with the candidates who had refused to answer "because they feared their answers would force them to recuse themselves from future cases, and more importantly, cast doubt on the impartiality and integrity of Pennsylvania's courts." The court added: "It is the court's hope that this decision, Pennsylvania's recusal Canon, and judicial candidates' dedication to public service will adequately safeguard the impartiality and integrity of Pennsylvania's elected judiciary for years to come."

The United States Courts of Appeals for the 7th and 9th Circuits vacated decisions holding the pledges, promises, and commits canons unconstitutional in Indiana and Alaska, finding that the plaintiff organizations did not have standing and the challenges were not ripe for adjudication, and ordered the dismissal of the suits. The 9th Circuit concluded the record did not show that even one judicial candidate in Alaska had a clear intention to violate the canons, "that the Commission [on Judicial Conduct] plans to enforce these canons, or that the Alaska Supreme Court would interpret them in a way that would restrict the speech [the plaintiff organizations] hope to solicit." *Alaska Right to Life Political Action Committee v. Feldman,* 504 F.3d 840 (2007).

The 7th Circuit characterized the situation as a "chess game."

> Candidates may not want to answer the questions and would perhaps be happy to have the Code as a reason to decline. When that is true, Right to Life, while ostensibly asserting the right of candidates to speak, may, in fact, be acting against what the candidates see as their best interests. And probably much to Right to Life's dismay, the Commission [on Judicial Qualifications], by taking no action against candidates, is simply not playing. The voters? One can hope that they can discern when a candidate is ducking a legitimate question and when she is legitimately refusing to become a pawn. Perhaps because of the strange alignment of interests, the plaintiffs have a problem showing that there is a case or controversy.

Indiana Right to Life v. Shepard (October 26, 2007).

Disqualification

Granting the defendants' motion to dismiss, the United States District Court for the Northern District of Florida upheld the validity of the requirement that a judge disqualify if the judge, while a judge or candidate, made or appeared to make a commitment with respect to the parties, issues, or controversy in the proceeding. *Florida Family Policy Council v. Freeman* (September 11, 2007). The court stated:

> [The disqualification canon] prohibits speech not at all, and burdens speech only a trifle, allowing a judge to keep the same job at the same pay and to perform the same type of work with the same perquisites while giving up only the right to preside over cases (presumably few if any) in which the judge reasonably appears not to have an open mind. A judge has no First Amendment right to sit in such cases, and any right plaintiff has to hear speech of this type clearly does not encompass a right to have judges sit on cases in which they have made commitments. There is no right to a biased judge, nor to a judge with a closed mind.

The court noted that "Justice Kennedy, whose vote was critical to the outcome [in *White*], made clear that a state 'may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.'" Stating that "disqualification standards long have turned on appearances," the court concluded "the suggestion that a state cannot tie disqualification to the reason-

(continued on page 10)

Developments Following *Republican Party of Minnesota v. White* *(continued from page 9)*

able appearances is simply wrong."

A cornerstone of due process is a judge with a mind sufficiently open to base his or her decision on the evidence and governing law. A judge who makes an advance commitment with respect to an issue or controversy—or who reasonably appears to commit in advance—has no business deciding the issue or controversy.

Endorsements

The New Mexico Supreme Court publicly reprimanded a judge who endorsed a mayor for re-election. *Inquiry Concerning Vincent*, Opinion and Formal Reprimand (November 9, 2007). Rejecting the judge's argument that his endorsement was constitutionally protected speech, the court concluded that the endorsement clause was carefully and narrowly designed to alleviate the concern that a judge could be perceived as being beholden to a particular political leader or party and promotes "the State's compelling interest in preventing political bias or corruption, or the appearance of political bias or corruption, in its judiciary."

It is the public pronouncement of support that most offends our notions of impartiality. A private promise of support to a candidate, like a private contribution of money, creates less of a perception of partiality. A public endorsement, like an advertised monetary contribution, hits closest to the mark. Our Code of Judicial Conduct aims only at public conduct that creates the highest degree of risk.

Other speech

The Arkansas Judicial Discipline and Disability Commission dismissed charges against a judge that were based on statements he made in speeches and articles on controversial public issues. *In the Matter of Griffen*, Final Decision and Order (September 27, 2007). The charges had cited, for example, a statement by the judge to a public meeting of the state chapter of the NAACP that the Hurricane Katrina disaster revealed the scab of racism and classism. The Commission concluded that the judge's speech was protected under the First Amendment and that no canon expressly prohibits a judge from publicly discussing disputed political or legal issues or could "be used as a basis for a finding of judicial misconduct if the alleged misconduct is solely related to a public discussion of disputed political or legal issues."

"A cornerstone of due process is a judge with a mind sufficiently open to base his or her decision on the evidence and governing law."

The United States Court of Appeals for the 5th Circuit held that the Texas State Commission on Judicial Conduct could sanction a judge for holding a press conference in his courtroom while wearing his robe, but not for the content of his message. *Jenevein v. Willing*, 493 F.3d 551 (2007). The Commission had publicly censured the judge for, during the court's normal business hours, reading a prepared statement to the press about a matter pending before another judge and allegations of judicial corruption and infidelity against his wife.

The court concluded that the censure "survives strict scrutiny to the extent that it is directed at Judge Jenevein's use of the trappings of judicial office to boost his message, his decision to hold a press conference in his courtroom, and particularly stepping out from behind the bench, while wearing his judicial robe, to address the cameras."

The state has a compelling interest in preserving the integrity of the courtroom, and judicial use of the robe, which symbolically sets aside the judge's individuality and passions. And while these interests cannot be met by broadly censuring the content of speech the commission finds offensive, they can be met with lesser if not minimal impact on the message: by accepting as we must that elected judges are political actors, but insisting that judges take it outside.

Moreover, the court agreed that the state has a compelling interest in protecting the integrity of its judiciary.

An impartial judiciary, while a protean term, translates here as the state's interest in achieving a courtroom that at least on entry of its robed judge becomes a neutral and disinterested temple, in appearance and fact — an institution of integrity, the essential and cementing force of the rule of law.

Noting that Texas has persisted in electing its judges, "a decision which, for good or ill, casts judges into the political arena," the federal court concluded that to the extent that the Commission sanctioned the judge for the content of his speech, the censure "works against" the state's interests in preserving the public's faith in the judiciary and litigants' rights to a fair hearing by "shutting down" communication between the judge and his constituents about a matter of judicial administration, not the merits of a pending or future case.

Assessing Complaints About Judicial Conduct *(continued from page 3)*

the Committee applied a different standard to determine whether an allegation about a judge's language in a ruling should be dismissed as merits-related. In those circumstances, if the judge's language seems relevant on its face or is demonstrated by an inquiry, the complaint is properly dismissed as merits-related even if there is an allegation of an improper motive.

Frivolous

Another grounds for dismissal without investigation under the federal act is if the allegation is "frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or contain[s] allegations incapable of being established through investigation." The Committee concluded that the phrase "lacking sufficient evidence" defines "frivolous."

Without that definition, a layperson's colloquial understanding would translate "frivolous" as unimportant. Thus, readers of a public order dismissing as frivolous groundless claims of racial bias might mistakenly conclude that the judiciary did not consider racial bias an important concern.

The Committee explained that an allegation may be dismissed as lacking sufficient evidence if, even if it is not literally impossible, it is "inherently incredible," that is, "if no reasonable person would believe that the allegation, either on its face or in the light of other available evidence, could be true."

"There can be no hard and fast rule" for when a complaint contains sufficient evidence to avoid dismissal, but generally all a complaint "need do is assert that the complaint's allegation is supported by the transcript or by a named witness."

Then it should be incumbent on the chief judge . . . to consult the transcript or question the alleged witness. Indeed, a complaint need not itself identify a particular transcript or witness, if the complaint sets forth allegations that are capable of being verified by looking at identifiable transcripts or questioning identifiable witnesses.

Depending on what the transcript or the witnesses reveal, it may be appropriate for the chief judge to question the judge complained against. In the situation where a complaint raises an allegation not inherently incredible as to which only the judge complained against is a practicable source, then it should be incumbent on the chief judge to question the judge complained against. An example is an allegation by a court employee that on occasions when she was alone with the judge, he touched her inappropriately. There are no witnesses and no transcript. Even if the chief judge, from personal knowledge of the judge complained against, is morally certain that this allegation is false, the Act requires that the chief judge at least make a limited inquiry of the judge complained against.

The Committee explained that the only situation in which allegations should be dismissed as "incapable of being established through investigation" is when the source is unidentified or unavailable.

For example, a complaint alleges that an unnamed attorney told the complainant that the judge did X. The judge complained against denies it. The chief judge requests that the complainant (who does not purport to have observed the judge do X) identify the unnamed witness, or that the unnamed witness come forward so that the chief judge can evaluate the unnamed witness's account. The complainant responds that he has spoken with the unnamed witness, that the unnamed witness is an attorney who practices in federal court, and that the unnamed witness is unwilling to be identified or to come forward. The allegation is then properly dismissed as incapable of being established through investigation. If the only witness to alleged misconduct refuses to submit to examination and cross-examination, and there is no other significant evidence, the matter cannot proceed.

Lacking factual foundation

If an allegation is neither merits-related nor frivolous, the chief judge is required to make a limited inquiry. Dismissal following a limited inquiry typically occurs when the transcripts and witnesses cited by the complaint and examined by the chief judge all support the judge. As part of the limited inquiry, however, the chief judge cannot make "any findings of fact about any matter that is reasonably in dispute." "If it is literally the complainant's word against the judge's—there is simply no other significant evidence," the chief judge must appoint a special committee to investigate.

This is because who is telling the truth is a matter reasonably in dispute (even if the chief judge is morally certain that the judge complained against is no liar). A straight-up credibility determination, in the absence of other significant evidence, is ordinarily for the circuit council, not the chief judge.

After an investigation, a special committee files findings and a recommendation with the circuit judicial council, may dismiss the complaint, certify the disability of a judge, order that temporarily no further cases be assigned to a judge, privately or publicly censure or reprimand the judge, or order other appropriate action. The complainant and the subject of a complaint can petition the United States Judicial Conference for review of action taken by a judicial council.

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The 21st National College on Judicial Conduct and Ethics

Chicago, Illinois • October 29–31, 2008

The Center for Judicial Ethics will hold its 21st National College on Judicial Ethics on October 29–31, 2008 at the Embassy Suites Downtown Lakefront, 511 N. Columbus, Chicago, Illinois.

The National College provides a forum for judicial conduct commission members and staff, judges, and judicial educators to learn about and discuss professional standards for judges and current issues in judicial discipline. The College will begin Wednesday afternoon with registration. Thursday through Friday morning, there will be 6 sessions with concurrent workshops. Topics under consideration include: revisions to the ABA Model Code of Judicial Conduct; ethical standards for commission members; ethical issues for judges and their families; judicial campaign conduct; disqualification; sanctions; issues for new members of conduct commissions; and issues for public members.

More information will be provided in subsequent issues of the *Judicial Conduct Reporter* and at www.ajs.org/ethics.