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Nine Judges Removed in 2002

Between 1980 and the end of 2001, approximately 285 judges had been removed from office as a result of state judicial discipline proceedings. In 2002, nine more judges (or in three cases, former judges) were removed, and one judge was suspended without pay until the end of his term. Furthermore, during the year, 11 judges resigned or retired in lieu of discipline pursuant to agreements with judicial conduct commissions that were made public. (In addition, one removal decision by the California Commission on Judicial Performance and five removal determinations by the New York State Commission on Judicial Conduct were pending on appeal at the end of the year.)

Removal cases

The **Georgia Supreme Court** removed a magistrate who had (1) demonstrated incompetence in areas of the law crucial to the discharge of his fundamental duties and failed to comprehend and safeguard basic constitutional rights, (2) demonstrated an immoderate

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Other Judicial Discipline in 2002

In addition to the judges who were removed, suspended until the end of their terms, or agreed to resign or retire, approximately 101 judges (or former judges in 11 cases) were publicly sanctioned in state judicial discipline proceedings across the country in 2002. In 51 of those cases, the discipline was imposed pursuant to the consent of the judge or former judge or based on stipulated facts.

There were 16 suspensions without pay (five of the suspensions also included censure; four also included a reprimand; one included a reprimand and a $40,000 fine), with the length of the suspensions ranging from two days to six months. Twenty-four public censures (not counting those judges who were also suspended) were issued; one censure also included an order of additional education and two also barred former judges from serving in judicial office again. Thirty-two judges were publicly admonished; 22 were publicly reprimanded (not counting those judges who were also suspended); and two were publicly warned. In addition, in decisions that were made public, a complaint against one judge was informally adjusted, a second judge was privately reprimanded, and a third judge was privately admonished. One judge was ordered to remain under appropriate medical supervision, and one former judge was ordered to never again seek or hold judicial office and to pay attorney's fees plus costs related to the judicial discipline proceedings.

In attorney discipline proceedings, misconduct as a judge resulted in one former judge being suspended from the practice of law and two former judges being censured.

What They Said That Got Them in Trouble *by Cynthia Gray*

As in previous years, in 2002, judges were disciplined for inappropriate judicial demeanor and failing to treat those appearing before them with the patience, dignity, and courtesy required by the code of judicial conduct. The improper statements were often made during gratuitous lectures and included making flippant comments to litigants, using profanity, name-calling, inappropriate references to age and gender, disrespectful comments about other judges and about attorneys, and praising a jury verdict.

For example, one judge told a woman who was seeking a restraining order against a man not to worry because if he "kills you, we'll get him." During a discussion of community service, that judge also told an older African-American man that he would not "be outdoors doing physical labor like picking cotton."

The same judge also used profanity when lecturing a young man charged with stalking. The judge stated, "My dad used to say to me when I'd do something stupid, he'd say, 'You got shit for brains. . . .' Did you ever hear that expression?" The judge conceded that this language was foul and inappropriate but claimed that he was simply trying to make his point. The judge was removed for these examples of inappropriate demeanor plus other misconduct. *Inquiry Concerning Hammill*, 566 S.E.2d 310 (Georgia 2002). *See* story at page 1.

Profanity also led to a finding of misconduct against a Pennsylvania judge. During an arraignment in night court, the judge had stated:

> This is fucking bullshit. This paperwork is all screwed.
>
> This whole thing is fucking ridiculous. I haven't even gotten a chance to eat my fucking dinner yet. This is absolute bullshit.
>
> This is bullshit, the only reason you are bringing him here is to make money.

The Pennsylvania Court of Judicial Discipline found that the judge's lan-

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Discipline for Driving While Intoxicated *by Cynthia Gray*

Several judges or former judges were disciplined in 2002 following convictions for driving while intoxicated. For example, in an agreed disposition, the Kentucky Judicial Conduct Commission publicly reprimanded a justice of the supreme court who had pled guilty to operating a motor vehicle under the influence of alcohol. *In re Johnstone*, Order (April 18, 2002). *See also In the Matter of Frese*, 789 A.2d 654 (New Jersey 2002) (public reprimand adopting presentment of the Advisory Committee on Judicial Conduct that found that judge drove while intoxicated, failed to report to appropriate judicial authority that he had been charged with DWI, and presided over DWI cases); *In re Lake*, Agreed Order (Washington State Commission on Judicial Conduct June 7, 2002) (www.cjc.state.wa.us) (pursuant to an agreement, public admonishment for former part-time judge for conviction of DUI for an incident that took place while she was a judge, among other misconduct).

Several cases in 2002 imposed a more severe sanction than reprimand or admonishment when the driving while intoxicated charge was aggravated by additional factors, for example, a prior conviction for the same offense. In an agreed disposition, the Kentucky Commission suspended a judge's pay for 60 days, in addition to a public reprimand, following his second conviction for driving under the influence. *In re Stewart*, Order (May 22, 2002). The Commission did not suspend the judge from his duties because he had been absent from the bench with pay for approximately two months after the most recent charge. The Commission had publicly reprimanded him for a prior DUI in 1999.

Similarly, although the New York State Commission on Judicial Conduct generally imposes a public admonition for a first-time offense (*see In the Matter of Burns*, Determination (New York State Commission on Judicial Conduct October 20, 1998) (www.scjc.state.ny.us/burns.htm)), it determined that censure was the appropriate sanction where the seriousness of a judge's guilty plea to driving while intoxicated was exacerbated by the judge's prior alcohol-related conviction in 1994, which was before he became a judge. *In the Matter of Stelling*, Determination (October 1, 2002) (www.scjc.state.ny.us/stelling.htm). In mitigation, the Commission noted that following his most recent conviction, the judge had undergone alcohol treatment, and he affirmed that he had abstained from consuming alcoholic beverages.

The Oregon Supreme Court suspended a judge for 30 days without

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Discipline for Failure to Perform Administrative Duties

One of the findings of a *Study of State Judicial Discipline Sanctions*, recently published by the Center for Judicial Ethics, was that failure to adequately perform administrative duties was frequently the basis for judicial discipline and even removal from office. According to the *Study*, of the 110 removal cases from 1990 through 2001, 14 involved exclusively administrative malfeasance, and in an additional 13, administrative lapses were part of the findings supporting removal.

Many judicial discipline cases in 2002 also involved administrative misconduct, including being late for court, failure to supervise court staff, and failure to comply with record-keeping and money-handling requirements. *See Inquiry Concerning Villegas*, Press Release (Arizona Commission on Judicial Conduct November 19, 2002) (www.supreme.state.az.us/cjc) (censure for, among other misconduct, being absent or late while litigants were waiting for scheduled proceedings); *In the Matter of Groneman*, 38 P.3d 735 (Kansas 2002) (censure for allowing administrative assistant to work at second job at times that conflicted with her duties and signing false time sheets); *In the Matter of Miller*, Determination (New York State Commission on Judicial Conduct December 30, 2002) (www.scjc.state.ny.us/miller.htm) (censure for, among other misconduct, failing to supervise clerk who, in small claims action, issued four notices to the defendant, over the judge's signature, stating that a warrant would be issued for the defendant's arrest if he did not pay the judgment); *In the Matter of Berg*, 653 N.E.2d 32 (North Dakota 2002) (censure of former judge for failing to properly supervise clerk, allowing clerk to steal over $10,000 and for court's failure to take action on demands for change of judge, to process municipal court cases, to notify the police department of dispositions of traffic citations, to report violations to the state licensing authority, and to dispose of approximately 145 cases); *In the Matter of Smith*, 559 S.E.2d 584 (South Carolina 2002) (admonition for allowing office personnel to sign name to orders and issuing orders without designating factual basis); *In the Matter of Addie*, 564 S.E.2d 668 (South Carolina 2002) (reprimand of former judge for failing to deposit money received in payment of a fine and spending some of the money on personal items); *In the Matter of Sanders*, 564 S.E.2d 670 (South Carolina 2002) (reprimand of former judge for consistently failing

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Discipline for Financial Improprieties

In several cases in 2002, judges were sanctioned for financial improprieties, such as writing worthless checks, improprieties as a trustee, accepting gifts from attorneys, and failing to file timely and accurate financial disclosure statements.

The California Commission on Judicial Performance censured one judge for his promotion of and participation in a dubious investment scheme and his avoidance of financial obligations over a lengthy period. (His conduct also included remanding defendants based on his "smell test" of their hair and/or his examination of their eyes.) Entered pursuant to a stipulation, the censure was conditioned on the judge's irrevocable retirement. *Inquiry Concerning Aaron*, Decision and Order (July 8, 2002) (cjp.ca.gov/pubdisc.htm).

The judge introduced investors to an investment scheme involving Westminster Financial Associates despite having reason to believe that the scheme was too good to be true and suspecting that it might not be legitimate. For example, while wearing his robe, the judge told an attorney who appeared before him that he knew that it was inappropriate for him to solicit money from the attorney. However, after noting that they both were Christians, the judge advised the attorney of what the judge characterized as an investment opportunity that could help the attorney meet his financial goals. The judge described the investment in general terms and stated that it was supposed to be safe and there was a promise of quick and large returns.

In addition, the judge acted as host at a series of meetings with Kenneth Roper, one of the principals of Westminster Financial, and attended by prospective investors. At the meetings, the judge told prospective investors that Roper was an investment banker whom he had known for many years through his church. The judge did not dispute affirmative representations made by Roper to induce individuals to invest even though the judge had no reasonable ground for

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Discipline for Failure to Perform Administrative Duties *(continued from page 3)*

to comply with record-keeping and money-handling requirements).

Failure to produce transcripts

In the most significant case involving administrative responsibilities in 2002, the Louisiana Supreme Court removed a judge who had repeatedly failed to produce transcripts or to produce them timely and accurately and who willfully and persistently refused to comply with orders from the court of appeal directing the production of transcripts. *In re Hunter*, 823 So. 2d 325 (Louisiana 2002). In Louisiana, the court reporter is a member of the judge's staff, directly hired by the judge, and, although the court reporter is responsible for producing the transcripts, the supreme court has held that it is incumbent on the trial judge to order that testimony be transcribed and to see that the court reporter delivers the transcript as required by law.

In June, the court had granted the Judiciary Commission's recommendation that the judge be disqualified while proceedings were pending. At the commencement of the Commission hearing after her suspension, Judge Hunter admitted that the alleged misconduct occurred and that the fault lay with her, although she argued that removal was not necessary.

The judge's poor supervision and management of employees caused a high turnover in staff, including court reporters and minute clerks. Since October 1996, when she first took the bench, the judge had had 44 full-time employees in five positions, far exceeding the number for any other judge in the court. The judge frequently replaced minute clerks and served as her own minute clerk for long periods. She assigned court reporters to other duties, preventing them from preparing transcripts in a timely fashion and from organizing the tapes. The tapes were totally disorganized, many tapes could not be located for lengthy periods, and some tapes were lost. The judge sometimes did not timely assign the preparation of transcripts to court reporters following an order from the court of appeal to produce a transcript.

> **"It appears to be a sad fact that the judge simply cannot comprehend the gravity of her offense."**

In 29 cases, the judge failed to produce transcripts timely and accurately, or even at all; 11 of those cases were reversed by the court of appeal because the transcripts were missing. The cases included murder or serious drug offenses where life sentences had been imposed. In some of the reversed cases, eyewitnesses developed poor memories at the retrial, witnesses could not be located, the defendant's testimony could not be impeached without the transcript from the first trial, or the cases could not be re-tried. Stating that the reversals "tax an already over-burdened criminal justice system," the court noted that the number of cases resulting in reversals and remands for new trials "will likely increase as cases pending in the appellate pipeline and in the court of appeal proceed to final judgment."

In 17 of the 29 cases, the judge refused to comply with orders of the court of appeal to produce transcripts until the court threatened her with contempt, and in two cases, show cause hearings were conducted. Following the second show cause hearing, the appellate panel found the judge in contempt but allowed her additional time to produce the transcript.

Acknowledging that there was no proof that the judge maliciously intended to fail, the court emphasized "that she did fail in performing her administrative duties and supervising staff, whether stemming from inexperience, negligence, or pride, as the judge asserts, or just personal or professional ineptitude." The judge contended that she had taken steps to resolve the deficiencies and the administrative problems would not recur. The court, however, concurred with the Commission's finding that the judge's efforts were "too long in coming and insufficient. The gravity of the consequences, past and likely future, and the minimal prospect of the judge adequately improving her administrative skills do not warrant subjecting the public to the risk of harm that would attend her remaining on the bench," noting that it "was not until the most recent hearing before the Commission that the judge even began to accept, much less understand, her culpability in the administrative debacle . . . ." The court concluded: "It appears to be a sad fact that the judge simply cannot comprehend the gravity of her offense to the individuals appearing before her, to the public at large, and to the justice system as a whole."

Discipline for Financial Improprieties *(continued from page 3)*

believing them to be true.

Furthermore, the judge did not disclose to all of the investors that he was not investing in the scheme; that he was splitting commissions and/or fees with others connected with the scheme; and that he would be entitled to a percentage of any profits realized by the investors. The judge accepted a payment of $20,000 from one of the principals even though he knew that the investors had not received any of the promised profits and retained the money even after the principals had all been convicted of or pled guilty to federal criminal offenses. The judge also instructed court staff to put all calls from the principals at Westminster Financial through to him either on the bench or in his chambers. The judge discouraged some investors from complaining to government authorities.

Furthermore, the judge avoided his financial obligations over a substantial period by writing worthless checks, making false promises and misleading representations, failing to disclose material information, failing to communicate with his creditors, and engaging in other delaying tactics. The judge also failed to pay personal property taxes when due on his personal airplane for five years and to pay personal property taxes on his personal boat for two years. *See also Inquiry Concerning Hammill*, 566 S.E.2d 310 (Georgia 2002) (removal for, among other misconduct, writing 45 checks that were returned for insufficient funds).

Improper financial and fiduciary dealings

Pursuant to a stipulation, the California Commission censured a former judge for a pattern of improper financial dealings and fiduciary activities, continuing to serve as a trustee of several trusts after becoming a judge, failing to disqualify from cases involving trusts for which he was trustee, and failing to disclose trustee fees, loans, and property interests on his statements of economic interest. *Inquiry Concerning Sullivan*, Decision and Order (May 17, 2002) (cjp.ca.gov/pubdisc.htm). The Commission also barred the judge from receiving an assignment or appointment. Noting this was the maximum sanction it could levy against a former judge, the Commission stated it would be remiss "if it did not root out, expose and discipline such longstanding financially motivated willful misconduct, regardless of the judge's age or health."

While continuing to serve as trustee of three trusts after taking the bench, the judge had misused trust funds for his own benefit and committed other serious improprieties as trustee. Furthermore, the judge had presided over the probating of a will and proceedings involving a testamentary trust even though he had managed the decendent's financial affairs before her death, had witnessed her will, was serving as the back-up executor and trustee, and continued to manage the estate and trust after her death.

Furthermore, after signing an order authorizing the sale of a conservatee's home, the judge agreed to purchase the property. The judge continued to preside over the case and advanced the date for the petition for affirmation of the sale, so that the notice of proposed sale was not given and the opportunity for third parties to make competing bids was reduced. He approved an accounting that included the sale of the property to him.

Gifts and financial disclosure statements

Acceptance of gifts or loans from attorneys appearing before them led to the discipline of one judge and one former judge. For example, a judge was publicly reprimanded for accepting eight tickets to Pittsburgh Steelers games from an attorney who appeared in numerous cases before him. *Office of Disciplinary Counsel v. Lisotto*, 761 N.E.2d 1037 (Ohio 2002). *See also Office of Disciplinary Counsel v. Cox*, 770 N.E.2d 1007 (Ohio 2002) (indefinite suspension for attorney who, while a court of appeals judge, received loans from attorneys who regularly appeared before him).

Failure to file required financial disclosure statements or to disclose all required information also resulted in discipline for judges in 2002. *See In re Kutrubis*, No. 99-C-3 (Illinois Courts Commission August 30, 2002) (six-month suspension, pursuant to agreement, for, among other misconduct, failing to identify one creditor and three lawsuits on financial disclosure statements); *In the Matter of Elliott*, Determination (New York State Commission on Judicial Conduct November 18, 2002) (www.scjc.state.ny.us/elliott.htm) (admonishment, pursuant to agreement, for failure to file financial disclosure statements by deadline).

For other cases of financial misconduct, *see Inquiry Concerning Villegas*, Press Release (Arizona Commission on Judicial Conduct November 19, 2002) (www.supreme.state.az.us/cjc) (censure for, among other misconduct, performing marriages for compensation during court hours); *In the Matter of George*, Determination (New York State Commission on Judicial Conduct February 4, 2002) (www.scjc.state.ny.us/george.htm) (removal for part-time, non-lawyer judge who had converted funds from client and employee of his private investigation business).

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lack of judicial decorum and temperament in three incidents (*see* story at page 2), and (3) wrote approximately 45 business-related and personal checks that were returned for insufficient funds. *Inquiry Concerning Hammill*, 566 S.E.2d 310 (Georgia 2002).

The **Louisiana Supreme Court** removed a judge who had (1) repeatedly failed to produce transcripts or produce them timely and accurately and (2) persistently refused to comply with orders from the court of appeal directing the production of transcripts. *In re Hunter*, 823 So. 2d 325 (Louisiana 2002). For more on this case, *see* story at page 3.

The **New Jersey Supreme Court** removed a former part-time judge who had (1) in 9 cases, ordered bench warrants for defendants who were merely late for court sessions; (2) prosecuted cases before the city board of alcoholic beverage control, despite a rule prohibiting part-time judges from practicing in any judicial or administrative penal matter; (3) acted as a professional boxing referee in 31 matches, including nine in Atlantic City casinos after being informed that the Supreme Court had decided that he should not referee fights professionally, and made false representations that he was not doing so; (4) recommended to persons at whose weddings he had officiated that they make a donation to specific charities and involved his court staff in the receipt and delivery of such donations; and (6) suspended $100 of a $200 fine for a defendant the day after the judge had officiated in his wedding, after which the groom donated $100 to a charity recommended by the judge. The court's order does not describe the conduct but simply adopts the presentment of the Advisory Committee on Judicial Conduct. The judge had resigned during the proceedings. *In the Matter of Smoger*, 800 A,2d 840 (New Jersey 2002).

The **New York State Commission on Judicial Conduct** determined that removal was the appropriate sanction for a non-lawyer judge who had converted to his personal use funds from a client and employee of his private investigations business. *In the Matter of George*, Determination (February 4, 2002) (www.scjc.state.ny.us/george.htm). The Commission's determination is final as the judge did not request review.

The **New York Court of Appeals** accepted the determination of the Commission that a judge be removed for informing a company's attorney of an impending search of the company's premises for environmental violations after the judge had signed the warrant. *In the Matter of Gibbons*, 778 N.E.2d 104 (New York 2002).

Affirming the decision of the Trial Division, the **Appellate Division of the Oklahoma Court on the Judiciary** removed a judge for (1) threatening a locksmith with contempt if he did not give the judge a key to the clerk's office; (2) ordering sheriff's deputies to arrest a defendant without a warrant and holding him without bond; (3) failing to follow proper procedures in terminating a defendant from the drug court program and relying on ex parte communications and inadmissible polygraph results in sentencing the defendant; and (4) issuing an order, based on ex parte communications, directing law enforcement agencies to assist a father take physical custody of his minor children without any allegation that the children were in danger or any written request for relief. *State of Oklahoma ex rel Edmondson v. Colcazier*, 2002 OK JUD 1 (June 14, 2002).

The **Trial Division of the Oklahoma Court on the Judiciary** ordered that a judge be removed for a pattern of oppression in office. *State of Oklahoma ex rel Edmondson v. Blithe*, CJTD-2002-1 (June 19, 2002). The decision is final as the judge did not appeal to the Appellate Division. (1) With nothing filed of record, the judge twice conducted "some sort of unspecified judicial proceeding" at the county hospital after which he approved decisions, which were not memorialized, not to resuscitate terminally ill patients, who had not been represented by counsel. (2) The judge attempted to dissuade two deputy sheriffs from investigating alleged voting irregularities by the sheriff. (3) The judge permitted his personal experience with Credit Bureau Services of America to influence his response to its request to enter default judgments, initiating an ex parte communication with an entity he perceived to be the real party in interest and asking the attorney for Credit Bureau Services to ask his client to remove an adverse entry from the judge's credit record. (4) The judge found a criminal defendant guilty of direct contempt and sentenced her to six months in jail even though the judge had contributed to her contempt and did not afford her the opportunity to be heard. (5) When a party to a domestic relations matter requested an accelerated hearing on his motion to reduce child support, the judge scheduled the matter for 10:00 a.m. the following day and refused to grant the opposing party a continuance to obtain an attorney even though she had been served with notice at 6:00 p.m. the day the motion was filed. (6) At the hearing in the same case, the judge

granted relief that had not been requested and of which no notice had been provided to the unrepresented opposing party. (7) In a small claims matter, when the defendant stated he would not pay the judgment, the judge became angry and ordered him to pay over instanter all the funds in his possession without affording him the opportunity to be heard. (8) The judge publicly endorsed one candidate for sheriff and publicly opposed another.

The **Pennsylvania Court of Judicial Discipline** removed a former judge from office following her plea of guilty to three felonies (of the 20 with which she had been charged). *In re Sullivan*, Opinion (April 3, 2002), Order (August 30, 2002). In 1999, the judge had been indicted on charges she had used heroin in her chambers and provided favors to drug dealers (including warning them when the police planned a raid) in exchange for heroin, cocaine, and prescription pills. She pled guilty to some of the charges pursuant to an agreement. She had been suspended following her indictment, and her term expired in January 2000.

The **Pennsylvania Supreme Court** affirmed the decision of the Court of Judicial Discipline removing a former judge who had resigned from office following his conviction in federal court of conspiracy to violate civil rights. The supreme court did vacate that portion of the order disbarring the former judge. *In re Melograne*, 812 A.2d 1164 (Pennsylvania 2002).

Suspension until end of term

The **Montana Supreme Court** suspended a judge without pay until the end of his term (December 31, 2002) for (1) knowingly accessing sexually explicit images on a county computer and monitor; (2) entering a man's residence uninvited; and (3) in a hotel room, advising a man with legal problems, "you know you're going to be arrested if you attract attention so why don't you just keep your nose clean and behave." *Harris v. Smartt*, 57 P.3d 58 (Montana 2002). Although there were questions about whether some of the evidence found on the judge's computer was unconstitutionally obtained and admissible in judicial disciplne proceedings, the court found that other evidence alone supported the Commission's finding that he had accessed sexually explicit images on his county-owned computer and exposed others to them, noting the judge's admissions in his testimony and press release. Arguing "there is a qualitative difference between suspension without pay and removal from office under the facts and circumstances of this case" that "is unlikely to go unnoticed by the people of Montana," two justices of the court would have removed the judge as recommended by the Judicial Standards Commission. One justice dissented from the findings of misconduct and the decision to suspend the judge.

In 2002, nine judges (or in three cases, former judges) were removed.

Agreed resignations

Granting a joint motion, the **Alabama Court of the Judiciary** accepted the settlement ageement between the Judicial Inquiry Commission and a judge pursuant to which the judge would immediately resign and the Commission would file a motion to dismiss its complaint against the judge with prejudice. *In the Matter of Woodard*, Order (November 26, 2002). In 1994, the Court of the Judiciary had suspended Judge Woodard without pay for six months for touching females under the age of 21 who were the subject of proceedings before him and touching adult females who worked in the court. The court noted then that it did not find by clear and convincing evidence that the judge's conduct had any sexual or predatory motive. *In the Matter of Woodard*, Final Judgment (October 14, 1994). In August 2002, the Commission filed a second complaint against the judge alleging similar conduct. The complaint charged that the judge had (1) inappropriate, unsolicited, and unwelcome physical contact with seven females, including juveniles; (2) made inappropriate comments and inquiries to four individuals, including juvenile defendants; (3) engaged in ex parte communications and relationships with five litigants; and (4) used his judicial office to improperly influence a law enforcement officer. For example, the complaint alleged that the judge had placed his arms around an 8 to 10-year-old girl in his courtroom during a hearing, pulled her close to him, held her there for approximately 15 minutes as he spoke to her, and kissed her on the check when he was finished speaking. The complaint also alleged that, alone in his office with a juvenile who had violated her probation (after asking her mother to leave), the judge had asked her how many people she had slept with. When she told him, the judge said, "you sound like a whore," and "you don't need to be acting like a whore." The complaint also alleged

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that the judge had a personal relationship with a woman while she was on probation in his court, including sleeping several times in the same bed. During the relationship, the judge entered a withholding order for payment of child support in favor of the woman and against her ex-husband.

Pursuant to a stipulation for discipline by consent, the **California Commission on Judicial Performance** censured a judge conditioned on the judge's irrevocable retirement within five days. *Inquiry Concerning Aaron*, No. 164 (July 8, 2002) (cjp. ca.gov/pubdisc.htm). The censure was for the judge's participation in a dubious investment scheme, for his avoidance of financial obligations over a lengthy period (*see* story at page 3), and for remanding defendants based on his "smell test" of their hair and/or his examination of their eyes. The Commission noted that if the judge failed to immediately retire, it could resume proceedings and his failure to comply would constitute grounds for discipline. The Commission did not bar the judge from receiving assignments as a retired judge but stated it "trusts that those considering an assignment, appointment or reference of work will review this decision and order."

The **Indiana Supreme Court** approved an agreement between a judge and the Commission on Judicial Qualifications in which the judge resigned in return for dismissal of the Commission's recommendation that he be removed and dismissal of other charges. *In the Matter of Kern*, 774 N.E.2d 878 (Indiana 2002). The Commission had recommended that the judge be removed for granting an ex parte request for temporary custody of a child without giving prior notice to the child's mother or following procedural requirements. The Commission had filed additional charges against the judge after he had ordered that the law firm that represented him before the Commission be paid out of the county general fund.

During the year, 11 judges resigned or retired in lieu of discipline pursuant to agreements with judicial conduct commissions that were made public.

In agreements with the **Massachusetts Commission on Judicial Conduct**, two judges retired to resolve complaints arising from the same incident. *Press release (Cavanaugh)* (March 15, 2002); *Press release (Harrison)* (March 15, 2002). Judge Cavanaugh had asked a member of the Commission about its confidential investigation of Judge Harrison; asked the Commission member to speak to Judge Harrison about the investigation; and received, unsolicited, from the Commission member a copy of a confidential investigative report. Judge Harrison had also received the confidential document, unsolicited, and read it rather than returning it to the Commission or notifying the Commission that he had received it. Both judges admitted the allegations, although Judge Cavanaugh denied additional allegations that he had made false statements to the Commission during its investigation.

The **Texas State Commission on Judicial Conduct** reached agreements with six judges in which the judges agreed to resign and to be forever disqualified from serving as judges in Texas and the Commission agreed not to proceed against them. All of the agreements noted that the Commission could enforce the agreement through any legal process including injunctive relief. Two of the agreements did not describe the conduct for which the judge was under investigation. *See In re Read*, Voluntary Agreement (March 5, 2002); *In re Lilley*, Voluntary Agreement (August 21, 2002).

Two agreements resolved complaints that judges had not complied with mandatory judicial education requirements. *See In re Hart*, Voluntary Agreement (December 5, 2002); *In re Fariss*, Voluntary Agreement, (December 5, 2002). A fifth agreement resolved complaints that a justice of the peace had not complied with mandatory education requirements and was unable to perform judicial duties because of a permanent disability. *In re Myers*, Voluntary Agreement (August 21, 2002). Finally, in the sixth agreement, the Commission resolved a complaint that a justice of the peace had a disability that was permanent or was likely to become permanent and that was seriously interfering with the performance of his duties. *In re Klatt*, Voluntary Agreement (December 5, 2002). In these latter four cases, the Texas Supreme Court, at the request of the Commission, had suspended the judges without pay, pending the outcome of the proceedings.

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guage was "intemperate, uncivil and crude," "totally uncalled for and indefensible, and disrespectful, not only to those to whom it was addressed and to those others who were present, but to the judicial office itself, and so extreme as to bring the judicial office into disrepute." The court ordered that the judge remain under appropriate medical supervision. *In re Zoller*, No. 3 JD 00, Opinion and Order (Pennsylvania Court of Judicial Discipline December 19, 2001; January 24, 2002).

A public reprimand was issued to a judge who, among other misconduct, referred to female attorneys from the public defender's office by names such as "little girl," "kiddo," "little sister," and "missy." The same judge told a female public defender whose brother was a police officer "how could your brother let you do this type of work? What kind of police officer is he?" That judge, in response to a question about an order previously entered by a woman judge, said that he did not know why that "stupid woman does anything the way she does and if you don't like it, appeal it." In addition to a public reprimand, the New Mexico Supreme Court ordered the judge to complete a mentor program and the next "Building a Bias-Free Environment in Your Court" course sponsored by the National Judicial College at his own expense. *In re Vincent*, Order (January 3, 2002)

The Oregon Supreme Court publicly censured a judge for requiring a defendant to appear in court without his attorney and making disparaging comments about the attorney to the defendant. *Inquiry Concerning Ochoa*, 51 P.3d 605 (Oregon 2002). The judge became angry when a defense attorney, who had the opportunity to go to Europe with his family, got a hearing continued by the presiding judge. The judge required the in-custody defendant to appear without counsel and told the defendant that the trial would go forward with or without the attorney. The judge stated that the attorney was probably using the thousands of dollars paid to him by the defendant's family to go to Europe rather than try the case. The attorney returned from Europe early to deal with the situation and eventually withdrew because he felt the attorney-client relationship was irreparably harmed by the judge's conduct. The judge ultimately recused himself from the case.

Praising a jury's verdict and excoriating defense counsel formed the basis for an admonition of a judge by the New York Commission.

Insulting comments about an attorney who was not present also earned a New York judge an admonishment. *In the Matter of Bradley*, Determination (October 1, 2002) (www.scjc.state.ny.us/bradley.htm). In reference to an attorney (Martin Johnson) who had previously represented a wife in divorce proceedings, the judge, who did not know Johnson, stated during a discussion about settlement:

> Now, granted, she has been overcharged by some clam Johnson. Who is he? I want to get a shot at him someday. Where is he? . . . I'm putting this on the record. Mr. Johnson is an absolute thief, and you can tell him I said so and you can tell him my phone number and my address. . . . And he stole from you, too, because you're going to have to pay a chunk of it. I hope the next time you see him, tell him what I think of him. And you can add your own.

The New York State Commission on Judicial Conduct noted that Johnson's fee was not directly before the judge and neither party claimed that the fee was excessive. Subsequently, the judge presided in other cases in which Johnson's firm appeared.

Praising a jury's guilty verdict and excoriating defense counsel formed the basis for the admonition of a second judge by the New York Commission. *In the Matter of Dillon*, Determination (February 6, 2002) (www.scjc.state.ny.us/dillon.htm). After a jury announced a guilty verdict in a first degree murder case, the judge remarked to the jury:

> I want you all to sleep well tonight because—while my opinion probably isn't worth any more or less than anyone else—I agree with your verdict. I think the verdict you've rendered in this case is consistent with the evidence that I saw from the witnesses and from the documents and from the stipulations.

A portion of those remarks were reported in the local press. During a subsequent proceeding, the judge chastised defense counsel and lauded the police and prosecution with remarks that in part were also reported.

(continued on page 10)

What They Said That Got Them in Trouble *(continued from page 9)*

Beginning with the opening statements at the trial, the prosecutor claimed to the jury—and I think ultimately proved to the jury—that the people that were involved in the investigatory stage of this case were—and I'm paraphrasing—honest, hard-working and dedicated and earnest individuals and also in the opening statement of the defense counsel, the defense counsel argued that the police lied; that there were violations of the constitution; that there were conspiracies amongst the police and between the police and the Assistant District Attorneys and, of course, those were opening statements. We then heard evidence in the case and in my view the evidence that was produced in this courtroom throughout the month of October supported the arguments that had been made by Mr. McCarty on behalf of the Prosecution; but did not in any way support the rather scurrilous allegations that were made by the defense in its opening statement.

When defense counsel objected, the judge said:

You may object, but I think this is worth saying. It is time that some judges speak out; that there are too many cases where persons who are facing a mountain of evidence will either try to blame the victim, that didn't happen here, or to allege misconduct on the part of the police and prosecutors and certainly allegations of misconduct is appropriate, if there is some evidence. I don't think it is appropriate in cases such as this where there is absolutely no evidence of misconduct on the part of police and prosecutors. . . . These individuals, according to the evidence that I saw, were honest, intelligent, hard-working individuals and like the Canadian Mounties, "They got their man," but they did it in the way that the law asks them to do it. To the extent that reputations have been attacked or tarnished, the Court takes this opportunity to restore the reputations of the following individuals who I'm going to identify by name and who I think an apology is owed to—although I don't expect an apology would be given.

The Commission found that the judge's excoriation of defense counsel "was clearly inappropriate and reveals a lack of understanding and respect for the role of defense counsel" and that the judge's "excessive, demeaning diatribe" was "gratuitous," "unrelated to any issue before the court," and not warranted by the record. The Commission also stated that the judge's "prefatory comment, 'It is time that some judges speak out' suggests that he was fully conscious of delivering an extraordinary, partisan speech." That the judge made these statements in a publicized case shortly before an election in which both he and the district attorney were candidates, in the Commission's opinion, raised a question as to whether the judge's "highly charged, pro-prosecutorial comments" were motivated by political concerns and "conveyed the impression that he was using a judicial proceeding for political grandstanding."

The Commission also noted that "the judge's commentary about the verdict was not in a court order or opinion, but was a gratuitous expression of his personal views." Rejecting the judge's argument that his comments were justified as an attempt to allay the apparent emotionalism of jurors after the verdict, the Commission stated "no matter how stressful the proceedings, a judge must remain neutral in the presence of a jury, and jurors should receive neither criticism for their verdict nor reassurance that they acted correctly."

Discipline for Driving While Intoxicated *(continued from page 2)*

pay for a first time driving while intoxicated charge because it was concerned about the likelihood of repetition. *Inquiry Concerning Norblad,* 39 P.3d 860 (Oregon 2002). The judge had driven nearly eight hours to his home after imbibing what he characterized as three "stiff" drinks without eating and subsequently stopping for more liquor. Several drivers called the state police to report the judge's dangerous driving. After exiting the highway, the judge ran a red light, stopped in the middle of an intersection, and made a sweeping turn, which took him into the opposing lanes of travel. A state trooper activated his emergency lights, but the judge continued driving. When he finally stopped, the trooper found an open container of alcohol in the car and observed that the judge had "red and glassy eyes" and a "dazed, stuporous and lethargic appearance." The judge smelled of alcohol, could not stand without assistance, and either could not perform or failed all the sobriety tests administered. The judge blew .20 on the Breathalyzer, more than twice the legal limit. He did not remember any of the drive and acknowledged that he was "smashed." After being charged with driving under the influence, the judge petitioned for and completed a diversion program, and the charges were dropped after he underwent three months of weekly substance abuse counseling. While in the diversion program, he attended Alcoholics Anonymous meetings and abstained from alcohol.

After completing the program, the judge resumed consuming alcohol (although reducing his intake to one or two glasses of wine a night) and

stopped attending AA. The judge had a history of misusing alcohol and admitted that he tended to "minimize" the facts when discussing his drinking. The court noted there was no evidence that the judge ever took the bench while under the influence of alcohol.

Although the judge did not dispute the Commission's conclusion that he had violated the code of judicial conduct, he maintained that no official sanction was necessary and suggested that the Chief Justice and the county's presiding judge could handle the matter informally. The court stated that the judge's "position appears to us to so downplay the seriousness of his conduct that it leaves us in substantial doubt that he comprehends the gravity of his recklessness." The court concluded that "the alternative 30-day unpaid suspension that the Commission recommended is the sanction that most likely will serve not only to discourage such behavior generally, but will impress upon the judge an appreciation for the gravity of his conduct."

Standard sanction

Although some states privately reprimand a judge for a first-time drunk-driving offense, the cases from 2002 are consistent with past decisions from many states holding that a public reprimand or admonition is the appropriate sanction for a first offense but that a harsher sanction, such as censure or suspension, is justified if there are aggravating factors such as multiple incidents or an attempt to avoid arrest by asserting the judicial office. For example, rejecting an argument that a private reprimand was appropriate where the judge had shown contrition following charges of first offense driving under the influence, the Mississippi Supreme Court held that "the position he enjoys as a sitting Judge requires that the resolution of this matter be known to the public." *Commission on Judicial Performance v. Thomas*, 722 So. 2d 629 (Mississippi 1998).

Similarly, the New Jersey Supreme Court has announced that it will impose a public reprimand as the minimum sanction for judges convicted of driving while intoxicated, but that judges will be censured or suspended for subsequent convictions, additional offenses, or attempting to use the prestige of office to get out of the charge. *Compare, e.g., In the Matter of Lawson*, 590 A.2d 1132 (New Jersey 1991) (public reprimand), *with In the Matter of Connor*, 589 A.2d 1347 (New Jersey 1991) (public censure for judge who had pled guilty to driving under the influence, leaving the scene of an accident, and driving in a careless manner); *In the Matter of Collester*, 599 A.2d 1275 (New Jersey 1992) (2-month suspension after second drunk driving offense); *In the Matter of Annich*, 617 A.2d 664 (New Jersey 1993) (public censure, pursuant to consent, for driving while intoxicated and acting in inappropriate manner subsequent to arrest). *See also, e.g., News Release (LaBarge)* (Arizona Commission on Judicial Conduct February 7, 1997) (public reprimand); *Letter to Jennings* (Arkansas Judicial Discipline & Disability Commission January 23, 2001) (www.accessarkansas.org/jddc/decisions.html) (public admonishment); *Inquiry Concerning Bradley*, Decision and Order (California Commission on Judicial Conduct June 3, 1999) (http://cjp.ca.gov./pubdisc.htm) (public censure of former judge; several convictions plus other misconduct related to alcohol abuse); *Public Admonishment of Ryan* (California Commission on Judicial Performance June 20, 2000) (http://cjp.ca.gov./pubdisc.htm) (public admonishment for DWI (with an accident) and failing to report charges and conviction to the Commission); *Inquiry Concerning Esquiroz*, 654 So. 2d 558 (Florida 1995) (public reprimand); *Judicial Council v. Becker*, 834 P.2d 290 (Idaho 1992) (three-months suspension and conditions for habitual intemperance, abuse of alcohol, and driving under the influence); *In re Racculgla*, No. 99-C-2, Order (Illinois Court Commission September 7, 2001) (public reprimand); *Inquiry Concerning Barbara*, Order (Kansas Commission on Judicial Qualifications July 2, 1996) (cease and desist order); *Public Reprimand of Garza and Order of Additional Education* (Texas State Commission on Judicial Conduct May 31, 2001); *In re Votendahl*, Order (Washington Commission on Judicial Conduct June 18, 1990) (public admonishment pursuant to stipulation).

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