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11 Judges Removed in 2005 *by Cynthia Gray*

Between 1980 and the end of 2004, approximately 325 judges had been removed from office as a result of state judicial discipline proceedings. In 2005, 11 state judges were removed.

A judge's misrepresentations were central to the decision of the Michigan Supreme Court to remove him for persistent docket problems, driving his car into a building, leaving the scene of the accident, and falsely telling the police and the Judicial Tenure Commission that he had not been drinking. *In re Noecker*, 691 N.W.2d 440 (Michigan 2005). The court concluded:

> Respondent's insistence that he was sober at the time of the accident is not credible. His misrepresentations about being sober when he caused an automobile accident that carried civil and criminal consequences are antithetical to his judicial obligation to uphold the integrity of the judiciary. The judge's repeated deception and the publicity surrounding the incident have seriously eroded the public's confidence in him and in the judiciary. . . . Respondent's continued deception before the JTC has seriously undermined the public's faith that judges are as subject to the law as those who appear before them.

One justice dissented from the removal, arguing that a 15-month suspension without pay was a sufficient sanction.

Three judges removed in New York

The New York Court of Appeals removed a judge for awarding several million dollars in fees to the friend he had appointed as counsel to the public administrator and systematically failing to apply statutory requirements for substantiation. *In the Matter of Feinberg*, 833 N.E.2d 1204 (New York 2005). The court concluded, "the record reflects not mere lapses or errors in judgment but a wholesale failure of petitioner's duty, reflecting an indifference if not cynicism toward his judicial office." For a longer discussion of this case, *see* "The

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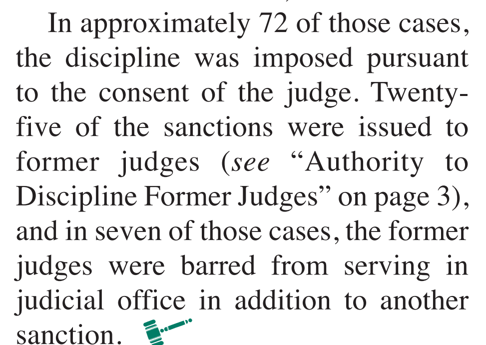
Other Discipline in 2005

In addition to 12 removals in 2005, one judge was ordered retired, three former judges were barred from serving in judicial office, judicial conduct commissions publicly announced the dismissal of charges against 12 judges following their resignations, and 116 additional judges were publicly sanctioned as a result of state judicial discipline proceedings.

There were 13 suspensions without pay with the length of the suspensions ranging from 3.5 days to four years. (Four of the suspensions were deferred in whole or in part.) Two suspensions also included public censures, and one of those also included a fine. Five also included public reprimands, and two of those also included fines. Two additional suspensions included fines. *See* "Suspensions" on page 2.

In addition, there were 35 public censures, 16 public admonishments, 43 public reprimands (four also included fines), one public warning, four cease and desist orders, and four informal adjustments or private reprimands made public. The fines were between $500 and $50,000.

In approximately 72 of those cases, the discipline was imposed pursuant to the consent of the judge. Twenty-five of the sanctions were issued to former judges (*see* "Authority to Discipline Former Judges" on page 3), and in seven of those cases, the former judges were barred from serving in judicial office in addition to another sanction.



Suspensions

As noted in the summary of dispositions, 13 judges were suspended from office without pay in 2005, with the length of the suspensions ranging from 3.5 days to four years.

The 3.5 day suspension was based on the 24 hours the judge had served as a judge on a tribal court during hours when he was also being paid by the state to serve as a full-time magistrate judge. He was also fined $840, the amount he was paid for serving as a tribal judge, and publicly reprimanded. *Inquiry Concerning Martinez*, Order (New Mexico Supreme Court August 10, 2005).

The four-year suspension was actually four consecutive one-year suspensions based on a finding that the judge had inappropriate sexual contact with four different women on four separate occasions while performing his official duties. *In the Matter of Toler* (West Virginia Supreme Court of Appeals December 2, 2005). The West Virginia Supreme Court of Appeals also censured the judge and imposed four fines of $5,000. The court does not have the authority to remove a judge but may impose admonishment, reprimand, censure, suspension without pay for up to one year, a fine of up to $5,000, or involuntary retirement.

The court noted that whether it may impose consecutive suspensions was a matter of first impression. The court held:

> Having found that Mr. Toler did, in fact, violate the Code of Judicial Conduct on at least four different occasions, in four completely separate and distinct situations, and against four separate individuals, it simply would make little or no sense to find in any other manner than to impose sanctions against Mr. Toler for each of the separate violations and to impose such sanctions consecutively. Given the nature and extent of the misconduct in this case, to rule otherwise would diminish public confidence in the judiciary, impugn the judicial disciplinary process, and would have a chilling effect on the willingness of victims of domestic violence to seek help from the judicial system.
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> * * *
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> To hold a violator of the Code of Judicial Conduct who has committed only one offense to the same exact standard and subject that offender to the same sanctions as a violator who has committed four, five, or fifty separate acts of misconduct would suggest unreasonable disparate treatment and this Court must give proper consider-

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Purpose of judicial discipline proceedings

State supreme courts have repeatedly held that punishing a judge is not the purpose of the sanction in judicial discipline cases. *See, e.g., In the Matter of Johnstone*, 2 P.3d 1226, 1233 (Alaska 2000); *In re Peck*, 867 P.2d 853, 857 (Arizona 1994); *Adams v. Commission on Judicial Performance*, 897 P.2d 544, 570 (California 1995); *In the Matter of Kouros*, 816 N.E.2d 21, 31 (Indiana 2004); *In the Matter of Gerard*, 631 N.W.2d 271, 280 (Iowa 2001); *In the Matter of Robertson*, 120 P.3d 790, 795 (Kansas 2005); *Summe v. Judicial Retirement and Removal Commission*, 947 S.W.2d 42, 48 (Kentucky 1997); *In re Huckaby*, 656 So. 2d 292, 300 (Louisiana 1995); *In the Matter of Seitz*, 495 N.W.2d 559, 575 (Michigan 1993); *In the Matter of Seaman*, 627 A.2d 106, 121 (New Jersey 1993); *In the Matter of Duckman*, 699 N.E.2d 872, 878 (New York 1998); *Disciplinary Counsel v. O'Neill*, 815 N.E.2d 286, 297 (Ohio 2004); *In the Matter of Larsen*, 616 A.2d 529, 609 (Pennsylvania 1992); *In re O'Dea*, 622 A.2d 507, 515 (Vermont 1993); *In the Matter of Turco*, 970 P.2d 731, 740 (Washington 1999); *In the Matter of Crawford*, 629 N.W.2d 1, 10 (Wisconsin 2001).

Instead, the general purposes of judicial discipline proceedings are **preserving the integrity of the judicial system, restoring public confidence in the system and, when necessary, safeguarding the bench and the public from those who are unfit**. More specific reasons include:

- **Impressing upon the judge the severity and significance of the misconduct** (*In re Hathaway*, 630 N.W.2d 850, 861 (Michigan 2001)).
- **Deterring similar conduct by the judge and others** (*In re Peck*, 867 P.2d 853, 857 (Arizona 1994); *In re Cox*, 658 A.2d 1056, 1057 (Maine 1995); *In re Hathaway*, 630 N.W.2d 850, 859 (Michigan 2001); *In re Krepela*, 628 N.E.2d 262, 271 (Nebraska 2001); *In re O'Dea*, 622 A.2d 507, 515 (Vermont 1993) *In the Matter of Turco*, 970 P.2d 731, 740 (Washington 1999)).
- **Reassuring the public that judiciary does not tolerate or condone judicial misconduct but recognizes and condemns it** (*In re Cox*, 658 A.2d 1056, 1058 (Maine 1995);

Authority to Discipline Former Judges *by Cynthia Gray*

As noted, in approximately 27 of the judicial discipline cases in 2005, including one of the removal cases, the sanctions were imposed on former judges who had either resigned, retired, or failed to be re-elected or re-appointed. In most states, the judicial conduct commission or supreme court retains authority to impose a sanction on a former judge—at least if formal charges have been filed before the judge left office. In some states, that authority includes the ability to remove a former judge; in other states, a former judge cannot be removed but can receive a reprimand or similar sanction.

Serving institutional goals

Several policy reasons are cited for continuing disciplinary proceedings even after a judge has left office. Judicial discipline proceedings have purposes other than punishment (*see* box on page 2), and those "greater institutional goals" cannot be achieved if leaving office insulates a judge from discipline for misconduct. *In the Matter of Backal*, 660 N.E.2d 1104, 1106 (New York 1995). Even if a judge is no longer presiding over cases, a sanction may still "be essential to 'the preservation of the integrity of the judicial system', especially if that integrity has been critically undermined, because the alternative, silence, may be construed by the public as an act of condonation." *Matter of Probert*, 308 N.W.2d 773, 776 (Michigan 1981).

The New Hampshire Supreme Court held that it retained the constitutional, statutory, and inherent power to authorize an investigation of misconduct even after a judge has resigned. *Petition of Thayer*, 761 A.2d 1052, 1055 (New Hampshire 2000). The court stated that the integrity of the judicial system is fostered, not just by the removal or suspension of a judge, but also by the Judicial Conduct Committee's investigation, ability to hold a public hearing, and sanctions other than removal from office, such as public censure.

> A viable and continuing JCC investigative process is an integral source of confidence upon which public perception may be based. When members of the public are informed as to judicial misconduct, they are better able to recognize, report, and otherwise protect themselves against future instances of similar misconduct.

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In re Krepela, 628 N.E.2d 262, 271 (Nebraska 2001); *In the Matter of Seaman*, 627 A.2d 106, 124 (New Jersey 1993); *In the Matter of Turco*, 970 P.2d 731, 744 (Washington 1999)).

- **Instructing the public and all judges of the importance of the function performed by judges in a free society** (*In the Matter of Turco*, 970 P.2d 731, 740 (Washington 1999)).

In its decision to remove a judge for a variety of misconduct, the Louisiana Supreme Court recently emphasized:

> The judiciary of this state is not defined by the inappropriate acts of an infinitesimal few. The strength of our judiciary lies in the vast, overwhelming number of judges who diligently discharge the duties of the office. The strength of our judicial system lies in its intolerance of those who are unfaithful to the oath administered to all judges, unfaithful to the constitution, and unfaithful to the Code of Judicial Conduct which governs judicial behavior. While removal of a judge elected to office by the citizenry is a grave responsibility, and one we would prefer never to have to exercise, that preference must yield when conduct demonstrates, clearly and convincingly, that there has been a complete failure to discharge and perform the duties incumbent on one holding judicial office.

In re Hughes, 874 So. 2d 746, 788 (Louisiana 2004).

The Alaska Supreme Court explained:

> The public may be "protected" by judicial discipline in several ways. One way to protect the public is to remove the offending judge from office. . . . [A]nother way to protect the public is to keep it informed of judicial transgressions and their consequences, so that it knows that its government actively investigates allegations of judicial misconduct and takes appropriate action when these allegations are proved. Judicial discipline thus protects the public by fostering public confidence in the integrity of a selfpolicing judicial system.
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> . . . [W]hile punishment plays an undeniable role in judicial discipline, punishment itself is not a goal of the process. The punitive aspect of judicial discipline serves multiple purposes: it discourages further misconduct on the part of the disciplined judge and the judiciary as a whole; it reinforces the general perception that judicial ethics are important; and it promotes public confidence by demonstrating that the judicial system takes misconduct seriously.

In the Matter of Johnstone, 2 P.3d 1226, 1234 (Alaska 2000).

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Appearance of Favoritism in Appointments," *Judicial Conduct Reporter* (fall 2005).

The New York State Commission on Judicial Conduct determined that removal was the appropriate sanction for a judge who had abandoned his judicial position to pursue private employment in Iraq. *In the Matter of Fiore*, Determination (New York State Commission on Judicial Conduct, August 17, 2005) (www.scjc.state.ny.us). (Decisions of the Commission are final unless the judge asks for review.) The judge had left for Iraq without giving any notice, and because he was the only judge for the town court, the town had to pay for the services of another judge as well as Judge Fiore's salary during his absence. The Commission concluded that the judge's "conduct is inexcusable, and in no way justified by his professed patriotism or support for the war effort."

The New York Commission also determined that removal was the appropriate sanction for a former non-lawyer village court justice who (1) made gratuitous comments about a defendant's race and (2) brought a young, female defendant to his home after an arraignment. *In the Matter of Pennington*, Determination (New York State Commission on Judicial Conduct, September 7, 2005) (www.scjc.state.ny.us). When an African-American defendant objected to a witness's identification of him as "colored," the judge stated:

> I don't perceive that as racial. I could understand it if he would have called you a Negro or a nigger, that would be racial. For years we had no colored people here, with the influx of Fort Drum, now we do.

The Commission found that the judge's "gratuitous comments about a defendant's race were manifestly inappropriate."

After Ms. R., a 17-year old female, pled not guilty before the same judge on a charge of harassment for allegedly throwing a cup at her mother's boyfriend, the judge released her on her own recognizance. When Ms. R. informed him that she did not have a place to go, the judge took her to his home. The judge did not ask the police to locate an appropriate place for Ms. R. to stay although a women's shelter and a county social services agency could have been contacted. Ms. R. left the judge's home after about an hour. The Commission found that the judge had "exhibited extraordinarily poor judgment," stating "although there is no evidence that he made improper advances toward the woman, respondent's conduct compromised his impartiality and conveyed an appearance of impropriety."

"[T]he record reflects not mere lapses or errors in judgment but a wholesale failure of petitioner's duty, reflecting an indifference if not cynicism toward his judicial office."

Sexual misconduct

The Pennsylvania Court of Judicial Discipline removed a judge for (1) routinely using offensive language in dealing with his staff and (2) having his employees send congratulatory notes by mail to constituents. *In re Berkhimer*, Opinion and Order (www.cjdpa.org/decisions/index.html) (Pennsylvania Court of Judicial Discipline April 12, 2005; June 28, 2005). For example, on approximately five occasions, the judge summoned his female staff to his office and showed them pictures of naked adult females. The employees reacted with disgust, refusing to look at the pictures. The court decided to remove the judge because of the nature of his conduct, his lack of contrition or remorse, his failure to cooperate with the Judicial Conduct Board, and his previous public reprimand. One member of the court dissented from the removal, arguing that a six-month suspension without pay was a sufficient sanction.

The Kansas Supreme Court removed a judge for looking at pornographic websites on his office computer in violation of an administrative order. *In the Matter of Robertson*, 618 S.E.2d 897 (Kansas 2005). The administrative order provided: "Access/display of a transmission/ downloading of sexually explicit images, messages or materials of any kind is specifically prohibited." The county director of computer technology had discovered through a security application that the judge was visiting adult websites on county-owned equipment utilized by the judicial branch in the judge's office at the county courthouse.

The judge argued that courts should be cautious in removing judges and disrupting the public's choice of who should serve in the judiciary. The court agreed but stated that "the public has also expressed its choice to have a system of discipline which can result in a judge's removal from office," noting the state constitutional provision giving the court authority to remove judges for cause. In response to the judge's argument that removal would be disproportionate to the sanctions

imposed in other cases, the court noted that comparison of sanctions "is of little guidance. Each case is evaluated individually in light of its particular facts and circumstances and in light of protecting the public."

The judge explained that he had viewed the pornographic websites as an escape from the stress induced by his service as a church elder, testifying that he spent 15-40 hours a week on church activities, including negotiating a lease for a boys' facility, dealing with budget matters, teaching classes, and visiting people in the hospital. The judge presented evidence that he had sought treatment and argued that his conduct had not affected his performance as a judge.

The court concluded, however, that the judge's "conduct showed disrespect for a basic principle which underlies the judicial system: respect for judicial orders." The court stated that the most serious aggravating factor was a severe erosion of public confidence. The chief judge had testified that he would have difficulty assigning the judge a docket "because of the publicity surrounding his misconduct," and judicial colleagues had testified that his misconduct had caused "irreparable harm" and embarrassment to the judiciary.

The Mississippi Supreme Court removed a judge for sexual advances toward two female litigants. *Commission on Judicial Performance v. Lewis*, 913 So. 2d 266 (Mississippi 2005). The court found the allegations meritorious and credible, stating that it was more than coincidence that two different women, who were strangers, made sexual misconduct allegations against the same judge on different occasions, during different times of the year, and even in different years.

Three justices dissented from the removal, arguing that a public reprimand and 30-day suspension without pay was a sufficient sanction.

Combined misconduct

The Mississippi court removed a second judge for interfering with the prosecution of a domestic violence case against his son and threatening the victim when she complained to the Commission on Judicial Performance. *Commission on Judicial Performance v. Brown* (Mississippi Supreme Court June 30, 2005). After Michael Brown was arrested on charges of assault and domestic violence against his wife, Allison, the judge had told the adult detention officer to release Michael, asked the sheriff's deputy to drop the charges, and asked the assistant prosecutor to have the charges dismissed. When Michael was charged with domestic violence a second time, Judge Brown instructed the court clerk to hold the file on her desk rather than place it on another judge's desk, the normal procedure. After Allison Brown filed a complaint against Judge Brown with the Commission, the judge contacted Alison and insisted she drop the complaint. Allison refused, telling Judge Brown that she believed he "abused his power as a judge to help his son." When asked how the judge responded, Allison testified, "He told me that if I came after his job that he was coming after mine."

The court concluded

> Allison Brown, the alleged victim of a violent crime, sought help from the appropriate authorities. Rather than receiving the protection of the legal system, her rights were trampled by an unprincipled judge who sought only to protect his son at the expense of his oath of office and his obligation to the administration of justice.

One justice dissented from the removal, arguing that a public reprimand and fine was a sufficient sanction.

The North Carolina Supreme Court removed a judge for mental and physical incapacities caused by stress and diabetes that were likely to become permanent. *In re Harrison*, 611 S.E.2d 834 (North Carolina 2005). Without sufficient evidence to support her claim, the judge had alleged to the state bar, the United States Department of Justice, and newspapers that certain judges and attorneys had conspired and attempted to have her assassinated and to have over 200 false complaints about her filed with the Commission on Judicial Standards.

The Florida Supreme Court removed a judge for practicing law and advising a client to flee the country rather than face prosecution. *Inquiry Concerning Henson*, 913 So. 2d 579 (Florida 2005). The court concluded that removal was necessitated by the combined misconduct, stating it was proper to consider the violations in tandem, particularly because they involved the same client.

> Ultimately, Judge Henson's misconduct deprives him of the probity and moral authority necessary to perform the duties of a circuit judge. An attorney who has

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practiced law while still a judge and then counseled a client facing trial to avoid prosecution by fleeing the jurisdiction does not deserve, and likely will not receive, the public's trust. Having compromised his own integrity, Judge Henson would place the integrity of our judicial system at stake were he allowed to continue in office. This we cannot allow.

The Louisiana Supreme Court removed a non-lawyer justice of the peace for failing to attend training required by statute. *In re Cook*, 906 So. 2d 420 (Louisiana 2005). For a longer discussion of this case, *see* "Judicial Education Requirements," *Judicial Conduct Reporter* (summer 2005).

Pending decisions

Two additional commission decisions removing judges are pending on review.

A judge has asked the California Supreme Court to review the decision of the Commission on Judicial Performance to remove him for (1) making improper comments about pending cases during appearances on a television program; (2) acting as a private arbitrator during the filming of a pilot that was used to market a proposed TV series; and (3) abridging the defendants' constitutional rights and abusing his judicial authority in four unrelated criminal cases. *Inquiry Concerning Ross*, Decision and Order (California Commission on Judicial Performance November 16, 2005) (cjp.ca.gov/pubdisc.htm). In addition to the underlying misconduct, however, the Commission stated that the "judge's persistent and profound lack of veracity and refusal or inability to be accountable" compelled the conclusion that "he is fundamentally unsuited to be a judge."

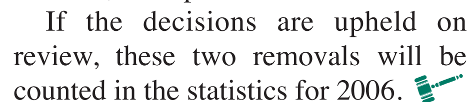
Decisions of the Commission are final unless the judge asks the state supreme court for review, and the constitution provides that "upon petition by the judge or former judge, the Supreme Court may, in its discretion, grant review of a determination by the commission to retire, remove, censure, admonish, or disqualify . . . a judge or former judge." The judge filed the petition for review on February 14, 2006, even though the judge had already resigned from office. "If the Supreme Court has not acted within 120 days after granting the petition, the decision of the commission shall be final."

The New York Court of Appeals has suspended a judge with pay pending disposition of her request for review of a determination by the State Commission on Judicial Conduct that she be removed for directing a court officer to escort a defendant out of her courtroom through a non-public, back stairway in order to elude a police detective who was waiting to effect a lawful arrest. *In the Matter of Blackburne*, Determination (New York State Commission on Judicial Conduct November 18, 2005) (www.scjc.state.ny.us). The facts were largely uncontested, and only the judge's motivation was in dispute.

The Commission had concluded that the judge's "conduct was not simply an egregious error in judgment, but an act that transcended the boundaries of acceptable judicial behavior." Two members of the Commission had dissented, arguing that removal of a judge for a single event of misconduct was unprecedented and that the appropriate sanction was censure.

The state constitution provides: "In reviewing a determination of the commission on judicial conduct, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. The court of appeals may impose a less or more severe sanction prescribed by this section than the one determined by the commission, or impose no sanction."

If the decisions are upheld on review, these two removals will be counted in the statistics for 2006.



Repeat offenders

Four of the cases in which judges were removed in 2005 (*Pennington*, *Berkhimer*, *Robertson*, and *Lewis*) were not the first proceedings in which the judges involved had been sanctioned, and that history was cited as one the factors supporting removal. In *Pennington*, for example, noting the judge's previous public censure and two letters of dismissal and caution, the New York Commission concluded that the "improprieties throughout respondent's disciplinary history include a variety of activities, indicating an apparent inability or unwillingness to recognize and avoid misconduct and demonstrating that he is unfit to serve as a judge." Similarly, in *Lewis*, the Mississippi court stated it was "disturbed" by the judge's prior record of a private admonishment and two public reprimands. The court concluded that "his prior disciplinary proceedings have apparently been to no avail," as the judge "continues to display a flagrant disregard for the Canons, the authority of this Court, and the law he is charged with adhering to."

ation and weight to the severity of each of the independent acts of judicial misconduct when deciding appropriate sanctions.

These four victims went to the magistrate court to seek the court's help during times of stress and vulnerability. Imagine going to a magistrate's office to fill out a domestic violence petition after being beaten so badly that you required medical attention and then having the magistrate grab you and engage in revolting and inappropriate sexual contact. Such conduct cannot and will not be tolerated by this Court. On each of the four different occasions Mr. Toler engaged in improper touching of the women as well as grossly inappropriate talk about sex or sexual conduct. Moreover, on each occasion, Mr. Toler subjected each individual to grossly inappropriate sexual misconduct while he was performing his official duties as magistrate. Four separate complaints could have been presented to the Judicial Hearing Board and the Board could have recommended and this Court could have imposed sanctions in each of the four complaints.

See also Inquiry Concerning Diaz, 908 So. 2d 334 (Florida 2005) (public reprimand, 14-day suspension, and $15,000 fine for sending anonymous e-mail message to another judge that could have been construed as threat); *In the Matter of Danikolas*, 838 N.E.2d 422 (Indiana 2005) (60-day suspension for discharging magistrate in retaliation for testimony during previous disciplinary matter and providing fallacious excuses for discharge under oath); *Press Release (Murray)* (Massachusetts Judicial Conduct Commission November 28, 2005) (1-year suspension without pay and $50,000 fine for inappropriate conduct toward two female court employees); *In re Conrad*, 696 N.W.2d 702 (Michigan 2005) (censure and 180-day suspension for two driving while intoxicated offenses); *Inquiry Concerning Gallegos*, Order (New Mexico Supreme Court March 14, 2005) (30-day suspension for ordering defendants to attend driving safety course for which court administrator was the instructor and allowing court administrator to use court property and facilities and to teach course for profit while she was employed by court); *Inquiry Concerning McBee*, Order (New Mexico Supreme Court November 28, 2005) (public reprimand, 37-day suspension (30 days deferred), and $1,000 fine for failing to disqualify from case when he had a personal relationship with defendant's attorney); *In the Matter of Stocker*, 608 S.E.2d 865 (South Carolina 2005) (30-day suspension for ex parte conversations with victim's mother and trying to influence case; holding defendant in contempt for failing to get job or pay judgment; ex parte communications with defendant and trooper about ticket); *In the Matter of Beckham*, 620 S.E.2d 69 (South Carolina 2005) (public reprimand and 60-day suspension for allowing defendants to plead guilty or be convicted solely on the basis of incident reports; meeting with public official to recommend law enforcement officer for promotion; failing to schedule bond hearings twice a day; conveying message to highway trooper about ticket received by friend of judge's brother-in-law; omitting reference to message from response to Disciplinary Counsel).

Several of the suspensions were deferred in whole or in part with conditions imposed on the judge.

Conditions

Several of the suspensions were deferred in whole or in part with conditions imposed on the judge. For example, the Louisiana Supreme Court suspended a justice of the peace for one year for failing to attend training courses required by statute but deferred the suspension on the condition that he strictly comply with the statutory requirements. Any failure by the judge to comply will be grounds for making the deferred suspension executory or imposing additional discipline. *In re Chaffin*, 906 So. 2d 428 (Louisiana 2005).

The New Mexico Supreme Court publicly reprimanded a judge and suspended her without pay for eight weeks for repeated interactions with court personnel that improperly interfered with a matter involving her son. Six weeks of the suspension were deferred on condition that the judge successfully complete one year of supervised probation; failure to satisfactorily complete the probation will result in the imposition of the full suspension. *Inquiry Concerning Chaparro*, Formal Reprimand and Suspension (New Mexico Supreme Court June 22, 2005).

The New Mexico court publicly reprimanded a second judge and suspended him for one week without pay for improperly using his judicial position to advance private interests, initiating ex parte communications with a special commissioner and a district court judge, and involving himself in a case involving his nephew. The suspension was deferred on the condition that no other formal disciplinary proceedings be initiated against him for six months. *In the Matter of Gentry*, Formal Reprimand (New Mexico Supreme Court August 15, 2005).

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761 A.2d at 1055.

The Vermont Supreme Court noted that "even after leaving office, an ex-judge retains the status of the judicial office on his resume. The public is entitled to know if the record is tarnished." *In re Steady*, 641 A.2d 117, 118 (Vermont 1994). Moreover, "judicial conduct is a matter of great public interest," and even cases involving former judges "serve as a guide for the entire judiciary" (*Commission on Judicial Performance v. Dodds*, 680 So. 2d 180, 182 (Mississippi 1996)) and establish needed precedent. *Goldman v. Commission on Judicial Discipline*, 830 P.2d 107, 110 (Nevada 1992). *Accord In re Weeks*, 658 P.2d 174, 177 (Arizona 1983).

Several courts note that if a commission has jurisdiction over misconduct when it begins an investigation, jurisdiction would not be lost by subsequent events such as resignation or retirement. *In the Matter of Johnstone*, 2 P.3d 1226, 1234 (Alaska 2000); *In re Cox*, 658 A.2d 1056, 1058 (Maine 1995); *In re Peoples*, 250 S.E.2d 890, 911 (North Carolina 1978).

Moreover, many decisions express an unwillingness to allow a judge to escape the consequences of his or her misconduct "by racing to resign." *In the Matter of Backal*, 660 N.E.2d 1104, 1107 (New York 1995). These decisions consider it "a travesty if a judge could avoid the full consequences of his misconduct by resigning from office after removal proceedings had been brought against him." *In re Peoples*, 250 S.E.2d 890, 914 (North Carolina 1978). A "judge charged with misconduct should not have the power, simply by leaving office, to short-circuit investigation of the allegations against him, leaving the proceedings incomplete and subject to the abrasion of time." *Matter of Probert*, 308 N.W.2d 773, 777 (Michigan 1981). *Accord Commission on Judicial Performance v. Dodds*, 680 So. 2d 180, 182 (Mississippi 1996).

Other repercussions

Furthermore, removal following discipline proceedings often has ramifications such as disqualification from future judicial service or suspension from the bar, and those additional repercussions justify continuing the proceedings even if a judge is no longer in office (*see* box below). The New York Court of Appeals, for example, noted that removal is "an indispensable means" of preventing judges who resign from seeking future office "to the public's detriment" and circumventing the constitutional mandate that judges who have been removed are ineligible to serve in office again. *In the Matter of Backal*, 660 N.E.2d 1104, 1107 (New York 1995). Similarly, the

Effects of removal

In some states, there are collateral consequences to removal from office that affect a former judge's ability to serve as a judge in the future or to practice law. For example, in at least 17 states, a removed judge is ineligible to serve in a judicial office again and may not seek or hold judicial office. *See* Arizona Const., art. 6.1, § 4(B); Arkansas Statutes, § 16-10-410(d); California Const., art. 6, § 18(e); Indiana Const., art. 7, § 11; Minnesota Statutes, § 490.16(4); Mississippi Statutes, § 9-19-17; Montana Statutes, § 3-1-1111(2); Nebraska Const., art. V, § 30(2); Nevada Revised Statutes, § 1.4653.1; New Jersey Statute, § 2B:2A-9; New York Const., art. 6, § 22; North Carolina Statutes, § 7A-376; North Dakota Statutes, § 27-23-03(4); Pennsylvania Const., art. 5, § 18(d)(3); South Carolina Appellate Court Rules, Rule 7b(1); South Dakota Statute, §16-1A-13; Wyoming Const., art. 5, § 6(h). In South Carolina, on petition, the supreme court "may dissolve this permanent injunction."

In Texas, when deciding to remove a judge, the review tribunal appointed by the Texas Supreme Court has the option of prohibiting the former judge "from holding judicial office in the future or from sitting on a court of this State by assignment." Texas Const., art. 5, § 1-a(2)(C) ("Under the law relating to the removal of an active Justice or Judge, the Commission and the review tribunal may prohibit a retired or former Judge from holding judicial office in the future"). The Michigan Supreme Court has held that it does not have the power to impose a permanent injunction against "*holding*" judicial office but that it may have the power to permanently enjoin a judge from "*serving in"* any judicial office in the future, and retains "the power to determine that a person is unfit for judicial office and to prevent him from ever exercising judicial power in this state for as long as he is, in our judgment, judicially unfit." *In the Matter of Jenkins*, 465 N.W.2d 317, 324 (Michigan 1991).

In California, in addition to being ineligible to serve as a full-time permanent judge, a judge removed from office is precluded from "receiving

North Carolina Supreme Court noted that the statutory scheme envisioned "not one but three remedies against a judge who engages in serious misconduct justifying his removal: loss of present office, disqualification from future judicial office, and loss of retirement benefits," and that only the first is rendered moot by a judge's resignation. *In re Peoples*, 250 S.E.2d 890, 914 (North Carolina 1978). Thus, in many jurisdictions, former judges have been removed from office. *See, e.g., Inquiry Concerning Hapner*, 718 So. 2d 785 (Florida 1998) (removal of former judge who had resigned after recommendation filed); *In re Anderson*, 451 So. 2d 232 (Mississippi 1984); *Goldman v. Commission on Judicial Discipline*, 830 P.2d 107 (Nevada 1992) (removal of former judge who had died after appeal of commission decision was filed); *In the Matter of Pennington*, Determination (New York State Commission on Judicial Conduct September 7, 2005) (www.scjc.state.ny.us) (removal of former judge who had resigned); *In re Larsen*, 717 A.2d 39 (Pennsylvania Court of Judicial Discipline 1998) (removal of former judge who had been disqualified from office by criminal conviction and impeachment); *In re Bartie*, 136 S.W.3d 81 (Review Tribunal Appointed by the Texas Supreme Court 2004) (removal following resignation); *In re Lallo*, 768 A.2d 921 (Rhode Island 2001) (removal of retired judge); *West Virginia Judicial Hearing Board v. Romanello*, 336 S.E.2d 540 (West Virginia 1985) (removal of former judge whose term had expired after charges were filed); *In the Matter of Sterlinske*, 365 N.W.2d 876 (Wisconsin 1985) (removal of former judge who had retired after recommendation was filed).

Moreover, even in those states where a judge's resignation takes removal "off the table," other sanctions such as public censure are still available, and a resignation or retirement does not moot the proceedings. *Petition of Thayer*, 761 A.2d 1052, 1056 (New Hampshire 2000). *Accord In re Cox*, 658 A.2d 1056 (Maine 1995) (disbarment of retired judge).

For example, in 2005, the South Carolina Supreme Court publicly reprimanded a former judge for mismanaging court funds even after the judge resigned, noting that a public reprimand was the most severe sanction it could impose when a judge no longer holds judicial office. The court also ordered that the former judge could not seek or accept any judicial office in the state, whether by appointment or election, without permission of the court. *In the Matter of Conway*, 613 S.E.2d 372 (South Carolina 2005).

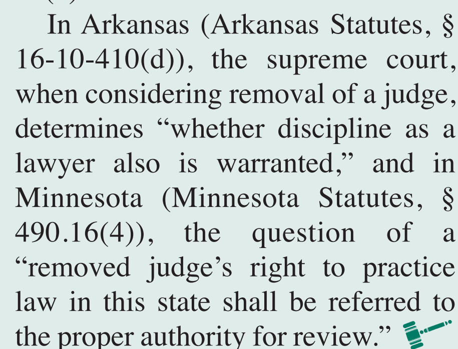
In another 2005 case, on the day a hearing was scheduled to begin on charges brought by the California Commission on Judicial Performance, the parties proposed a settlement that included the judge's irrevocable agreement to retire. *Inquiry Concerning*

an assignment, appointment, or reference of work from any California state court." In Wisconsin (Wisconsin Const., art. VII, § 11), a judge removed for cause is ineligible for reappointment or temporary service and cannot be reappointed, although there does not appear to be a bar to running for judicial office.

In Alaska (Alaska Statutes, § 22.30.070(d)), a judge removed by the supreme court is ineligible for judicial office for three years. In Louisiana (Louisiana Supreme Court Rule XXIII, § 26) and Washington (Washington Const., art. 4, § 31(5)), a judge removed from office cannot run for office again unless certified by the supreme court and the former judge cannot petition for certification for five years. (The first step is a petition filed with the commission.) The Louisiana Supreme Court adopted the rule when a judge it had removed from office in November 1996, argued that he could serve the second term to which he had been elected in September 1996, after the Judiciary Commission had recommended removal. Rejecting the judge's argument, the court noted that its earlier order had concluded that the judge's conduct warranted "the most severe discipline," and had declared that his office "be, and is hereby, declared vacant," without limitation. The court held that the effect of its earlier holding was that the judge was removed from office both for the term he was serving and any subsequent term to which he was elected. *In re Johnson*, 689 So. 2d 1313 (Louisiana 1997). The court had removed the judge for owning and operating a company that provided pay telephone service for inmates in the local jail. *In re Johnson*, 683 So. 2d 1196 (1996).

In California, Indiana, Mississippi, Montana, and North Dakota, a removed judge is also by rule suspended from practicing law in the state pending further order of the supreme court. California Const., art. 6, § 18(e); Indiana Const., art. 7, § 11; Mississippi Statutes, § 9-19-17; Montana Statutes, § 3-1-1111(2); North Dakota Statutes, § 27-23-03(4).

In Arkansas (Arkansas Statutes, § 16-10-410(d)), the supreme court, when considering removal of a judge, determines "whether discipline as a lawyer also is warranted," and in Minnesota (Minnesota Statutes, § 490.16(4)), the question of a "removed judge's right to practice law in this state shall be referred to the proper authority for review."



Danser, Decision and Order (California Commission on Judicial Performance June 2, 2005) (cjp.ca.gov/pubdisc.htm). The parties also agreed that the charges would be determined based on the transcript and exhibits from the judge's criminal trial. The judge's retirement deprived the Commission of the jurisdiction to remove him (*see* box on page 11), but the Commission did subsequently publicly censure him and bar him from receiving an assignment, appointment, or reference of work from any state court for (1) ticket-fixing in 24 cases and improperly communicating with a court commissioner before whom one case was pending; (2) transferring four DUI cases to his department and affording preferential procedural and substantive treatment to the defendants; (3) improper demeanor and abuse of power in attempting to prevent the district attorney from obtaining a transcript in one of the DUI cases; and (4) attempting to dismiss citations issued to his child. The Commission concluded:

> This opinion is issued as an unqualified denunciation of *all* of Judge Danser's misconduct in an effort to enforce rigorous standards of conduct. We thereby also seek to repair the damage Judge Danser has caused the reputation of the judiciary by his wholesale transgressions of those standards. We endeavor to rehabilitate and maintain ongoing public confidence in the integrity and independence of the judicial system by censuring Judge Danser in the strongest terms possible.
>
> Judge Danser is seriously lacking in the requisite minimum qualities to be a judge. Our settlement agreement with him accomplished his early retirement. The final remedy available to us, a bar, is designed to protect the public going forward by ensuring Judge Danser does not wear a judicial robe again in this state.

Agreed resignations

As noted in the summary of 2005 dispositions, despite having continuing jurisdiction, judicial conduct commissions sometimes agree to dismiss proceedings against a judge after the judge agrees to resign and, usually, also commits not to serve in judicial office in the future.

"In a few states, however, a judge's resignation, retirement, or election defeat eliminates the jurisdiction of the judicial discipline authority or moots the question of sanction."

For example, pursuant to a stipulation and the judge's resignation and agreement not to seek or accept judicial office in the future, the New York State Commission on Judicial Conduct discontinued a proceeding against a non-lawyer judge and closed the case. *In the Matter of Kennedy*, Decision and Order (New York State Commission on Judicial Conduct March 10, 2005) (www.scjc.state.ny.us). The Commission had served the judge with a formal complaint alleging, *inter alia*, that he had released two defendants charged with felonies on recognizance without notice to the district attorney as required by law; that he had refused to conduct arraignments in four cases, when contacted by the police, instructing them to release the defendants; that he had pressured a state trooper to accord special consideration to a speeding defendant who had done business with the employer of the judge's wife; and that he had authorized his court staff to collect and disburse monetary judgments on behalf of certain civil litigants.

Pursuant to a judge's resignation, the Texas State Commission on Judicial Conduct agreed to pursue no further disciplinary proceedings based on complaints that the judge had sexually assaulted a female in his justice court office. *Voluntary Agreement to Resign from Judicial Office in Lieu of Disciplinary Action (Wood)* (Texas State Commission on Judicial Conduct March 16, 2005). The agreement noted that the parties "are desirous of resolving these matters without the time and expense of further disciplinary proceedings." The judge also agreed to be disqualified from sitting or serving as a judge, standing for election or appointment to judicial office, or performing or exercising any judicial duties in the state. The Commission can enforce the agreement through any legal process necessary. The judge did not admit guilt, fault, or liability regarding the matters in the complaints.

Minority rule

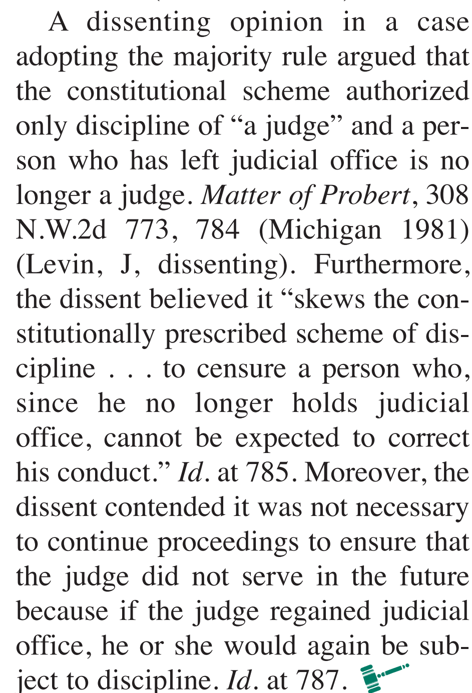
The conclusion that a commission or court has the authority to proceed after a judge leaves office does not necessarily mean that it will proceed. In *Matter of Probert*, 308 N.W.2d 773, 777 (Michigan 1981), the court noted that as a matter of policy, the Judicial Tenure Commission "has declined to act further after termination of a respondent's judicial office by resignation, by failure to be re-elected, or by

death." This policy, the court, stated "no doubt developed in light of the commission's estimation of the most effectual allocation of its resources. Once an unfit or incompetent judge is separated from judicial power, the greatest danger has passed." However, the court stated, it "should not and will not transform that policy into a fast, inflexible rule of law that would preclude contrary action when the commission, in its considered judgment and discretion, deems it appropriate." The court listed "considerations affecting the decision to continue proceedings against a judge after he has left office," including, "the likelihood of re-election to judicial office, the gravity of the misconduct, and the importance of official reprobation to public confidence and trust in the integrity of the Michigan judicial system." *Id*. at 777 n.10.

In *Quinn v. State Commission on Judicial Conduct*, 430 N.E.2d 879 (New York 1981), the New York Court of Appeals noted that its usual policy that "one charged with misconduct may not generally avoid the consequences of removal for cause by racing to resign" would not be undermined by censuring rather than removing a former judge, giving effect to his resignation, where the judge was suffering from alcoholism and had recognized his inability to perform his judicial duties because of ill health. Similarly, when a judge announced that, due to serious illness, he was resigning from his judicial position while a recommendation was under advisement, the Commission on Judicial Fitness and Disability agreed that the case should be dismissed based on the judge's representation that that he would never again serve in any judicial capacity, and the Oregon Supreme Court dismissed the recommendation as moot. *In re Fadeley*, 953 P.2d 373 (Oregon 1998).

In a few states, moreover, a judge's resignation, retirement, or election defeat eliminates the jurisdiction of the judicial discipline authority or moots the question of sanction. *See, e.g., In the Matter of Moroney*, 914 P.2d 570 (Kansas 1996). In 2005, for example, after a judge resigned, the Louisiana Supreme Court dismissed the Judiciary Commission's recommendation that the judge be removed following his conviction of mail fraud. However, the court did refer the matter to the lawyer disciplinary agency for appropriate action. *In re Green*, 913 So. 2d 113 (Louisiana 2005).

A dissenting opinion in a case adopting the majority rule argued that the constitutional scheme authorized only discipline of "a judge" and a person who has left judicial office is no longer a judge. *Matter of Probert*, 308 N.W.2d 773, 784 (Michigan 1981) (Levin, J, dissenting). Furthermore, the dissent believed it "skews the constitutionally prescribed scheme of discipline . . . to censure a person who, since he no longer holds judicial office, cannot be expected to correct his conduct." *Id*. at 785. Moreover, the dissent contended it was not necessary to continue proceedings to ensure that the judge did not serve in the future because if the judge regained judicial office, he or she would again be subject to discipline. *Id*. at 787.



Provisions

In several states, the laws governing judicial discipline proceedings expressly address the issue of proceedings against former judges. For example, the Massachusetts general law creating the Commission on Judicial Conduct provides that its "jurisdiction shall include . . . conduct of a lawyer who is no longer a judge that occurred while he held judicial office." Statutes or rules in Arizona, South Carolina, and Utah give the conduct commissions there "continuing jurisdiction" over former judges regarding allegations that misconduct occurred during service as a judge.

The Florida constitution gives the Commission on Judicial Qualifications "jurisdiction over justices and judges regarding allegations that misconduct occurred before or during service as a justice or judge if a complaint is made no later than one year following service as a justice or judge." Wyoming has a similar provision. A rule in Vermont gives the Judicial Conduct Board continuing jurisdiction over former judges "if a complaint is made within three years of the discovery of the grounds for the complaint." In New York, the "jurisdiction of the court of appeals and the commission on judicial conduct continues "notwithstanding that a judge resigns from office" if the Commission has already issued a determination that the judge be removed or transmits such a determination to the court of appeals within 120 days "after receipt by the chief administrator of the courts of the resignation of such judge."

The California constitution expressly gives the Commission on Judicial Performance the authority to censure, publicly or privately admonish a former judge, or bar a former judge from receiving an assignment, appointment, or reference of work from any California state court – but not to remove a former judge.

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The 20th National College on Judicial Conduct and Ethics

Chicago, Illinois * * October 19–21, 2006

The Center for Judicial Ethics will hold its 20th National College on Judicial Ethics on October 19-21, 2006 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 Thursday afternoon with registration. Friday through Saturday morning, there will be six sessions with three concurrent workshops offered during each session. Topics under consideration include: revisions to the ABA model code of judicial conduct; ethical standards for commission members; disqualification; charitable fund-raising; sanctions; issues for public members; developments after *Republican Party of Minnesota v. White*; courtroom demeanor; the appearance of impropriety; abuse of the contempt power; and impaired judges.

More information will be provided in subsequent issues of the *Judicial Conduct Reporter.*